Neutral Citation Number: [2023] EWHC 1181 (Ch)

Case No: BL-2020-MAN-000067

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF WALMLEY ASH LTD (FORMERLY BALMORAL LTD)
AND IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 18 May 2023

Before :

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

THE OFFICIAL RECEIVER	**Claimant**
- and -	
MR ANDREW ANTHONY KELLY	**Defendant**

- -
- -

Jennifer Newstead Taylor (instructed by **Legal Services Directorate, Insolvency Service**) for **the Claimant**
The Defendant appeared in person on 19-21 April 2023

Hearing dates: 17-21 April 2023

- -

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30 am on Thursday 18 May 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

HHJ CAWSON KC:

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Introduction

1. This is an application brought by the Official Receiver by Claim Form dated 10 December 2019 seeking a Disqualification Order under s. 6 of the Company Directors Disqualification Act 1986 ("**the CDDA 1986**") against Andrew John Kelly ("**Mr**

Kelly") in respect of Mr Kelly's conduct as a director of Walmsley Ash Ltd, formerly known as Balmoral Ltd ("**the Company**").

2. The Official Receiver appeared by Ms Jennifer Newstead Taylor of Counsel. Mr Kelly appeared in person.

3. The trial was due to commence on Monday, 27 April 2023. However, on Friday, 24 April 2023, Mr Kelly lodged an application with the Court seeking an adjournment of the trial on the grounds that he was suffering from ill health. Mr Kelly did not attend at the commencement of the trial on 27 April 2023. Nevertheless, I gave consideration to his application for an adjournment, but was not satisfied that the evidence in support thereof satisfied the guidance set out in *Levy v Ellis Carr* [2012] EWHC 63 (Ch) with regard to the evidence generally required to support an application for an adjournment on the grounds of ill-health. However, I considered that the appropriate course was to adjourn the commencement of the trial to 2 PM on Tuesday, 18 April 2023 in order to provide Mr Kelly with a final opportunity to attend trial, either in person or remotely, and/or to provide further evidence in support of his application. I directed that any further evidence should be filed and served by 1 PM on 18 April 2023, and that if Mr Kelly should wish to attend remotely by CVP, then he should provide his contact details to the Court.

4. Mr Kelly did not attend at Court at 2 PM on Tuesday, 18 April 2023, and nor did he provide his contact details to the Court to enable him to attend remotely. However, he did write to the Court indicating that he was seeking a doctor's appointment and to say that he wished to pursue his application for an adjournment of the trial, also raising a further potential ground for seeking an adjournment, namely that his Solicitors had only recently come off the record and he was without legal representation. I considered the position at 2 PM on Tuesday, 18 April 2023, and gave an extempore judgment dismissing the application for an adjournment for the reasons set out in that judgment. I directed that the trial should commence at 10:30 AM on Wednesday, 19 April 2023, and that Mr Kelly should be given a further opportunity to attend remotely should he prefer to do so instead of attending in person.

5. In the event, Mr Kelly did attend remotely by CVP at 10:30 AM on Wednesday, 19 April 2023, and the trial then proceeded with Ms Newstead Taylor opening the case for the Official Receiver. Mr Kelly attended, again remotely, on 20 and 21 April 2023. For the reasons referred to below, the Official Receivers' witnesses did not attend for cross examination, but Mr Kelly did tender himself for cross examination, and was cross examine by Ms Newstead Taylor. The trial concluded with submissions on 21 April 2023. I did not, during the course of the trial, detect any signs of ill-health on Mr Kelly's part that hindered his ability to properly participate in the proceedings. Mr Kelly was invited to attend in person on 20 and 21 April 2023, but indicated a preference to attend remotely.

Matters alleged to determine unfitness

6. The conduct on the part of Mr Kelly that it is alleged by the Official Receiver makes him unfit to be concerned in the management of a company in accordance with s. 6 (1) (b) of the CDDA 1986 is that:

    a. Between 30 May 2006 and 1 June 2006, Mr Kelly caused the Company to participate in transactions ("**the 05/06 Deals**") which were connected with the

fraudulent evasion of VAT, such connections being something which Mr Kelly either knew or should have known about; and

b. On the Company's May 2006 VAT Return, Mr Kelly caused or allowed the Company to wrongfully claim the sum of £1,748,687.50 from HMRC.

7. The Official Receiver's original allegation of unfitness covered three VAT periods, namely August 2004, May 2006, and July 2006. However, the allegation is now limited simply to the May 2006 VAT Return.

Evidence

8. The Official Receiver's application is supported by the following evidence, namely:

a. The report of Kenneth David Beasley ("**Mr Beasley**") dated 4 December 2019;

b. The affirmation of Andrew Siddle ("**Mr Siddle**") dated 11 October 2022; and

c. The third report of Michael Smith ("**Mr Smith**") dated 5 December 2022.

9. Mr Beasley has retired during the course the present proceedings. Mr Smith has effectively adopted Mr Beasley's report in his own third report, as well as updating the evidence in the light of the Order of DDJ Brightwell (as he then was) dated 20 October 2022. During the course of the trial, I granted permission for Mr Beasley's report to be adopted in this way.

10. Paragraph 9 of DDJ Brightwell's Order dated 20 October 2022 ("**the Brightwell Order**") required Mr Kelly to confirm which of the Official Receiver's witnesses were required to attend for cross examination by 4 PM on the day 28 days before trial. Mr Kelly did not do so. On 5 April 2023, DJ Richmond acceded to an application made by the Official Receiver for Mr Smith's and Mr Siddle's attendance at trial to be excused.

11. In these circumstances, the evidence of Mr Smith and Mr Siddle in the form of their third report and affirmation respectively was formally put in evidence without them attending for cross examination, and was not, to that extent, challenged.

12. In defence of the application seeking to disqualify him as a director, Mr Kelly filed and served the following evidence, namely:

a. His affidavit dated 29 May 2020;

b. His witness statement dated 11 November 2020 (relating to the application dealt with by DDJ Brightwell in his Order dated 20 October 2022); and

c. His affidavit dated 21 December 2022.

13. As I have already mentioned, Mr Kelly did tender himself cross examination, and was cross examined by Ms Newstead Taylor at some length. Prior to Mr Kelly being cross examined, I explained to him the purpose of cross examination, and that Ms Newstead Taylor was likely, during the course of cross examination, to seek to undermine his

evidence and case. On the other hand, I explained to Mr Kelly that if he were not cross examined, then I would be bound to place limited weight on his affidavits and witness statement. In response, Mr Kelly made clear that he wished to be cross examined.

The Brightwell Order

14. The claim in respect of import tax in the sum of £1,748,687.50 made by the Company's May 2006 VAT Return was rejected by HMRC and became the subject matter of an appeal by the Company to the First-tier Tribunal Tax Chamber ("**FTT**"). This appeal to the FTT was unsuccessful. In its decision dated 7 March 2016 ("**the 2016 FTT Decision**"), and in rejecting the appeal, the FTT made a number of findings adverse to the Company and Mr Kelly in respect of the Company's involvement, by the 05/06 Deals, in transactions involving the purported sale of mobile phones, which were connected with the fraudulent evasion of VAT, and in particular MTIC (Missing Trader Intra-Community) fraud.

15. These adverse findings go to the heart of the matters alleged to determine unfitness in the present case given that the transactions and VAT Return relating thereto under consideration by the FTT are the same as those under consideration in the present case.

16. By paragraph 1 of the Brightwell Order, on 20 October 2022, on the hearing of an application by the Official Receiver to strike out parts of Mr Kelly's evidence in the light of the 2016 FTT Decision, DDJ Brightwell ordered that Mr Kelly was: *"debarred from denying that between 30 May 2006 and 1 June 2006 the Company participated in three transactions, being the 05/06 Deals, which were connected with the fraudulent evasion VAT, as found by the First-tier Tribunal Tax Chamber in its decision Walmley Ash Limited (formerly Balmoral Ltd) v The Commissioners for Her Majesty's Revenue & Customs [2016] UKFTT 160 (TC)."*

MTIC fraud

17. Given that the allegations in the present case centre upon the Company's involvement with transactions related to MTIC fraud, before considering the background to the case in any detail and the Official Receiver's case in respect thereof, it is necessary to explain what MTIC fraud involves. A helpful judicial description thereof is to be found in *Red 12 Trading Ltd v HMRC* [2009] EWHC 2563 (Ch), per Christopher Clark J (as he then was) at [2]-[3] and [5]-[10], as follows:

> "2. This case concerns what is called "Missing Trader Intracommunity Fraud" ("MTIC fraud"). Anyone reading this judgment is likely to be familiar with this expression, which has been explained in several tribunal and High Court decisions. The classic way in which the fraud works is as follows. Trader A imports goods, commonly computer chips and mobile telephones, into the United Kingdom from the European Union ("EU"). Such an importation does not require the importer to pay any VAT on the goods. A then sells the goods to B, charging VAT on the transaction. B pays the VAT to A, for which A is bound to account to HMRC. There are then a series of sales from B to C to D to E (or more). These sales are accounted for in the ordinary way. Thus C will pay B an amount which includes VAT. B will account to HMRC for the VAT it has received from C, but will claim to deduct (as an input tax) the output tax that A has charged to B. The same will happen, mutatis mutandis, as between C and D. The company at the end of the chain – E – will then export the

goods to a purchaser in the EU. Exports are zero-rated for tax purposes, so Trader E will receive no VAT. He will have paid input tax but because the goods have been exported he is entitled to claim it back from HMRC. The chains in question may be quite long. The deals giving rise to them may be effected within a single day. Often none of the traders themselves take delivery of the goods which are held by freight forwarders.

3. The way that the fraud works is that A, the importer, goes missing. It does not account to HMRC for the tax paid to it by B. When HMRC tries to obtain the tax from A it can neither find A nor any of A's documents. In an alternative version of the fraud (which can take several forms) the fraudster uses the VAT registration details of a genuine and innocent trader, who never sees the tax on the sale to B, with which the fraudster makes off. The effect of A not accounting for the tax to HMRC means that HMRC does not receive the tax that it should. The effect of the exportation at the end of the chain is that HMRC pays out a sum, which represents the total sum of the VAT payable down the chain, without having received the major part of the overall VAT due, namely the amount due on the first intra-UK transaction between A and B. This amount is a profit to the fraudsters and a loss to the Revenue.

…

5. A jargon has developed to describe the participants in the fraud. The importer is known as "the defaulter". The intermediate traders between the defaulter and the exporter are known as "buffers" because they serve to hide the link between the importer and the exporter, and are often numbered "buffer 1, buffer 2" etc. The company which export the goods is known as the "broker".

6. The manner in which the proceeds of the fraud are shared (if they are) is known only by those who are parties to it. It may be that A takes all the profit or shares it with one or more of those in the chain, typically the broker. Alternatively the others in the chain may only earn a modest profit from a mark up on the intervening transactions. The fact that there are a series of sales in a chain does not necessarily mean that everyone in the chain is party to the fraud. Some of the members of the chain may be innocent traders.

7. There are variants of the plain vanilla version of the fraud. In one version ("carousel fraud") the goods that have been exported by the broker are subsequently re-imported, either by the original importer, or a different one, and continue down the same or another chain. Another variant is called "contra trading", the details of which are explained in paragraphs 9 and 10 of the judgment of Burton J in R (on the application of Just Fabulous (UK) Ltd) v HMRC [2008] STC 2123 . Goods are sold in a chain ("the dirty chain") through one or more buffer companies to (in the end) the broker ("Broker 1") which exports them, thus generating a claim for repayment. Broker 1 then acquires (actually or purportedly) goods, not necessarily of the same type, but of equivalent value from an EU trader and sells them, usually through one or more buffer companies, to Broker 2 in the UK for a mark up. The effect is that Broker 1 has no claim for repayment of input VAT on the sale to it under the dirty chain, because any such claim is matched by the VAT accountable to HMRC in respect of the sale to UK Broker 2. On the contrary a small sum may be due to HMRC from Broker 1. The suspicions of HMRC are, by this means, hopefully not aroused. Broker 2 then exports the goods and claims back the total VAT. The overall effect is the same as in the classic version of the fraud; but the exercise has the effect that the party claiming the repayment is not Broker 1 but Broker 2, who is, apparently, part of a chain without a missing trader ("the clean chain"). Broker 2 is party to the fraud.

8. HMRC will have records of whatever returns have been made to them by companies registered for VAT and will know what has been accounted to them and what has not. Using those records and information provided by VAT registered companies they are able to trace a chain of transactions in respect of which output tax received

> has been accounted for and claims to deduct imput tax have been made. They can, thus, trace back from exporter E to (say) importer A. But at some stage the trail is likely to go cold. In the classic version of the fraud it will do so when HMRC gets to A because A and its documents have disappeared. HMRC will know that A has defaulted on its obligations in respect of VAT since it will not have received any of the output tax paid by B to A (as accounted for by B).
>
> 9. However, HMRC may not be in a position to know whether A is in fact the importer or whether there may have been earlier companies in the chain, either as purchasers or transferees, such that its full length was (say) Y – Z – A – B etc. In that example there will have been a defaulter (A), who will not have accounted to HMRC for VAT, but there will also have been an importer (Y). Whether or not Y or Z are liable to account for VAT may depend on the exact nature of the dealings between Y, Z and A, between whom money may not have changed hands.
>
> 10. In a chain of transactions between traders all of whom are honest each trader will account to HMRC for the output tax received (in respect of which the trader acts, broadly speaking, as agent for HMRC: Elida Gibbs Ltd v Customs & Excise Comrs [1997] QB 499), less any input tax incurred, which he will claim from HMRC. He will, ordinarily, need most of the money received from his sales to pay his supplier and the VAT due. The full extent of any chain will be patent. Where there is dishonesty the position is different. It is in the interests of those who seek to defraud HMRC of VAT to hide the full extent of any chain by the use of buffer companies. Such persons lack any interest in seeing that they, or the companies through whom they operate, are able to account to HMRC for all the VAT that they should."

