Neutral Citation Number: [2021] EWCA Civ 1235

Case No: A3/2020/1473

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
(