18. In the present case, in respect of the transactions in question, it is the Official Receiver's case that, to use the terminology in *Red 12 Trading v HMRC* at [5] and [7], the Company acted as the broker.

Input tax

19. The reclaiming of input tax in respect of VAT is governed by Ss. 24, 25, and 26 of the Value Added Tax Act 1994 ("**VATA**") and Reg 29 of the VAT Regulations 1995, which give effect in domestic law to Articles 167 and 168 of Council Directive 2006/112/EC. In essence, there is a right to deduct from VAT payable, or to reclaim VAT due or paid, in respect of supplies of goods and services to the relevant party registered for VAT.

20. There is a body of European case law concerning the circumstances in which the relevant tax authority (in the present case HMRC) has a right to refuse repayment of input tax.

21. Earlier cases of the Court of Justice had held that:

    a. Where tax is evaded by the taxable person himself, the criteria of supplies and economic activity will not be met, in which case there will be no right to deduct input tax in relation to the transactions concerned[1];

    b. However, transactions, not themselves vitiated by VAT fraud, did meet the criteria of supplies and economic activity regardless of the possible fraudulent nature of another transaction, prior or subsequent, in the supply chain of which the taxable person had no knowledge and no means of knowledge, in which

[1] See *Halifax plc v Customs and Excise Commissioners* (Case C-255/02) [2006] STC 919.

case there would be a right to deduct input tax in relation to the transactions concerned[2].

22. In *Axel-Kittel v Belgium; Belgium v Recolta Recycling* [2006] ECR 1-6161; [2008] STC 1537 at [51]-[61], the Court of Justice considered the middle ground between the two cases referred to above where the taxpayer in question seeking to claim the input tax was not himself seeking to evade tax, but did have knowledge or means of knowledge of a fraud by someone else. In essence, the Court of Justice held that where, having regard to objective factors, the taxable person knew or should have known that he was participating in a transaction connected with the fraudulent evasion of VAT there would not be a right to deduct input tax in relation to the transactions concerned even where the criteria of supplies and economic activity were met ("**the Kittel principle**").

23. The Kittel principle has been discussed and applied by the English courts in a number of cases:

a. In *Megtian Limited (In Administration) v the Commissioners for Her Majesty's Revenue and* Customs [2010] EWHC 18 (Ch) at [33]-[38], Briggs J clarified what had been said by Lewison J in *HMRC v Livewire and Olympia* [2009] EWHC 15, and held that it is not necessary to demonstrate knowledge or means of knowledge of the detail of the fraud. As Briggs J put it at [38]:

> "38. I consider that there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible for it to be, demonstrated precisely which aspects of a sophisticated multifaceted fraud he would have discovered, had he made reasonable inquiries. In my judgment, sophisticated frauds in the real world are not invariably susceptible, as a matter of law, to being carved up into self-contained boxes even though, on the facts of particular cases, including *Livewire*, that may be an appropriate basis for analysis."

b. The Court of Appeal in *Mobilix Ltd (In Administration) v HMRC* [2010] EWCA Civ 517 considered the question of knowledge and, per Moses LJ at [59]-[60], held that:

> "59. The test in Kittel is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in Kittel.
>
> 60. The true principle to be derived from Kittel does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the

[2] See *Optigen Ltd v Commissioners for Customs and Excise* [2006] Ch 218, at [47] & [51]-[52].

> circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion."

c. In *AC (Wholesale) Ltd v The Commissioners for Her Majesty's Revenue & Customs* [2017] UKUT 191 (TCC) at [27] the Upper Tribunal ("**UT**") stated that: *"…the 'only reasonable explanation' test is simply one way of showing that a person should have known that transactions were connected to fraud."* The UT went on to say that:

> "29 It is, to us, inconceivable that Moses LJ's example of an application of part of that test, the *'no other reasonable explanation'*, would lead to the test becoming more complicated and more difficult to apply in practice. That, in our view, would be the consequence of applying the interpretation urged upon us by Mr. Brown. In effect, HMRC would be required to devote time and resources to considering what possible reasonable explanations, other than a connection with fraud, might be put forward by an appellant and then adduce evidence and argument to counter them even where the appellant has not sought to rely on such explanations. That would be an unreasonable and unjustified evidential burden on HMRC. Accordingly, we do not consider that HMRC are required to eliminate all possible reasonable explanations other than fraud before the FTT is entitled to conclude that the appellant should have known that the transactions were connected to fraud.
>
> 30 … It does not make the elimination of all possible explanations the test which remains, simply, did the person claiming the right to deduct input tax know that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT or should he have known of such a connection."

Section 6 of the CDDA 1986

24. S. 6(1) of the CDDA 1986 provides:

> "**6. – Duty of court to disqualify unfit directors of insolvent companies**
>
> 6 (1) **[Court's duty** The court shall make a disqualification order against a person in any case where, on an application under this section, it is satisfied –
> (a) that he is or has been a director of a company which has at any time become insolvent (whether while he was a director or subsequently), and
>
> (b) that his conduct as a director of that company (either taken alone or taken together with his conduct as a director of any other company or (overseas companies) makes him unfit to be concerned in the management of a company."
>
> (1A) **[Conduct as director]** In this section references to a person's conduct as a director of any company … include, where that company … has become insolvent references to that person's conduct in relation to any matter connected with or arising out of the insolvency."

25. *Re Howglen Ltd, Secretary of State for Trade and Industry v Reynad* [2002] 2 BCLC 625 at 629, per Mummery LJ, provides authority for the proposition that a defendant director's conduct in the disqualification proceedings can be taken into consideration on the issue of fitness or in fixing the disqualification period.

26. It follows from the wording of S. 6 (1) CDDA 1986 that the Official Receiver must satisfy the Court that Mr Kelly: (i) was a director; (ii) of a company which became

insolvent; and (iii) that his conduct as a director of that company (either taken alone or taken together with his conduct as a director of any other company or companies) makes him unfit to be concerned in the management of a company. In the present case, there is no issue that Mr Kelly was a director of a company which became insolvent. The final unfitness issue is very much in issue.

27. As the conduct said to demonstrate unfitness took place before 1 October 2015, the now repealed s. 9 of the CDDA 1986 still applies (see paragraph 95 below), which requires the Court when determining unfitness to have regard to the matters mentioned in Part I of Schedule 1 to the CDDA 1986 and, where the company has become insolvent, to the matters mentioned in Part II of that Schedule. However, *Re Amaron Ltd* [1998] BCC 264 at 268G-H is authority for the proposition that the fact that a ground is not specified in Schedule 1 to the CDDA 1986 does not militate against its importance. On behalf of the Official Receiver, it is submitted that *Re Amaron* remains good law and, accordingly, allegations of unfitness must be considered on their merits whether or not they fall within the Schedule 1.

28. The test for unfitness is helpfully explained in *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 at 174 G-H, per Dillon LJ, as follows:

> "The test laid down in s.6 … is whether the person's conduct as a director of the company or companies in question "makes him unfit to be concerned in the management of a company." These are ordinary words of the English language and they should be simple to apply in most cases. It is important to hold to those words in each case. The judges of the chancery division have, understandably, attempted in certain cases to give guidance as to what does or does not make a person unfit to be concerned in the management of a company. Thus in *Re Lo-Line Electric Motors Ltd*, Sir Nicolas Browne-Wilkinson V-C said: "Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt in extreme cases of gross negligence or total incompetence disqualification could be appropriate." Then he said that the director in question: "has been shown to have behaved in a commercially culpable manner in trading through limited companies when he knew them to be insolvent and in using the unpaid Crown debts to finance such trading." Such statements may be helpful in identifying particular circumstances in which a person would be clearly unfit. But there seems to have been a tendency, which I deplore, on the part of the Bar and possibly also on the part of the Official Receiver's Department, to treat the statements as judicial paraphrases of the words of the statute, which fall to be construed as a matter of law in lieu of the words of the statute. The result is to obscure that the true question to be tried is a question of fact, what used to be pejoratively described in the Chancery Division as "a jury question."

29. In *Re Structural Concrete Ltd* [2001] BCC 578 @ 586 Blackburne J said:

> "[A]ssuming … that the qualifying conditions laid down by s 6(1)(a) are satisfied (i.e. that the person against whom a disqualification order is sought is or has been a director of a company which has at any time become insolvent) the requirement, laid down by s6(1)(b), "that his conduct as a director of that company … makes him unfit to be concerned in the management of a company" involves a decision by the court whether the conduct upon which the Secretary of State or Official Receiver relies .., taking into account any extenuating circumstances has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies. See *Re Grayan Building Services*. That decision involves a three stage process: (1) do the matters relied upon amount to misconduct, (2) if they do, do they justify a finding of unfitness; and (3) if they do, what period of disqualification, being not less than two years, should result?"

30. The purpose of the CDDA is to protect the public and encourage higher standards in the management of companies – see *Re Westmid Packing Services Ltd* [1998] BCC 836 at 841H. It is well established that this is achieved in three ways:

    a. Keeping directors whose conduct has been such as to merit a disqualification order *"off the road";*

    b. Deterring such directors from repeating the misconduct (individual deterrence); and

    c. deterring others.

31. The burden of proof in disqualification proceedings is on the applicant. The standard of proof is the civil standard. However:

    a. I bear in mind that where there is an allegation of fraud, or involvement in fraudulent activity, the burden remains the same, and the standard remains the same civil standard. However, if a serious allegation is made, then more cogent evidence may be required to overcome the unlikelihood of what is alleged, at least to the extent that it is incumbent on the party making the serious allegation to prove it. This is on the basis that the more serious the allegation, the less likely it is that the event occurred and hence the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability – see Phipson on evidence, 20th edition, 6-57 and *H (Minors)* [1996] AC 563 at 586D-F, per Lord Nicholls. Given the nature of the allegations in the present case, I bear this firmly in mind.

    b. In disqualification proceedings, the defendant director bears an evidential burden in respect of matters raised in his defence - see *Cathie and another v Secretary of State for Business, Innovation and Skills (No. 2)* 2011 EWHC 3026 at [54].

32. In considering whether a defendant director's conduct is such as to make him unfit, the Court is entitled to have regard to the fact that a director cannot simply fail to involve himself in the affairs of a company and/or fail to monitor, supervise or keep himself informed of the same. As stated by HHJ Cooke in *Secretary of State v Earley* (unreported) and approved by HHJ Behrens in *Re Brampton Manor (Leisure) Ltd* [2009] EWHC 1796 at [58 (2)]:

> "where a director simply fails to undertake, whether through lack of knowledge, incompetence or whatever, those duties which he ought to undertake, he is as guilty as those who do positive wrong, and, if anything, probably even more dangerous."

33. The allegations of unfitness in the present case, as framed, include allegations that Mr Kelly *"caused or allowed"* the Company act in the ways said to demonstrate unfitness on his part. As to the expressions *"caused"* and *"allowed"*:

    a. The word *'caused'*: *"…will, ordinarily, be given a 'pro-active' interpretation as meaning 'to bring about, to be the cause of, to produce, induce or make"*- see Mithani, Directors' Disqualification, at [415O]. However, a director who knows about a state of affairs, appreciates it and its consequences may, if he

fails to do anything about it at all, depending on the circumstances, be just as much *'causing'* the consequences – see *Kappler v Secretary of State for Trade and Industry* [2006] EWHC 3694 (Ch);

b. In *Re Continental Assurance Co of London plc* [1996] BCC 888 at 896 Chadwick J expressed the view that: *"… a director who fails to appreciate the obvious 'allows' the consequences of what he has overlooked just as much as if he did appreciate the position and did nothing about it."*

c. *In Re Clean & Colour Ltd, Secretary of State for Industry v Tuck* (Unreported, 7 June 2001), Sir Andrew Morritt VC responded as follows to a suggestion that the expression *"allowed"* must denote some positive step: *"I do not agree. In my view a person may be said to allow a state of affairs if he knows or ought to know of it and though entitled to take some action, does nothing"*.

34. If the Court concludes that the defendant director's conduct does make him unfit to be concerned in the management of a company, then the mandatory nature of s. 6(1) requires the Court to make a disqualification order, and the question then arises as to the period of disqualification.

35. Under S.6 (4) of the CDDA 1986: *"…the minimum period of disqualification is 2 years, and the maximum period is 15 years."*

36. In *Re Sevenoaks Stationers (Retail) Ltd* (supra), the Court of Appeal gave guidance as to the appropriate duration of a disqualification order, specifying: 2 – 5 years for not very serious cases, 6 – 10 years for serious cases not meriting the top bracket and 10 – 15 years for particularly serious cases.

37. In *Re Westmid Packing Services Ltd* (supra) at 843H, Lord Woolf MR expressed the view that fixing the duration of a disqualification order was:

> "[an] exercise that is … little different from any sentencing exercise. The period of disqualification must reflect the gravity of the offence. It must contain deterrent elements. That is what sentencing is all about, and that is what fixing the appropriate period of the disqualification is all about … We do not consider that it would send out a wrong message to fix the period of disqualification by starting with an assessment of the correct period to fit the gravity of the conduct, and then allowing for the mitigating factors, in much the same way as a sentencing court would do."

Disqualification in the context of MTIC fraud

38. In *Secretary of State v Corry* (Unreported, 9 January 2012), HHJ Pelling QC considered the interplay between VAT fraud and directors disqualification proceedings. Specifically, he considered the application, in the context of directors disqualification proceedings, of the Kittel principle as undertaken by the Tax Tribunals when hearing appeals against decisions denying entitlement to input tax on the grounds that the trader has become involved in MTIC fraud. HHJ Pelling QC, at [7], held that:

> "7. ... It seems to me that the Secretary of State is entitled to seek to demonstrate unfitness by establishing first that the company concerned is to be treated as knowingly involved in MTIC fraud by carrying out the steps that would normally be expected in a Kittel inquiry, and then that such knowledge as is to be attributed to the

company was, in fact, knowledge of the relevant director for the purpose of bringing a disqualification application."

39. In *Secretary of State for Business Innovation and Skills v Warry* [2014] EWHC 1381 (Ch), HHJ Hodge QC, correctly in my judgment, endorsed and applied HHJ Pelling QC's approach, adding this gloss at [27]:

> "27. I respectfully agree with this approach, and I adopt Judge Pelling's formulation (at the end of paragraph 7 of his judgment), although I would emphasise (as Judge Pelling's formulation of the appropriate test makes clear) that in the context of a directors' disqualification claim, the question of whether the relevant company is to be regarded as a participant in a transaction or transactions connected with the fraudulent evasion of VAT is only the first stage of the inquiry, with the court then having to move on to consider the extent of the respondent director's personal knowledge of, and involvement in, that fraud, and how that impacts upon his fitness to be concerned in the management of a company."

40. In *Secretary of State for Business Innovation and Skills v Warry*, HHJ Hodge QC provided some helpful guidance, which I endorse, with regard to period of disqualification where the relevant company has been involved in transactions connected to MTIC fraud:

> "49. In my judgment, the threat of MTIC fraud is so persistent, and so pervasive, and the loss to the revenue of the state is potentially so great, that I cannot conceive of any case in which disqualification for a period in the bottom bracket (of 2 to 5 years) would be appropriate.
>
> 50. In any case where the respondent director has been knowingly involved, and has played a significant role, in MTIC fraud, then a period of disqualification in the top bracket (of over 10 years) should be imposed. This is also likely to be appropriate in cases where the director has wilfully closed his eyes to MTIC fraud.
>
> 51. In *Corry*, Judge Pelling imposed an 11 year period of disqualification; and I consider that this should be the minimum period in such cases. It can be justified in *Corry* because the defendant in that case had not attended the trial, and had not sought to justify his conduct in court. Where a defendant does so unsuccessfully, then such conduct may only serve to reinforce his unfitness to be concerned in the management of a company, and it is likely to justify a period of disqualification of 12 years or more.
>
> 52. In any case where it is proved that the respondent director did not actually know but (without wilfully closing his eyes to the obvious) ought to have known of the MTIC fraud, the period of disqualification should be within the middle bracket (of more than 5 and up to 10 years). Absent extenuating circumstances, in my judgment, in such a case the disqualification period is likely to fall in the top half of that bracket, and thus between seven-and-a-half and 10 years. In *Ahmed*, the extenuating circumstances of the director's youth and lack of business experience at the time of the relevant events were held to justify a disqualification period of seven-and-a-half years despite the seriousness of the findings of unfitness made against him. But for those factors, in my judgment, a longer period of disqualification would have been justified."

Relevant individuals and entities

41. The following individuals and entities are relevant to the present proceedings:

Walmley Ash Ltd, formerly known as Balmoral Ltd ("**the Company**")	The company in respect of which Mr Kelly's conduct is said to make him unfit.
Mr Andrew Anthony Kelly ("**Mr Kelly**")	The Defendant, being the sole director of and shareholder in the Company.
Sinclair & Co (Accountants) Ltd	The Company's accountants up to 2007.
NJ Khan & Co Chartered Accountants	The Company's accountants.
Trinity & Co (Accountants) Ltd	The Company's accountants.
Dass Solicitor	The Company's solicitors.
Challinors Lyon Clark Solicitors	The Company's solicitors.
United Traders of Portugal ("**United**")	The EU supplier in the 05/06 Deals.
West 1 Facilities Management Ltd ("**West 1**")	The Defaulter in the 05/06 Deals.
International Investment Services (UK) Ltd ("**International**')	Balmoral's supplier in the 05/06 Deals.
Online Cellular & Multimedia SL ("**Online**")	A Spanish company that was the Company's buyer in the 05/06 Deals.
All Systems Courier Worldwide Ltd ("**ASC**")	The freight forwarder used in the 05/06 Deals.
First Curacao International Bank ("**FCIB**")	One of the banks with which FCIB held a bank account, and the bank through which monies for the 05/06 Deals passed.

Background

42. The Company was incorporated on 30 January 2002 under company number 04363953. The Defendant was, from incorporation, the Company's sole registered director and sole shareholder. The Company's main business activity was the wholesale of mobile phones and cameras.

43. On 1 July 2002, the Company was registered for VAT with VRN 784 1497 93.

44. On 29 July 2002, HMRC undertook a pre-registration visit to validate the bona fide nature of the business of the Company.

45. On 14 January 2003, the Company's trading address changed to 66 The Qube, Scotland Street, Birmingham, B1 2EJ ("**66 The Qube**").

46. On 16 January 2003, HMRC visited the Company, the visit being triggered by a suspected MTIC trader seeking to verify the Company through HMRC's *"Redhill"* verification procedure. It is the Official Receiver's case, evidenced by contemporaneous correspondence, that, at this visit, the Company was warned about the high level of risk in its trading activity, that conditions were agreed for the Company's future trading, and that the Company was fully advised as to the importance of verifying VAT registration numbers ("**VRNs**") via the Redhill verification procedure. The conditions agreed were subsequently set out in correspondence dated 25 March 2003.

47. In the period 21 - 25 March 2003, the Company undertook transactions with a net value of over £10 million. As evidenced by contemporaneous visit reports, between 26-31 March 2003, HMRC investigated these transactions. This investigation included attendances upon Mr Kelly, and Beverley Tookey ("**Ms Tookey**"), an employee of the Company who Mr Kelly said had previously been involved with him in a business concerning the retail of mobile phones, and who was Company Secretary of the Company between 1 March 2003 and 4 August 2003. The visit reports record HMRC as having been informed that the relevant transactions took place whilst Mr Kelly had been away from the business in order to sort out personal problems, and after he had asked Ms Tookey to *"hold the fort"* for him, and that Ms Tookey had been responsible for involving the Company in the transactions. The transactions concerned what purported to be purchases primarily from an entity called Conductive, and sales to SL Logistics, with input tax of £1,784,249.30 on such purchases. However, the evidence available to HMRC indicated that Conductive and another supplier involved had been *"hijacked"*, i.e., their VRN had been falsely used by a third party for the transactions, and that as the Company had no available bank account, SL Logistics paid the suppliers directly. There was no evidence of the Company having carried out any checks on the suppliers.

48. In consequence of its involvement in these transactions, on 31 March 2003, HMRC told the Company that it was being de-registered for VAT to protect the revenue. On 1 April 2003, WJB Chiltern challenged Balmoral's de-registration, with the result that on 30 April 2003, the Company's VRN was re-instated subject to conditions.

49. On 2 October 2003, HMRC informed the Company that it had been involved in a supply chain with a hijacked company. The relevant correspondence contained a warning to the Company that if it continued to trade in a supply chain with businesses that represented a serious risk to the collection of VAT, and if it could not demonstrate that it had taken reasonable steps to verify the legitimacy of its suppliers and customers, then HMRC may require security from it.

50. On 4 February 2004, HMRC wrote to the Company noting their belief that the Company had ceased trading, as three of its VAT Returns were outstanding, and stating that it would therefore be de-registered. Shortly thereafter, the Company was then de-registered for VAT. On 17 February 2004, Mr Kelly wrote to HMRC stating that the Company required its VRN. On 20 February 2004, Mr Kelly wrote to HMRC requesting re-consideration of the decision to de-register the Company for VAT. On 6 April 2004, HMRC upheld its decision to de-register the Company.

51. On 29 April 2004, Mr Kelly on behalf of the Company applied for a new VRN. On 20 May 2004, HMRC undertook a pre-registration visit to check the bona fides of the Company's business. With effect from 6 February 2004, the Company was re-registered under VRN 833 3270 47 and placed on monthly returns.

52. On 22 June 2004, HMRC sent the Company an MTIC fraud advice letter, advising as to the prevalence and serious problems caused by MTIC fraud, and as to the Redhill verification process. The correspondence specifically identified mobile phones as being amongst the commodities frequently involved in MTIC fraud.

53. Between 22 August 2004 and 1 June 2006, HMRC sent to the Company a number of veto letters, informing the Company of the de-registration for VAT of specified companies and warning the Company that any input tax claimed in relation to transactions post-dating the de-registration might fail to be verified.

54. One such veto letter, dated 23 August 2004, related to Direct Phones Ltd ("**Direct**"). As recorded in a Tribunal decision dated 14 May 2008 on an unsuccessful appeal brought by the Company against the refusal of HMRC to admit a claim of £2,017,336 input tax in relating thereto, between 17 and 20 August 2004, the Company had bought as many as 26 consignments of mobile phones from Direct in circumstances in which the identity of Direct had been hijacked. After the Company had claimed credit for the input tax incurred in the purchases in question from Direct, and credit in respect thereof had been allowed, HMRC subsequently issued an assessment dated 3 October 2005 to recover the input tax in question. In the event, HMRC successfully relied at the above appeal not on the hijack of Direct's identity, but upon the fact that none of the invoices which supported the Company's claim for input tax contained Direct's VRN, with the consequence that they were not valid VAT invoices.

55. On 25 August 2004, Mr Kelly telephoned HMRC's Officer Emery cancelling a visit arranged due to a hijack concern, i.e. relating to Direct.

56. On 20 October 2004, HMRC re-issued their warning letter dated 2 October 2003 referred to in paragraph 49 above.

57. On 21 October 2004, following the Company's involvement in a further deal chain resulting in a tax loss to the Revenue, identified as the deal chain involving Direct, HMRC required the Company to give security by guarantee or cash deposit in the sum of £1,541,300.00 for the payment of any VAT due then or in the future.

58. On 26 October 2004, Dass Solicitors, on behalf of the Company, appealed HMRC's decision requiring the Company to give security in the sum of £1,541,300.00. On 10 August 2005, the FTT dismissed the Company's appeal.

59. On 4 October 2005, HMRC disallowed input tax in the sum of £2,017,366.92 on the grounds that the Company's purchase invoices in the 08/04 VAT period did not contain the supplier's VAT number and, consequently, did not qualify as valid VAT invoices ("**the 08/04 Decision**"). This related to the matters referred to in paragraph 54 above. On 23 January 2006, HMRC wrote correcting the letter dated 4 October 2005 and clarifying that the correct amount disallowed was £2,107,453.50 and not £2,017,366.

60. On 31 October 2005, Dass Solicitors, on the Company's behalf, appealed the 08/04 Decision.

61. On 30 November 2005, HMRC informed the Company that its 08/05 and 09/05 VAT Returns had been selected for extended verification in order to establish the veracity of the repayment claims, albeit that a £65,701.94 repayment claim for 08/05 was released on a without prejudice basis.

62. On 14 February 2006, HMRC informed the Company that its 12/05 VAT Return had been selected for extended verification in order to establish the veracity of the £41,561.63 repayment claim made thereby, albeit the repayment was again released on a without prejudice basis.

63. On 2 March 2006, HMRC informed the Company that its VAT Return for 01/06 was subject to ongoing verification and requested information about three sales to Spanish Global Assistance Trade BV ("**SGA**"). On 16 March 2006, Mr Kelly responded to HMRC providing further information. Notwithstanding, on 30 March 2006, HMRC informed the Company that its three sales to SGA did not qualify for zero rating and that, in the absence of further information, VAT at the standard rate would be due. On 5 April 2006 and 10 April 2006, Mr Kelly provided further information.

64. On 5 April 2006, Mr Kelly wrote to HMRC requesting a change in the Company's trade classification code to the same as its sister company Balmoral Solutions Ltd ("**Solutions**"). The grounds for the request were stated to be that the Company was a wholesaler, and not a retail company, trading in the same goods as Solutions, save that the Company dealt solely with exports.

65. On 28 April 2006, HMRC informed the Company that it had discovered, as a result of extended verification into the 01/06 VAT Return, that all three of the transactions selected for verification started with defaulting traders resulting in a loss to the revenue, together exceeding £1,094,800. The transactions all involved sales to SGA, whose Dutch VAT registration had been withdrawn with effect from 15 December 2005 with the consequence that any further supplies made to SGA would carry the standard rate of VAT.

66. By their correspondence on 28 April 2006, HMRC directed the Company to Notice 726 relating to joint and several liability in the supply of specified goods. Specifically, HMRC advised that:

> "As explained in Notice 726, where you have genuinely done everything you can to check the integrity of the supply chain, can demonstrate you have done so, of any indications that VAT may go unpaid and have no other reason to suspect VAT would go unpaid, the joint and several liability measure will not be applied to you.
>
> However, if you knew, or have reasonable grounds to suspect, that VAT would go unpaid then the measure can be applied to you"

67. On 31 May 2006, the Company entered into the three deals for the purchase of mobile phones (the 05/06 Deals) that comprise the transactions connected with the fraudulent evasion of VAT the subject matter of the allegations of unfitness in the present case. These can be summarised as follows:

Date of Purchase	Supplier	Supplier invoice number	Product	Number of units	Input tax claimed
31/05/06	International Investment Services (UK) Ltd	117	Nokia 8800 Silver	6000	£475,387.50
31/05/06	International Investment Services (UK) Ltd	118	Nokia 8801	8000	£636,650.00
31/05/06	International Investment Services (UK) Ltd	119	Nokia 8801	8000	£636,650.00
				Total:	**£1,748,687.50**

68. The prices paid by the Company to International in respect of the three transactions were, respectively, £2,716,500 plus VAT, £3,638,000 plus VAT and £3,638,000 plus VAT. In each case, the mobile phones were sold on to Online in Spain for £2,944,500, £3,952,000 and £3,952,000 respectively, with no VAT being payable on the sale for export.

69. Each of the three transactions involved exactly the same parties in the same position in the chain as follows: United Traders (EU) ›– West 1 ›- International ›– the Company ›– Online. The freight forwarder for each of the deals was ASC until the goods were exported to KPP International Logistics, a freight forwarder in Rotterdam.

70. Each of the payments made through the chain and in respect of each transaction therein were effected through FCIB. The way in which the transactions, here described as deals 1, 2 and 3 respectively, took place were helpfully described in paragraph [172] – [177] of the 2016 FTT Decision, as follows:

> "172. Deals 2 and 3 are identical in terms of goods and quantity and the payment descriptions do not include invoice numbers so although the Officers have conflated the payments in deals 1 and 2, it could equally be a conflation of deals 1 and 3 with deal 2 standing alone. It makes no difference. The funds for the conflated two deals appear to move in tandem.
>
> 173. In each case the funds moved in a circular fashion through the known participants in the transaction chain on 31 May 2006. However, in addition in every case Hunzie introduces the funds to Online from outwith the United Kingdom.
>
> 174. In deals 1 and 2 the payments were all made within one hour. In those deals Online, which had been invoiced a total of £6,896,500 by Balmoral (zero rated), paid that sum to Balmoral at 20:09:03 having received £7,000 more than that from Hunzie three minutes earlier. Balmoral owed International £7,466,537 (inclusive of VAT) but paid only £6,896,000 at 20:12:04. International who owed West 1 £7,462,425 paid £6,896,500 at 20:15:17 and West 1 in turn then paid that sum to United Traders. Then at 21:03:13, United Traders paid more than £5 million to Hunzie and in excess of £1.5 million to a Spanish company, which ultimately remitted the funds to the USA.

> 175. There is therefore a shortfall in Balmoral's payments to International and indeed onward through the chain. There are no other payments through FCIB in this matter.
>
> 176. In deal 3 all payments were made within 18 minutes. The chain started at Hunzie who paid £3,956,000 to Online at 21:06:02 who paid £3,952,000 to Balmoral at 21:09:02, which sum then passed through West 1 to United Traders finishing back at Hunzie at 21:24:02. Again, because Balmoral was paid the sum due on a zero rated supply and the same sum passed through the chain, no other party was paid in full.
>
> 177. Crucially, it has been identified that all of the transactions utilised the same IP address. HMRC officers have established that there is a minimum of a three minute gap between any single transactions from an IP address (ie the refresh). That is the gap each movement of funds except between International and West 1 where it is six minutes in both deal chains."

71. On 7 June 2006, HMRC received the Company's VAT Return for the 05/06 period making a claim for the input tax of £1,748,637.50. On 10 July 2006, the Company's 05/06 VAT Return was selected for extended verification.

72. On 21 September 2006, Mr Kelly attended a Means of Knowledge interview in which he confirmed he was the sole director and shareholder of the Company, and maintained that the 05/06 Deals were done by employees not himself.

73. On 9 October 2006, FCIB accounts were frozen by the Central Bank of the Netherlands on the suspicion that FCIB had aided financial fraud.

74. On 29 January 2007, HMRC informed the Company that following extended verification it had been established that the 05/06 Deals traced back to defaulting traders resulting in a loss to HMRC exceeding £1.74 million.

75. On 18 January 2008, HMRC denied the Company the input tax of £1,748,687.50 on the purchase of mobile phones in VAT period 05/06 ("**the 05/06 Decision**"). Mr Kelly, on behalf of the Company, subsequently appealed this decision.

76. On 27 February 2008, HMRC informed the Company that in the absence of evidence of continuing intention to trade it would be de-registered for VAT. Further, HMRC adjusted the Company's VAT Return for the 05/06 period as no records supporting the return had been provided.

77. On 14 May 2008, the FTT dismissed the Company's appeal in respect of the 08/04 Decision, and upheld the same as referred to in paragraph 59 above.

78. On 5 June 2008, Balmoral was de-registered for VAT.

79. On 3 August 2010, the Company was dissolved, having been struck off the Register of Companies.

80. On 21 October 2010, despite having been dissolved, a resolution was passed changing the name of the Company from Balmoral Ltd to Walmley Ash Ltd.

81. On 21 January 2011, on hearing of the Mr Kelly's application dated 23 November 2010, the name of the Company was restored to the Register of Companies. However, this was on the basis that Mr Kelly had, as recorded on the Order of Registrar Derrett dated 21 January 2011, undertaken, amongst other things, that the Company would

not carry on business or operate in any other way other than to take the necessary steps to recover and distribute the refund of VAT from HMRC in respect of the 05/06 VAT return, and thereafter take steps to place the Company into liquidation. The restoration to the Register was to enable the Company to pursue the appeal against the 05/06 Decision on the basis that it would thereafter be wound up.

82. The appeal to the FTT in respect of the 05/06 Decision was heard between 2 and 4 November 2015. On 7 March 2016, the FTT handed down the 2016 FTT Decision, and dismissed the Company's appeal finding that, in the 05/06 VAT period the Company and Mr Kelly had participated in transactions that were connected to the fraudulent evasion of VAT. There was no further appeal.

83. On 30 November 2016, HMRC issued the Company with a Notice of Assessment of Misdeclaration Penalty in respect of the 05/06 Decision. This required the Company to pay £196,727 immediately.

84. On 16 October 2017, the Company was wound up on a petition presented by HMRC on 24 August 2017.

85. The Insolvency Service served notice under S. 16 of the CDDA 1986 on Mr Kelly on 27 April 2018, and the Claim Form in the present proceedings was issued on 10 December 2019.

Issues to be determined

86. Mr Kelly takes a procedural point that that it is not open to the Official Receiver, in the present case, to rely upon conduct as demonstrating unfitness if that conduct occurred prior to 1 October 2015. His argument is, essentially, that whilst S. 108 of the Small Business, Enterprise and Employment Act 2015 ("**SBEEA 2015**") extended the time period for bringing disqualification proceedings as provided for by S. 7(2) of the CDDA 1986 from 2 years to 3 years from when the company became insolvent (in the present case from when it was wound up) where the insolvency event occurred after 1 October 2015 (as in the present case), then the relevant provisions of SBEEA 2015 and the associated implementing statutory instrument are to be construed as having the effect that where, in disqualification proceedings, the Secretary of State or Official Receiver relies upon the new three year limitation period in relation to a company which has become insolvent after 1 October 2015, then he/she can only rely for that purpose upon conduct which took place after 1 October 2015. If that is right then the Official Receiver would not be able to rely upon the conduct that he seeks to rely upon and the claim would fail.

87. Subject to this preliminary point, there being no issue that Mr Kelly was a director of the Company and that the Company has become insolvent, the real issue is the present case is as to whether the conduct relied upon by the Official Received make Mr Kelly unfit to be concerned in the management of a company ("**the Unfitness Issue**").

88. It follow from *Secretary of State v Corry* (supra) and *Secretary of State v Warry* (supra) that where the conduct said to demonstrate unfitness relates to involvement in MTIC fraud, the questions for the Court in deciding the Unfitness Issue are:

a. Whether the transactions comprising the 05/06 Deals were connected with the fraudulent evasion of VAT?

b. If so, did the Company know or ought the Company to have known that that was the case?

c. If so, does Mr Kelly's conduct as a director of the Company make him unfit to be concerned in the management of a company having regard, in particular, to the following:

i. Mr Kelly's role in the Company and his knowledge of and involvement in respect of the transactions comprising the 05/06 Deals;

ii. Whether the matters relied upon by the Official Receiver amount to misconduct?

iii. If so, whether they justify a finding of unfitness?

iv. If they do, what period of disqualification should be imposed?

89. As to the above questions going to the Unfitness Issue:

a. As to whether the transactions were connected with the fraudulent evasion of VAT, in accordance with the Brightwell Order, Mr Kelly is debarred from denying that, between 30 May 2006 and 1 June 2006, the Company participated in three transactions, being the 05/06 Deals, which were connected with the fraudulent evasion of VAT as found by the 2016 FTT Decision. There is therefore no issue as to the fact of such connection.

b. However, there is an issue as to whether the Company knew or ought to have known that the 05/06 Deals were connected with the fraudulent evasion of VAT.

c. Further, there is an issue as to whether, if the Company knew or ought to have that the 05/06 Deals were connected with the fraudulent evasion of VAT, that knowledge is to be attributed to Mr Kelly such that his conduct as a director of the Company makes him unfit to be concerned in the management of a company. In this regard, the Court is principally concerned with: *"… The extent of* [Mr Kelly's] *personal knowledge of, and involvement in, that fraud, and how that impacts upon his fitness to be concerned in the management of the company"*, per HHJ Hodge QC in *Secretary of State v Warry* at [27].

90. Before addressing the Unfitness Issue, I will deal shortly with Mr Kelly's preliminary issue.

Preliminary Issue

91. The preliminary issue identified by Mr Kelly was specifically considered in *Secretary of State v Bains* (Unreported, October 2018), a decision of HHJ McCahill QC sitting in the Birmingham County Court, where HHJ McCahill QC rejected the argument of the defendant director that where the Secretary of State or Official Receiver relies on

the new three year limitation period in relation to a company which has become insolvent after 1 October 2015, the Secretary of State or Official Receiver is confined to relying upon conduct which took place on or after 1 October 2015. Being a County Court decision, this decision is not binding upon me. Nevertheless, I am satisfied that it was correctly decided.

92. S. 108(1) of the SBEEA 2015 simply provided that, in S. 7(2) of the CDDA 1986, *"3 years"* was substituted for *"2 years"*. S. 108(2) then said that S. 108(1): *"applies only to an application relating to a company which has become insolvent after the commencement of that subsection."*

93. The SBEEA 2015 amended and revised other provisions of the CDDA 1986 by Ss. 104, 106 and 110 thereof.

94. The Small Business, Enterprise and Employment Act 2015 (Commencement No. 2 and Transitional Provisions) Regulations 2015 (**"the SBEEA 2015 Regs**") governed the commencement of the SBEEA 2015 and included a number of transitional provisions. So far as S. 108 is concerned, reg 2(e) thereof simply said that S. 108 would come into force on 1 October 2015. No other provision of either the SBEEA 2015 of the SBEEA Regs 2015 sought to restrict the operation of S. 108(1) apart from S 108(2), which, as we have seen, simply provided that the new 3 year time limit would only apply where the relevant company became insolvent after 1 October 2015.

95. In contrast, in respect of Ss 104, 106 and 110, specific transitional provisions were included in Part 1 of Schedule 1 of the of the SBEEA Regs 2015 as follows:

> "2. The amendments to sections 6 and 8 of the Disqualification Act (as made by section 106 of the Act) in respect of overseas companies apply in respect of a person's conduct as a director of an overseas company where that conduct occurs on or after 1st October 2015.
>
> 3. Save where conduct is considered by a court or by the Secretary of State under section 5A of the Disqualification Act (as inserted by section 104 of the Act), section 12C of the Disqualification Act (as inserted by section 106 of the Act) and Schedule 1 to the Disqualification Act (as substituted by section 106 of the Act) apply to a person's conduct as a director where that conduct occurs on or after 1st October 2015.
>
> 4. Sections 15A to 15C of the Disqualification Act (as inserted by section 110 of the Act) apply in respect of a person's—
>
> (a) conduct (as mentioned in section 15A(3)(b) of the Disqualification Act); or
>
> (b) exercise of the requisite amount of influence (as mentioned in in section 15A(6) of t he Disqualification Act),
>
> occurring on or after or after 1st October 2015."

96. These transitional provisions do seek to limit the scope of the relevant sections of SBEEA 2015 to where one is concerned with conduct of the director on or after 1 October 2015. However, I do not see any scope for applying these provisions by analogy to S. 108(1). Had it been intended that the scope of S. 108(1) should be limited to conduct of the director on or after 1 October 2015, then one would have expected there to have been a specific provision in Part 1, Schedule 1 of the SBEEA Regs 2015, so providing, but there is not. In contrast, by S.108(2) the scope of S 108(1) is only limited to those cases where the relevant company became insolvent before 1 October 2015.

97. In the circumstances, I must reject Mr Kelly's submission that it is not open to the Official Receiver to rely upon conduct that occurred before 1 October 2015.

98. The Company became insolvent on 16 October 2017 when it was wound up. The present proceedings were commenced on 10 December 2019, less than three years thereafter, and in time.

The Official Receiver's case as to unfitness

Introduction

99. It is the Official Receiver's case that the Company:

    a. Knew that the only reasonable explanation for the circumstances in which the 05/06 Deals took place was that they were transactions connected with the fraudulent evasion of VAT; or

    b. Alternatively, turned a blind eye as to the explanation for the circumstances in which the 05/06 Deals took place and as to whether the latter involved transactions connected with the fraudulent evasion of VAT; or

    c. Alternatively, ought to have known that the only reasonable explanation for the circumstances in which the 05/06 Deals took place was that they were transactions connected with the fraudulent evasion of VAT.

100. It is the Official Receiver's primary position that the Company knew that the only reasonable explanation for the circumstances in which the 05/06 Deals took place was that they were transactions connected with the fraudulent evasion of VAT.

101. It is then the Official Receiver's case that Mr Kelly's role and position in respect of the Company was such that the Company's state of mind in respect of these matters is to be attributed to him on the basis that he caused or allowed the Company to act in the way that it did in relation to the 05/06 Deals.

102. The Official Receiver relies upon a number of particular features and matters in respect of the way that the Company carried on business, and in relation to the circumstances behind the 05/06 Deals, as supporting his case as to the state of knowledge of the Company in relation to the connection of the 05/06 Deals to the fraudulent evasion of VAT, as to the extent to which this should be attributed to Mr Kelly, and thus as to the seriousness of conduct said to demonstrate unfitness on Mr Kelly's part.

The Company's financial position

103. The Official Receiver points to the fact that the Company:

    a. Had no assets, no start-up capital, no bank loans and no investors

    b. Traded from Mr Kelly's residential address which had office space below, but no storage facilities;

c. Prior to the 05/06 VAT period, submitted 23 monthly VAT Returns under its second VRN, of which 3 showed minimal trade (06/04, 05/05 & 10/05) and 6 were nil returns (07/04, 09/04, 12/05, 02/06 – 04/06) meaning that it was only actively trading for 60% of the time. Nonetheless, between 6 February 2004 and 31 January 2005, the Company's turnover exceeded £40,000,000 and the 05/06 Deals alone exceeded £10,000,000.

104. The Official Receiver points to these factors as being typical hallmarks of a company involving itself with the fraudulent evasion of VAT, trading with no appreciable assets but generating turnover running into hundreds of thousands or even millions of pounds in circumstances in which the volume of turnover, rather than profitability, drives the amount of VAT that can be fraudulently extracted. The Official Receiver submits that the Company's reported turnover of in excess of £40 million between February 2004 and January 2005, and in excess of £10 million in respect of the 05/06 Deals is simply not credible.

The goods

105. The Official Receiver relies upon the fact that the Company traded in mobile phones, and that the 05/06 Deals involved mobile phones, being high value, low bulk goods. These are said to be the types of goods frequently associated with MTIC VAT fraud, because trading results in high transaction costs (leading to large VAT reclaims on re-export), but low freight and storage costs.

106. Further, reliance is placed by the Official Receiver on the fact that the mobile phones the subject matter of the 05/06 Deals were SIM free, EU and/or US specification (i.e., two pin plugs). The Official Receiver submits that the fact that EU specification mobile phones were being traded in the UK should have alerted the Company to the possibility of MTIC fraud notwithstanding assertions made by Mr Kelly that the sale in the UK of non-UK specification mobile phones is neither illegal nor unusual.

The Company's general awareness of MTIC fraud

107. It is the Official Receiver's case that prior to the 05/06 Deals taking place, the Company, through Mr Kelly himself, had a fairly comprehensive awareness of MTIC fraud, including the need to take reasonable steps to establish the credibility and legitimacy of customers, suppliers and supplies. Particular reliance is placed by the Official Receiver upon the events, and contact with HMRC referred to in paragraphs 46 to 66 above, and the fact that on 21 September 2006, in the course of a formal Means of Knowledge interview, Mr Kelly confirmed that he had read various notices and practice statements including notice 726.

108. Further, the Official Receiver relies upon the fact that in paragraphs 20, 25 and 26 of his affidavit dated 29 May 2020, Mr Kelly further acknowledged and accepted that prior to the 05/06 Deals, he was aware of MTIC fraud as follows:

> "20. I was aware that HMRC had concerns about the sector that I was trading in and that they had suffered losses as a result of traders going missing. HMRC did issue some guidance and I did my best to comply with it and co-operate with HMRC. As far as I am concerned I did what HMRC asked of me to the best of my ability. Due to the passage of time I do not recall the conversations and letters referred to in paragraphs 64 to 117 of the Report albeit those documents are contained within the bundle"

…

25. I acknowledge that HMRC wrote to Balmoral about the risks associated with the trading activities of Balmoral. However, I do not recall getting all of the letters listed in pages 26 to 29 of the claimant's report. I also do not remember being warned by HMRC at a visit on the 16th of January 2003

26. At this time, I had heard of carousel fraud within the industry which is where a trader goes missing without paying VAT…"

Back-to-back transactions

109. I have described the 05/06 Deals in paragraph 67 to 70 above. Reliance is placed by the Official Receiver upon the fact that the 05/06 Deals were conducted back-to-back, and specifically that all deals in the chain, and not just the Company's own purchases and sales, took place on the same day, and involved the same model of mobile phone in the same volume, with the goods all being dispatched on 31 May 2006.

110. Deal 1 concerned 6,000 Nokia 8800 mobile phones at a net purchase value £2,716,500 and net sales value of £2,944,500. Deal 2 concerned 8000 Nokia 8801 at a net purchase value of £3,638,000 and net sales value of £3,952,000. Deal 3 concerned a further 8,000 Nokia 8801 at a net purchase value of £3,638,000 and net sales value of £3,952,000. The Official Receiver submits that:

    a. It is not credible to source and supply mobile phones in such quantities within the same day, especially given the expected delay for due diligence, product queries, transport organisation and payment;

    b. It is even less credible to source mobile phones in such quantities for multiple deals with the same parties on the same day; and

    c. An assertion by Mr Kelly that the use of the same supplier is a coincidence is not credible.

111. The Official Receiver points to the fact that none of the 05/06 Deals can be traced to a manufacturer, authorised distributor or end user, and he contends that the absence of an end user is notable because the mobile phones in question were designed and marketed internationally for consumers in circumstances in which one would expect profitability to increase when the mobile phones were broken up for retail sale, something that Mr Kelly would have been aware of given his previous experience in retail.

112. Reliance is also placed by the Official Receiver on what was said by HMRC in making the 05/06 Decision dated 28 January 2008 referred to in paragraph 75 above:

> "all deals were back-to-back, being made on the same day for the same amount of goods and the same product. Balmoral was never left with stock that it hadn't sold. It would be expected that a reasonably conscientious business carrying on a commercial venture would, if it was buying goods to sell on, hold unsold stock, or if it was contacted first by a customer and then went out to source the goods, that there would be a delay between obtaining the order and finding someone able to supply the precise quantities and specification of goods required by the customer. The fact that these requirements could be instantly matched suggests that the deals were artificially contrived."

113. The Official Receiver submits that back-to-back transactions of this kind are classic hallmark of MTIC VAT fraud.

No or no adequate due diligence

114. Given the Company's and Mr Kelly's awareness of MTIC fraud and of the consequences of inadequate due diligence, it is the Official Receiver's case that the Company and Mr Kelly were, at the time that the Company embarked on the 05/06 Deals, fully aware of the importance of conducting due diligence in order to establish the legitimacy of the Company's suppliers, customers and suppliers and thereby establish the integrity of the supply chain. It is submitted that, although Mr Kelly has maintained at paragraphs 54 and 56 of his affidavit dated 29 May 2020 that he *"... took reasonable and proportionate steps to verify [his] suppliers…"*, and that *"To the best of [his] knowledge due diligence was carried out"*, in fact the Company undertook no or no adequate due diligence on its trading partners."

115. As to the Company's supplier, International:

    a. On 24 July 2006, HMRC requested copies of the Company's due diligence on its suppliers.

    b. The Company provided a letter from HMRC's Redhill office dated 4 May 2006 verifying International's VRN, a supplier declaration dated 31 May 2006, a purchase agreement dated 31 May 2006 (referring to Solutions and not the Company at various points), and a contact centre enquiry seeking to verify International's VRN.

    c. On 8 August 2006, the Company faxed a Veracis due diligence report on International to HMRC. However, this report was dated 3 August 2006, i.e., two months after the 05/06 Deals, and therefore can have been of no use to the Company in establishing the integrity of the supply chain at the time of the 05/06 Deals. Further, this report bore the stamps *"Draft and Unapproved*" and *"strictly in Draft before Peer Reviews and Final Checks."* In addition, under the heading *'due diligence',* the report stated:

> "we were only permitted to peruse some documentation relating to a sale to Balmoral limited in May 2006 where we were given copies of the purchase order, Balmoral Ltd's signed supplier declaration, sales invoice and stock release instruction... and the gentleman would not allow us to see the supporting supplier documentation for this deal, or a [sic] any UK/Overseas sample deal as viewed these details as sensitive information. Told that no deal checklists are used."

    d. On 27 September 2006, HMRC wrote to the Company requesting copies of contemporaneous due diligence, but nothing was received by HMRC in response thereto.

116. As to the Company's purchaser/customer, Online:

    a. On 31 May 2006, the Company made a contact centre enquiry seeking to verify Online's VRN.

b. HMRC has received from the Company a due diligence pack created by Veracis and a credit save report both dated 31 May 2006. The Official Receiver submits that it is difficult to understand how the Company can have given instructions in respect thereof prior to entering into the 05/06 Deals, especially given its reference to a premises visit on 31 May 2006.

c. In relation to the due diligence pack:

i. Some of the paperwork supplied by Online was in Spanish, but was not translated. Veracis said therein that it *"…was reliant on the company as regards linguistic and legal interpretation."*

ii. Online is recorded as acknowledging that it made third party payments, which the Official Receiver submits should have been a warning sign especially as Veracis noted this as a negative indicator.

d. As to the credit report, despite the credit report providing Online with a credit limit of €153,258.09, the Company proceeded to supply Online with goods worth in excess of £10,000,000.

e. No letter of introduction, Companies House checks, trade references or trade application were obtained.

117. As to ASC (the Company's freight forwarder), there is no evidence of the Company having undertaken any due diligence notwithstanding the value of the goods purported to have been entrusted thereto.

118. The Official Receiver submits that the Company's due diligence in respect of its trading partners was minimal, amounted to little more than box ticking (mainly showing that the companies existed) and was largely ignored, such that it did not and could not provide any comfort that the companies in question were legitimate trading partners. The Official Receiver submits that this is particularly so in the light of what are said to be inconsistencies the Company chose to ignore. Reliance is placed upon an example of such an inconsistency with Mr Kelly having said at the Means of Knowledge interview on 21st September 2006 that the Company would not have dealt with a party if it received a negative Veracis report, the Company was seemingly unconcerned by Online's history of making third party payments and by dealing with it in respect of sums significantly in excess of the suggested credit limit.

119. The Official Receiver submits that the only reasonable explanation for the Company to enter into the 05/06 Deals in circumstances in which it had carried out no or no adequate due diligence is that the Company knew that the 05/06 Deals were connected to the fraudulent evasion of VAT. Alternatively, the Company must have turned a blind thereto. Alternatively, in the circumstances, the Company should have known that the 05/06 Deals were so connected.

Position in respect of written contracts

120. There is something of a lack of clarity with regard to written contracts. At the Means of Knowledge interview on 21 September 2006, Robert Holland of Dass told HMRC

that the Company had no formal contract. However, at the same interview, the Company's employee, Jackie Harris, said that some applications to trade with suppliers had terms and conditions on them.

121. As to International, a Purchase Agreement dated 31 May 2006 has been produced, reportedly between International and the Company. However, the Official Receiver refers to the fact that, in a number of places, it refers to Solutions rather than to the Company, and purports to have been signed by SF Cole on behalf of Solutions. Further, it does not contain a number of provisions that one might expect to find in a sales contract for the sale of valuable goods, e.g. covering the transfer of title, delivery, or returns.

122. So far as Online is concerned, no written contract has been produced. The Official Receiver relies upon the absence of a written contract as being indicative of the Company knowing that the 05/06 Deals were connected to fraud, in particular bearing in mind the high value of the goods in question.

Inspection

123. During the course of the Means of Knowledge interview on 21 September 2006, Mr Kelly stated that ASC undertook inspections, namely 10% checks, that were paid for by the Company and faxed to the Company after the goods had been dispatched. The Official Receiver says that, even if it is true that the Company did pay for inspections, this must have been purely a box ticking exercise as there is no evidence that the Company took any steps to ensure that the inspections were done or to understand the results of such inspections, which were, in any event, provided after the goods had been dispatched.

124. However, the Official Receiver challenges Mr Kelly's assertion that inspections were carried out by ASC and asserts that there is no evidence that the Company undertook, either itself or by paying ASC, any inspections of the mobile phones to confirm, among other things, their quantity and/or condition. Accordingly, it is submitted that the Company did not know whether or not the very expensive mobile phones that it was supplying were complete and in good condition.

125. Further, reliance is placed onthe fact that the Company did not record any International Mobile Equipment Identity ("IMEI") Numbers, i.e., the unique 15-digit number given to every phone that allows a network to identify valid phones and block stolen phones. Regardless of any legal requirement to do so, the Official Receiver submits that a genuine, commercial company would record IMEI numbers so as to avoid dealing in stolen phones, avoid dealing in the same phones more than once, and to provide verification for returns and insurance claims.

126. Again, the Official Receiver maintains that the only reasonable explanation for the Company not to undertake any inspections and not to record IMEI numbers is that Balmoral knew that the 05/06 Deals were connected to fraud.

Insurance

127. The Official Receiver refers to the fact that the 05/06 Deals concerned mobile phones worth in excess of £10,000,000 which were being moved from the UK to the EU and

submits that a legitimate business dealing with goods of this value would consider insurance an essential pre-requisite of trading.

128. In paragraph 62 of his affidavit dated 29 May 2020, Mr Kelly says that he believes that insurance was in place. However, the Official Receiver submits that there is no evidence that the Company obtained any insurance for the mobile phones. In the course of the Means of Knowledge interview on 21 September 2006, Mr Kelly stated that ASC insured the goods in transit and that Online paid for insurance in storage, albeit no details of insurers were provided. In contrast, it is the Official Receiver's evidence that ASC, when interviewed by HMRC, stated that it covered the goods in the warehouse but that insurance during transport was the haulier's responsibility. In any event, no insurance policy and/or proof of payment of an insurance premium was provided by the Company.

129. It is the Official Receiver's case that what is said to be this casual attitude to insurance points to the 05/06 Deals being contrived, and that the Company's lack of concern with regard to any issues with or risks to the mobile phones can be explained only on the basis of it being aware that the 05/06 Deals were connected to transactions involving the fraudulent evasion of VAT.

Payment and other timing aspects

130. The Company used its FCIB account for the 05/06 Deals. Only Mr Kelly had access to this account as the sole signatory thereon. HMRC traced all the payments by the participants in the chain of transactions making up the 05/06 Deals through accounts held with FCIB. As is apparent from paragraphs 172-177 of the 2016 FTT Decision referred to in paragraph 17 above, this tracing exercise was fundamental to the conclusion reached in the 2016 FTT Decision that the 05/06 Deals were connected with the fraudulent evasion of the VAT. The Official Receiver submits that the same considerations apply for present purposes.

131. Apart from payments, further timing aspects are relied upon by the Official Receiver as indicative of the fraudulent evasion of VAT, including the following:

    a. The Company placing purchase orders with International before receiving a copy of the Purchase Agreement or the Seller's Declaration; and

    b. The Company dealing with International, and paying the latter, without having received an invoice.

132. The Official Receiver submits that the only reasonable explanation for the circular movement of the monies, the speed with which the payments were made in the parties' tolerance of the payment shortfalls, and the timing considerations referred to in paragraph 131 above was that the Company knew, or ought to have known, that the 05/06 Deals were connected with fraud.

Low profit margins

133. The Official Receiver observes that in the transactions making up the 05/06 Deals, the Company traded as a broker exporting the mobile phones to the EU, and that whilst the buffers added only 25p, being 0.06%, the Company added £38 per unit (8.39%) in

Deal 1 and £39.25 per unit (8.63%) in Deals 2 and 3. The Official Receiver notes that Mr Kelly claims in paragraph 60 of his affidavit dated 29 May 2020 that it is the nature of the wholesale business to buy at one price and sell at another in order to make a profit. However, the Official Receiver submits that as all UK traders were operating in the same market, there is no obvious reason, absent fraud, for such a large increase by the Company, especially given that the Company sold on the same mobile phones without enhancement or modification. In addition, the Official Receiver submits that it is notable that the Company never made a loss and that its markups were consistent across the 05/06 Deals despite the fact that they concerned different mobile phones and volumes.

Delivery

134. The Official Receiver points to the use of freight forwarders as being indicative of VAT fraud given that the use thereof enables goods to move through the chain of deals quickly and without additional transport costs. Reliance is therefore placed on the role played by ASC in allowing goods to move up the chain, and the Company's knowledge as to the use thereof.

135. Reliance is placed by the Official Receiver on the lack of clarity as to who paid the transportation costs, and upon the fact that the Company never took possession of the mobile phones.

136. The Official Receiver relies upon the following evidence concerning ASC itself. ASC's registered business address was Abbey House, 450 Abbey Road, Longford, Heathrow, UB7 0E. Its main business activity was courier post. It was registered for VAT on 8 March 2006, only 2 months before the 05/06 Deals took place. In its VAT1, ASC's estimated turnover was £750,000. However, the actual turnover for the business in the first two months as reported to HMRC was £1.8 million. HMRC's enquiries disclosed that it had no commercial premises, no vehicles capable of providing a service and that the owner of the premises where the goods were said to be stored denied any knowledge of the business.

137. Further, the Official Receiver relies upon the fact that whilst Online was a company registered in Spain, it required delivery of the mobile phones to KPP International Logistics, a freight forwarder in Rotterdam. Whilst delivery to freight forwarders might not be not uncommon, it is the Official Receiver's case that the risk of goods being re-dispatched to the UK (i.e. going round in circles) was well publicised, and it is submitted that the delivery of the mobile phones to Rotterdam (from where they could easily be re-dispatched to the UK) should have caused the Company to make further enquires, which it did not do. Further, it is submitted that there is no evidence that the mobile phones ever reached Online or any end user

Conclusion regarding the Company's knowledge and/or involvement

138. The Official Receiver submits that, certainly taken together, the above facts, matters and circumstances relied upon are highly inconsistent with normal commercial trading, and demonstrate that the Company had knowledge of, or at the very least least ignored fraud as the obvious explanation for the 05/06 Deals and turned a blind eye to, the fact that the 05/06 Deals were contrived for the purpose of facilitating

fraud. Alternatively the Company ought to have know that the 05/06 Deals were connected to transactions involving the fraudulent evasion of VAT.

The position of Mr Kelly

139. So far as Mr Kelly himself is concerned, the Official Receiver submits that his conduct, and whether it makes him unfit to be concerned in the management of a company, requires to be considered against the background of what is said to be his long-standing experience of the mobile telephone industry as evidenced by:

    a. His own acceptance, in paragraph 34 of his witness statement dated 29 May 2020 that he: *" ... Had a lot of experience in trading electronic goods ..."*.

    b. His own admission in paragraph 41 of his witness statement dated 29 May 2020 that he: *" ... Had a lot of experience and contacts having started in the mobile phone industry in 1998 and then running a retail shop for over 10 years."*

    c. Having been a director of Five Star Communications Ltd between 1990 and 2001.

    d. Having been a director of Solutions, which was incorporated on 6 May 2003, trading from the same registered office as the Company, and which was also registered for VAT. On 19 May 2004, Mr Kelly informed an HMRC officer that the business activity of Solutions would be earning commission for arranging car finance, secured loans and insurance. At a subsequent meeting on 24 March 2005, HMRC was informed that Solutions was to trade in the wholesale of computer parts, with the intention of keeping this business separate from the sale of mobile phones as conducted through the Company albeit that Solutions did subsequently trade in mobile phones, at least after Mr Kelly had written to HMRC on 5 April 2006 as referred to in paragraph 64 above.

140. The Official Receiver relies upon the following as showing that Mr Kelly knew, or should have known, that the 05/06 Deals were connected with the fraudulent evasion of VAT:

    a. Mr Kelly was the Company's sole director and shareholder.

    b. Even if Ms Tookey was responsible for the transactions carried out between 21-25 March 2003 referred to in paragraph 47 above, in which she had, allegedly, without Mr Kelly's knowledge, entered into sales and purchases in excess of £10,000,000 without undertaking any checks on the Company's suppliers (resulting in the de-registration of the Company), as a result thereof, Mr Kelly knew or ought to have known that it was his responsibility to control and supervise those working for the Company.

    c. Mr Kelly was the sole signatory on all of the Company's bank accounts. Accordingly, he had oversight of and control over the same. The Official Receiver submits that Mr Kelly knew, or should have known, of the

Company's huge increase in turnover referred to above, and in particular of the receipts from Online and the payments to International.

d. For the reasons already referred to, Mr Kelly was well aware of the mechanics of VAT fraud and of the need to take reasonable steps to establish the credibility and legitimacy of its customers, suppliers and supplies.

e. Despite Mr Kelly's general awareness of VAT fraud and knowledge of the Company's huge increase in turnover including the receipts from Online and payments to International, the Official Receiver says that Mr Kelly took no steps to ensure that any, or any adequate, due diligence was undertaken by the Company on its trading partners and/or failed to consider either adequately or at all the due diligence that was undertaken, that written contracts were in place for the 05/06 Deals, that the mobile phones were inspected and/or insured or that the delivery arrangements were credible.

141. It is therefore submitted on behalf of the Official Receiver that the above matters should have put Mr Kelly on enquiry as to the credibility and legitimacy of the 05/06 Deals. It is submitted that the only reasonable explanation for Mr Kelly's failure to make any, or any adequate, enquiries into any of these factors is that he knew that the 05/06 Deals were connected with fraud, or at least turned a blind eye to this being the case. Alternatively, considering the above factors, it is submitted that Mr Kelly ought to have known that the 05/06 Deals were connected with fraud.

142. As to Mr Kelly causing or allowing the Company to participate in the 05/06 Deals, the Official Receiver relies upon the legal principles referred to in paragraph 33 above. The Official Receiver submits that:

a. As the sole director, sole shareholder and controlling mind of the Company, Mr Kelly caused the Company to enter into the 05/06 Deals, or

b. Mr Kelly knew of the 05/06 Deals, knew of the risk of VAT fraud and its consequences, but failed to act and, accordingly, caused the Company to enter into the 05/06 Deals, or

c. At the very least, Mr Kelly ought to have known of the 05/06 Deals and the connection to VAT fraud and, in failing to appreciate the obvious, allowed Balmoral to enter into the 05/06 Deals.

143. In the circumstances, the Official Receiver invites me to reject the statements made by Mr Kelly in his affidavit dated 29 May 2020 that he and the Company were entirely innocent (paragraph 10), that he is *"…as much of a victim of the VAT fraud as HMRC"* (paragraph 97), and he and the Company got *"… caught up in this through no fault of their own…" (Paragraph 32).* It is the Official Receiver's case that the Company and Mr Kelly were knowing participants in VAT fraud, turned a blind eye to the same, or, at the very least, had the means of knowledge and ought to have known that the 05/06 Deals were connected to the fraudulent evasion of VAT.

144. With regard to the second allegation against Mr Kelly, namely that by the Company's 05/06 VAT Return he caused or allowed the Company to wrongfully claim the sum of £1,748,687.50 from HMRC, the Official Receiver relies upon the following:

a. Mr Kelly applied, twice, for Balmoral to be VAT registered and liaised with HMRC about the application and generally as referred to above. Accordingly, Mr Kelly knew or ought to have known that the Company was required to account for VAT to HMRC.

b. Mr Kelly, as sole director, was responsible for ensuring that proper accounting records were maintained.

c. In paragraph 76 of his affidavit dated 29 May 2020, Mr Kelly asserts that the Company's VAT Returns were prepared by his accountant. However, it is submitted that as a director of the Company, Mr Kelly had *"inescapable"* personal responsibilities including to keep himself informed of the Company's affairs and supervise/control them - see *Re Westmid Packing Services Ltd (No. 3)* (supra) at 836-842A-B and, 843C-D. This, it is submitted, included the Company's VAT Returns. Further, whilst delegation is permissible, for example to an accountant and/or bookkeeper, it is submitted that Mr Kelly remained responsible for the delegated functions and had a residual duty of supervision and control – see *Re Barings plc (No. 54)* [1999] 1 BCLC 433 at 487 & 489.

145. The Official Receiver submits that in the light of the matters referred to in paragraph 144 above, Mr Kelly knew that VAT Returns would be submitted in respect of the 05/06 Deals, knew of the risk that the Company would wrongfully reclaim VAT, but failed to act and, accordingly, caused the Company to wrongfully claim the sum of £1,748,687.50 from HMRC.

146. Alternatively, Mr Kelly ought to have known that VAT Returns would be submitted in respect of the 05/06 Deals which risked the Company wrongfully reclaiming VAT and, in failing to appreciate the obvious, allowed the Company to wrongfully claim the sum of £1,748,687.50 from HMRC.

Period of disqualification

147. It is primarily the Official Receiver's case that this is a case where Mr Kelly has been knowingly involved in MTIC fraud such that a period of disqualification well within the top bracket of over 10 years should be imposed, as it should if the Court concluded that, rather than being knowingly involved in transaction concerning MTIC fraud, he wilfully closed his eyes to a connection between the 05/06 Deals and transactions concerning MTIC fraud. Recognising that period of disqualification is a question for the Court, the Official Receiver suggests a period of disqualification of 13 years.

Mr Kelly's case

148. Mr Kelly's case is set out in his affidavits dated 29 May 2020 and 21 December 2022, and he developed a number of further points in the course of submissions.

149. The gist of Mr Kelly's case in response to the allegations of unfitness that are made against him can be summarised as follows:

a. In paragraph 4 of his first affidavit, Mr Kelly complains that the circumstances of the application date back to 2004, with the main events having taken place in May 2006, some 17 years ago. He says that he has not been involved in the management of the Company for some 12 years, and has not retained any records to assist in dealing with specific allegations that are made by the Official Receiver. He thus submits that he is at a significant disadvantage in answering the criticisms that are made of him. This is point that Mr Kelly stressed on a number of occasions during the course of his cross-examination.

b. In paragraph 18 of his first affidavit, Mr Kelly says that he is unable to remember who the Company banked with, although he does subsequently go on in paragraph 49 of the same affidavit to say that he can recall that FCIB advertised in trade publications, and that he recalls that that is how the Company *"ended up banking with them."*

c. In paragraph 20 of his first affidavit Mr Kelly said that he did his best to comply with HMRC guidance to the best of his ability, and to cooperate with HMRC at all relevant times.

d. In paragraph 23 of his first affidavit, Mr Kelly emphatically denied that he was knowingly concerned in, or took steps with a view to fraudulently evading VAT, and in paragraph 24 thereof he went on to say that he was not aware at the time that the traders that he dealt with were using false or had no valid VAT registration numbers.

e. Whilst acknowledging in paragraph 25 of his first affidavit, that HMRC wrote to the Company about the risks associated with its trading activities, in paragraph 26 of the same affidavit he goes on to say that he does not recall getting all of the letters relied upon by Official Receiver, nor of being warned by HMRC during the course of a visit on 16 January 2003. In paragraph 27, he maintains that all traders within the mobile phone industry were tarnished with the same brush, and that genuine traders such as himself were subjected to *"extended verification"*.

f. In paragraph 31 of his first affidavit, he says that he has reviewed the statement in support of the application with regard to its setting out of the characteristics of companies trading whilst engaged in VAT fraud, and he contends that these were also the characteristics of many businesses which were trading legally not committing any kind of fraud, and that just because he was involved in a business that might have had a connection to a missing trader did not mean that he was part of the fraud.

g. In paragraph 34 of his first affidavit, and commenting on the Official Receiver's allegations regarding high value/low bulk goods, he accepts that the Company traded in such goods, but contends that he had been involved in the mobile phone industry since 1988, and describes having operated a retail shop with his girlfriend for some 10 years, having had a break for a couple of years, and starting to trade again with the Company, diversifying into the wholesale of mobile phones between 2004 and August 2006.

h. In paragraph 37 of his first affidavit, Mr Kelly observes that it is not uncommon to trade from a residential address, and that this is what many small businesses do.

i. As to the Official Receiver's allegations regarding trading with minimal assets/high turnover, in paragraph 38 of his first affidavit Mr Kelly comments that many businesses trade in this way, and he asserts that simply by trading in this way does not mean that the party concerned is engaged in VAT fraud. He comments that if assets are high-value, then it is possible to generate a high turnover very quickly even though the profit margins are quite low.

j. In paragraph 39 of his first affidavit, Mr Kelly comments on the trading between 21 and 25 March 2003 when the Company apparently generated £10 million in sales. This is the trading which it has been said that Ms Tookey was responsible for as referred to in paragraph 47 above. As to this, Mr Kelly says that this was 13 years ago, and that he does not recall this trade nor the circumstances of it. In paragraph 40 of his first affidavit, Mr Kelly commented in like terms in respect of other allegations made by the Official Receiver in respect of high trading volumes, i.e. to the effect that he cannot recall the trades or the circumstances of them.

k. In paragraph 41 of his first affidavit, Mr Kelly deals with the Official Receiver's allegations concerning the allegedly erratic trading patterns, commenting that with products such as mobile phones, he knew from his experience of the mobile phone industry that it was unlikely that trading would be steady.

l. In paragraph 44 of his first affidavit, dealing with the Official Receiver's allegations in respect of low profit margins, Mr Kelly maintains that the increase in the cost of the unit before it is sold on is not evidence of fraud. As he puts it: *"I could not sell it for the same or less than I purchased it because then I would not be able to trade or generate a profit."*

m. With regard to the Official Receiver's allegations concerning back-to-back deals, in paragraph 46 of his first affidavit, Mr Kelly comments that back-to-back deals are common in many industries, and he says that not all of the deals that the Company engaged in where back-to-back deals and that: *"on some occasions I was just lucky that I was able to find purchasers."* He says that he does not accept that deals were contrived by him, and he goes on to say that if they were contrived, then he was unaware of what was going on.

n. As to freight forwarders, in paragraph 48 of his first affidavit, Mr Kelly accepts that he did use freight forwarders, but says that he does not accept that this was anything other than normal business practice.

o. So far as the Official Receiver's allegations concerning inadequate insurance arrangements are concerned, in paragraph 49 of his first affidavit, Mr Kelly says that he has no records relating to the business insurance that was in place when he was trading.

p. In paragraph 51 of his first affidavit, Mr Kelly does not accept that no due diligence was carried out in respect of FCIB, observing that, it is difficult for him to respond to the allegation in detail with the passage of time. He does, however, say that he was *"satisfied"* with FCIB, and that if he had had any concerns or knowledge of their actions and activities, he would not have banked with them. He does not explain the coincidence of all the various parties within the chain relating to the 05/06 Deals using FCIB.

q. With regard to the Official Receiver's allegations concerning third-party payments, Mr Kelly complains at paragraph 52 of his first affidavit that he was not represented at the Tribunal hearing that might have dealt with this question. He goes on in paragraph 53 thereof to say that, given the passage of time, he does not have the detailed information available which he would require in order to address the allegations concerning the dealings with Direct. He does, however, say that he did not knowingly do anything against HMRC guidance, and that so far as he was concerned, he was following the guidance that he was provided with.

r. As to the Official Receiver's allegations concerning inadequate due diligence to protect the Company from becoming involved in VAT fraud, Mr Kelly deals with these allegations in paragraphs 54-61 of his first affidavit. He refers to having made contact with HMRC's Redhill office with regard to checking the validity of VAT registrations of those that the Company dealt with. He says that so far as he was aware, the advice given by HMRC was followed. As to the allegations concerning the absence of evidence as to the carrying out of due diligence, he again says that he is unable to properly respond to this allegation due to not having access to the Company's documents. He does, however, say: *"I can say that there would have been paperwork at the time for some contracts, but other transactions may have been conducted by telephone and followed up by invoices afterwards."* He, again, refers to his experience in the wholesale trade of mobile phones and to having had *"lots of established business contacts and connections."*

s. As to examples of inadequate due diligence, Mr Kelly deals with the Official Receiver's case in respect thereof in paragraphs 62 to 68 of his first affidavit, again complaining as to the absence of documentation given the passage of time. He does, however, comment regarding Direct, saying that he had a contact named *"Ian"*, and that he did examine copies of a VAT registration certificate and certificate of incorporation, and verified with Redhill that Direct was registered for VAT. He acknowledges that he did not meet Ian or visit the premises, or have the goods inspected, but says that that in itself does not mean that he knew that this could be a fraudulent transaction. Commenting on not keeping a record of IMEI Numbers, Mr Kelly comments that this was not a legal requirement, and does not mean that he did anything wrong.

t. In paragraph 70 to 72 of his first affidavit, Mr Kelly comments with regard to the 05/06 Deals being traced back to a defaulting trading, and asserts that the Company was never a defaulting trading and was not responsible for the actions of other companies. With regard to West 1, he says that he did not know that it was involved in VAT fraud. As to International, he accepts that the Company traded with the latter, but says that he did not know that it was

committing VAT fraud, or know that one of the directors was in prison. He says that there was no way of him knowing of this.

u. As to the alleged wrongful submission of VAT claims, in paragraph 76 of his first affidavit, Mr Kelly comments that VAT returns were prepared by his accountant, and at the time they were submitted, he believed them to be accurate and correct.

v. Commenting on the process that led to the bringing of disqualification proceedings against him, in paragraph 86 of his first affidavit, Mr Kelly commented as follows:

> "All the way through the Official Receiver has argued that I have not made sufficient representations or provided evidence to support a defence or mitigation. I have explained on many, many occasions that I do not have the company records, so it is impossible for me to provide what I don't have. I have done my best in very difficult circumstances. We are talking about a situation that occurred 16 years ago. The Insolvency Services' conduct has prejudiced my position because it has taken so long to bring these proceedings against me."

w. In paragraph 96 of his first affidavit, Mr Kelly says that his church leader, financial broker and accountants have provided references for him, and found him to be honest and reliable and have acted with integrity. He maintains that the proceedings are unjustified and should not have been brought against him, and that he is just as much a victim of the VAT fraud as is HMRC, commenting that the demise of the Company has caused him serious financial hardship.

150. Mr Kelly's second affidavit dated 21 December 2022 was made after the making of the Brightwell Order. At paragraph 7 thereof, he said this:

> "The events complained of took place 18 years ago. Memories have clearly faded over the years. In short, those explanations and reasons were that:-
>
> a. I had no actual knowledge that the Company's purchases were connected with the fraudulent evasion of Tax, by others, within the claim of transactions.
>
> b. I do not consider that the circumstances in which those transaction took place, were sufficient or adequate to put me on notice of their connection to the fraudulent evasion of Tax, by others, within the claim of transactions.
>
> c. At the Tribunal hearing, I had no real opportunity to contest the allegations of dishonesty that were levelled at me during that hearing. I rely upon the terms of the Judgment of Deputy District Judge Brightwell, as set out in the transcript of his decision dated 05 January 2022 on this point.
>
> d. I will at final hearing herein, rely upon the terms of my First Witness Statement (sic) in this Action, signed off by me and dated 29 May 2020, in support of my position in this case (insofar as that evidence does not contravene the terms of the Court Order sealed on 18 November 2022). I stand to be cross-examined on this and my earlier evidence, in light of Officer Siddle's evidence, at Trial herein."

151. During the course of submissions, Mr Kelly took a new point that, in about February 2008, he had used HMRC's Security Guarantee Condition, which allowed the use of a third party such as a bank to provide a guarantee to enable security to be given for

VAT payable, or to become payable. He said that he came to terms with Northern Rock with regard to the payment of interest on a monthly basis on the amount of the deposit behind the guarantee. He says that he then had the idea of a commercial venture involving marketing such product, and obtained Bank of Ireland's interest therein with Bank of Ireland even offering £100 million insurance cover. However, he says that HMRC effectively prevented him from pursuing any such venture as part of a vendetta or witch-hunt against. He maintains that the present proceedings effectively amount to a continuation of this vendetta or witch-hunt against him, and that the present proceedings required to be so viewed by the Court.

152. In the above circumstances, it is Mr Kelly's case that the present proceedings should be dismissed.

Assessment of Mr Kelly as a witness

153. It is fair to say that it is by no means ideal that the Court is being required to consider Mr Kelly's fitness as a director based primarily on events that took place some 17 years ago, in May 2006. In these circumstances, it would be no surprise if Mr Kelly has little or no real recollection of the events in question, or if documentation that might otherwise have been available to assist in understanding what occurred is not now available. Having said this, the Company did, at Mr Kelly's direction, pursue the appeal to the FTT that ultimately led to the 2016 FTT Decision. Although this appeal was disposed of some seven years ago, it will have provided something of a more recent focus for Mr Kelly on the events in question. Nevertheless, in considering Mr Kelly's evidence, and the case that he advances, I must take into account the considerable difficulty that he must inevitably face in responding to allegations made concerning events that took place so long ago.

154. However, notwithstanding giving what I consider to be all due credit in respect of the passage of time, I did not find him to be a satisfactory witness able to give a plausible explanation of events. Three particular points in respect of his evidence stood out to me:

a. Firstly, I would make the general point that even after such a long period of time, Mr Kelly's evidence, both contained in his affidavits, and as further developed during the course of cross examination, failed, as I saw it, to set out a credible narrative as to how the Company went about its business otherwise than by involving itself in transactions redolent of those connected with VAT fraud. Thus, for example, whilst Mr Kelly might have made reference to having had many contacts, there is no real explanation or cogent narrative as to how the Company went about identifying mobile phones for sale, identifying the sellers thereof, or finding buyers for the same in order to make a profit on the resale thereof in an ordinary commercial way.

b. Secondly, in his first affidavit Mr Kelly was quite clear that he could not recollect the transactions in March 2003 referred to in paragraph 47 above which it was suggested that Ms Tookey had been involved in entering into in Mr Kelly's absence. However, in giving evidence under cross examination, Mr Kelly was able to recall that he had had a personal crisis resulting in him leaving matters in the hands of Ms Tookey, and detail such as leaving her with the keys to his flat and a bank card, but without any specific instructions to

effect any deals. It is possible that Mr Kelly's memory has been refreshed by a reading of HMRC's visit reports dated 26 March 2003, but I did not find his evidence under cross examination at all convincing. Indeed, I find the explanation that Ms Tookey caused the Company to enter into the relevant transactions to the value of some £10 million without Mr's Kelly's authority to be frankly incredible notwithstanding the explanations given to HMRC at the time. I consider such conclusion to be supported by the fact that notwithstanding her involvement in this transaction, Ms Tookey continued to be involved with the Company and/or Solutions for some considerable time thereafter. It was put to Mr Kelly that the only reasonable explanation for keeping Ms Tookey after these events was that Mr Kelly was fully aware of the deals that she was involved in. He denied this, but I found his denial to be wholly unconvincing.

c. Thirdly, it is clear that, by May 2006, Mr Kelly was, even on his own admission, aware of MTIC fraud and the hallmarks thereof, and of the level of due diligence that HMRC advised ought to be carried out before engaging in transactions of the kind that the Company did engage in respect of the 05/06 Deals. The importance of the position had come to the fore in March and April 2006 as referred to in paragraphs 53 to 55 above in consequence of the transactions concerning SGA in January 2006. In the light of this, during the course of his cross examination, I asked why, in relation to the 05/06 Deals the Company had not carried out due diligence of the level advised by HMRC. Mr Kelly was unable to provide any explanation at all, simply saying: *"At this moment I can't provide any explanation as to why this was not carried out."*

d. Fourthly, in paragraph 25 of his first affidavit, Mr Kelly sought to suggest that he had not (on behalf of the Company) received a significant amount of the correspondence relied upon by the Official Receiver as showing that Mr Kelly was aware of the risks of involvement in MTIC fraud and how to avoid the same. However, he did not refer to this in his appeal decided by the 2016 FTT Decision, and he did not provide any cogent explanation as to why he would not have received correspondence addressed to the Company at his flat apart from suggesting that it may have been misplaced in communal post facilities thereat. I found his evidence in this respect to be unpersuasive, and while he might not now have a recollection of receiving particular correspondence, I see no good reason to believe that he did not receive it at the time.

e. Fifthly, during the Means of Knowledge interview on 21 September 2006, Mr Kelly sought to suggest that employees had been responsible for the 05/06 Deals. Under cross-examination, Mr Kelly accepted that he would have been aware of the deals at the time and he was, as I saw it, unable cogently to explain which individuals employed at the time might have considered themselves as having the authority to enter into deals with the values in question. Bearing in mind that payments were made into and out of the Company's FCIB account on the day (31 May 2023) in respect of the 05/06 Deals and that Mr Kelly was the sole signatory on the account, I consider it fanciful to suggest that the deals in question were down to employees, and that Mr Kelly's attempt more contemporaneously in September 2006 to blame matters on employees to be entirely disingenuous.

155. The answer referred to at the end of sub-paragraph 154(c) above was generally fairly typical of the answers given by Mr Kelly in cross-examination to various challenges made by Ms Newstead Taylor in respect of matters relied upon by the Official Receiver in support of his case. Again, I recognise that the Court is dealing with matters many years after the event, but even so, I would have expected at least some cogent and credible answers to be given to the questions that were posed. However, in fact, I found that very few if any of the answers given by Mr Kelly served to assist his case, and that very many of them served to damage it through the inability to provide reasoned explanation in respect of a significant number of matters even giving credit for the fact that the events in question occurred so long ago.

Determination of the case of unfitness

156. I am driven to conclude by what I consider to be the overwhelming evidence that the Company, and through the Company Mr Kelly, was aware that the Company, by entering into the transactions that formed its part of the 05/06 Deals, was involving itself in transactions involving the fraudulent evasion of VAT through MITC fraud, or at the very least that the Company and Mr Kelly turned a complete blind eye to such being the case. I consider the evidence to be overwhelming notwithstanding the passage of time, and notwithstanding having given what I consider to be appropriate credit to Mr Kelly in respect of the difficulties that he has faced in defending the claim so many years after the events in question. Should I be wrong as to this, then I certainly conclude that, on the facts, the Company and Mr Kelly ought to have known, applying the *Kittel* principle, that the 05/06 Deals were connected with transactions involving the fraudulent evasion of VAT.

157. The following factors, in particular, have led me to the conclusion that I have reached with regard to the involvement and knowledge of the Company and Mr Kelly:

    a. Firstly, the evidence is clear that Mr Kelly's knowledge of the mobile phone trade extended, at all relevant times, to a knowledge of MTIC fraud, how it operated, what its hallmarks were, and what HMRC suggested was required by way of due diligence in order to minimise the risks of involvement in MTIC fraud. I repeat what I have said in sub-paragraph 154(c) above. Mr Kelly was singularly unable to provide any explanation why the Company did not carry out anything but cursory due diligence in respect of its supplier and buyer in respect of the 05/06 Deals, as well as the freight forwarder that was to be entrusted with mobile phones worth many millions of pounds. I can see no cogent explanation for such conduct other than being aware of the fraudulent nature of transactions behind the 05/06 Deals, or deliberately turning a blind eye to same knowing what the likely results of proper due diligence would be, and that proper due diligence did not in reality matter given the artificial nature of the transactions. For reasons that I have already explained, I can see no proper scope for Mr Kelly hiding behind the actions of his employees for this purpose. Mr Kelly accepted under cross examination that he was aware of the transactions in question. The 05/06 Deals concerned transactions totalling significantly in excess of £10 million. I consider any suggestion that Mr Kelly was not completely au fait with what was going on to be an unrealistic and incredible suggestion if, indeed, that is what Mr Kelly is suggesting by some of his responses under cross examination.

b. Secondly, a significant number of the features of the transactions in which the Company was involved in connection with the 05/06 Deals, particularly when viewed together, point firmly in my judgment to the conclusion that the Company, and through the Company Mr Kelly, was aware that those transactions were connected with the fraudulent evasion of VAT, or at the very least to a blind eye being turned thereto by the Company and Mr Kelly. I refer, in particular, to the following:

    i. The back-to-back nature of the transactions through the chain up to the missing trader, West 1, with the transactions all taking place over a very short period of time on one day, involving the same goods, and the use of the same bank, FCIB, to effect all the payments up the chain and, in all likelihood, utilisation of the same IP address. The explanation provided by Mr Kelly for the Company using FCIB is, I consider, barely credible.

    ii. From the Company's own perspective, the fact that there were three transactions on the same day with the same customer and supplier.

    iii. The circularity of the payments as described in paragraphs 172-177 of the 2016 FTT Decision, a particular feature being that the monies ultimately received by Hunzie in respect of Deal 2 were almost certainly used to fund Deal 3.

    iv. The fact that the Company, without any obvious explanation and with no apparent subsequent recourse by International, did not pay the full price (inclusive of VAT) due to be paid to International, but rather paid a lesser sum limited by what it had received from Online (which was not obliged to pay VAT given that the goods were sold for export). This was despite the fact that the written contract as between the Company and International provided for payment in full to International.

    v. Particularly given the high value of the 05/06 Deals, the absence of a written contract between the Company and Online, and the highly unusual features of the written contract that has been produced as between the Company and International. As to the latter, there are the references to Solutions in the written contract, and the fact that the written contract fails to deal with matters one might have expected to have been dealt with in a proper commercial contract between genuine and bona fide commercial parties.

    vi. The odd timing of various steps in the transaction process, including the Company placing a purchase order with International, before entering into the written contract with International, or the receipt of a seller declaration.

c. Thirdly, the fact that even if, which I consider appears highly doubtful, the Company did pay for inspection reports, on Mr Kelly's own account as

provided at the Means of Knowledge Interview on 21 September 2006, this can only have been a box ticking exercise as explained in paragraph 123 above, not least because the results of the inspections would have been provided, if they ever were, after the goods have been dispatched. Further, related to the question of inspection, I consider it highly unlikely that a genuine commercial trader carrying on a legitimate business would trade in large quantities of high-value mobile phones without recording the IMEI numbers relating thereto for a number of reasons, including insurance purposes, and verifying returns.

d. Fourthly, it is reasonably clear from the evidence that the Company did not ensure that the mobile phones that it was trading were insured in the way that one would expect large quantities of high-value items to be insured by a genuine commercial trader carrying on a legitimate business. I refer to the summary of the evidence referred to in paragraph 126 above, and in particular the fact that whilst Mr Kelly has maintained that ASC insured the goods in transit, ASC, when interviewed by HMRC, stated that it merely covered the goods when they were in the warehouse.

e. Fifthly, I regard it as significant that the Company never took possession of the mobile phones in question, and that there is a lack of clarity as to who paid the transportation costs.

f. Sixthly, so far as ASC is concerned, despite the fact that its representatives appear to have been interviewed by HMRC as referred to above, it is a feature of the case that it only registered for VAT a couple of months before the 05/06 Deals were carried out, and that HMRC's enquiries have disclosed that it had no commercial premises, or vehicles capable of providing a service. This raises at least significant questions with regard to delivery of the mobile phones in questions, questions that are compounded by the fact that although the mobile phones were purportedly purchased by Online, a Spanish company, the latter required delivery to a freight forwarder in Rotterdam and, according to HMRC's enquiries, as referred to above, the proceeds of sale of Deals 1 and 2 found their way to Hunzie, only to be recycled by payment to Online to enable it to complete Deal 3. Whilst it is conceivable the Company was unaware of this recycling of funds, it would certainly have known that delivery was required to a freight forwarder in Rotterdam, which hardly rests easily with the sale to a Spanish company, but is consistent with reimportation to the UK which I consider that Mr Kelly, with his knowledge of the mobile phone wholesale market, is highly likely to have appreciated the significance of despite what he might have said under cross examination.

g. Sixthly, whilst perhaps not the most significant of factors taken on their own, one further has the way that the Company conducted business with very few assets, that fact that it traded out of a residential flat, and the fact that it traded in the high-value/low bulk goods (mobile phones). Taken together with the other factors referred to above, these do, in my judgment, point firmly towards the Company's knowing involvement in transactions connected with fraudulent VAT evasion.

158. The one factor relied upon by the Official Receiver to which I attach rather less weight, at least taken on its own, is the profit margin made by the Company on the sale of the mobile phones in question. One would expect that a genuine commercial sale of items such as mobile phones by way of export would yield a significant profit. That, in itself, does not, as I see it, point to involvement in fraud. What is, perhaps, of more significance in the present case is that other transactions in the chain did not yield any significant profit, although the Company was not necessarily aware thereof. However, the yet further significant consideration is, as I see it, the point referred to above with regard to the Company not paying the full consideration due to International, but a lesser sum or closely aligned with the consideration that it received, without any VAT being included, on its sale to Online. This does, as I see it, strongly support the Official Receiver's case.

159. So far as the submission of the 05/06 VAT return is concerned, and the allegation that Mr Kelly caused or allowed the Company to wrongly claim the sum of £1,748,687.50 from HMRC, I do not consider that Mr Kelly can hide behind the relevant VAT return as having been prepared by the Company's accountant in that Mr Kelly, as sole director of the Company, was ultimately responsible for the submission of VAT returns, and Mr Kelly was not merely aware of the fact of entry of the Company into the transactions related to 05/06 Deals, but, on the basis of my findings above, the fact that the transactions in question were connected with the fraudulent evasion of VAT, in which case the Company would have no entitlement to recover the VAT in question.

160. As identified in *Secretary of State v Corry* (supra) and *Secretary of State v Warry* (supra), when considering, in the context of allegations of involvement in MTIC fraud, the *"jury question"* identified in *Re Sevenoaks* (supra) as to whether a defendant director's conduct in relation to a company makes him unfit to be concerned in the management of a company, it is necessary to consider whether the relevant company is to be regarded as a participant connected with the fraudulent evasion of VAT, and to then consider the extent of the defendant director's personal knowledge of, and involvement in, that fraud, and how that impacts on his fitness to be concerned in the management of the company.

161. Carrying out this exercise in the circumstances of the present case, and for the reasons explained above, I am satisfied that, on the present facts, the Company was aware that it was participating in transactions that were connected with the fraudulent evasion of VAT, or at the very least that it turned a blind eye thereto, and that the knowledge of the Company, and its state of mind, is to be to be attributed to Mr Kelly given what I have found to be his role as sole director and shareholder, and sole signatory on its bank accounts, with the knowledge of the transactions in question that I consider that he had.

162. In the circumstances, I am satisfied that the Official Receiver has demonstrated on the evidence that Mr Kelly has shown by his conduct in relation to the Company that he is unfit to be concerned in the management of a company, and that this being the case, I am required to make a disqualification order against him.

163. I find it difficult to accept that Mr Kelly was subject to the vendetta or witch-hunt by HMRC that he contends that he was. However, I do not consider this relevant to the question of unfitness. The present proceedings are not bought by HMRC, but by the

Official Receiver who, following the entry of the Company into liquidation, will have had to consider whether it was appropriate that disqualification proceedings be brought against Mr Kelly. There is no evidence to suggest that there is any flaw in the process by which the present proceedings were brought by the Official Receiver based on the evidence made available to him.

164. In all circumstances, therefore, I consider that I am bound to make a disqualification order against Mr Kelly.

Period of disqualification

165. Guided by the factors identified by HHJ Hodge QC in *Secretary of State v Warry* at [49] et seq, on the basis of my finding the Mr Kelly has, through the Company, been knowingly involved in transactions involving MTIC, or at the very least turned a blind eye to whether the transactions in question involved MTIC, I consider that a period of disqualification towards the middle to top of the top *Sevenoaks* bracket is appropriate.

166. I regard it as an aggravating factor that Mr Kelly has defended the present proceedings without recognising in any way the error of his ways, cf *Re Howglen Ltd* (supra), referred to in paragraph 25 above. So far as mitigating factors are concerned, there are two possible considerations that I have identified. Firstly, Mr Kelly refers to the directors of West 1 having been disqualified for 13 years and 6 years respectively. Unfortunately, there is no evidence as to what roles these directors actually played, but certainly the VAT losses sustained as a result of West 1's activities were significantly more, so it would seem, than those in respect of the Company, particularly given that the Company's claim for input tax was rejected. It might be said that it would be unjust to disqualify Mr Kelly for the same period, or longer than the 13 year period said to have been imposed in respect of West 1. Secondly, it might be said that some discount is appropriate bearing in mind the length of time since the events that found the basis for the finding of unfitness in the present case. I consider there to be some force in this latter point.

167. Having regard to the above considerations, I have come to the view that a period of disqualification of 12 years is appropriate in the circumstances of the present case.

Conclusion

168. I shall therefore make a disqualification order against Mr Kelly for a period of 12 years.

169. This Judgment will be handed down remotely by email to the parties or their legal representatives, and released to the National Archives. No attendance will be required. Unless a final order can be agreed dealing with all outstanding issues, there will need to be a further hearing dealing with consequential matters arising from this Judgment, which I would hope can be listed in the near future. I will adjourn consideration of any applications for permission to appeal to this consequential hearing and extend the time for filing an appellants' notice with the Court of Appeal until 21 days after the latter.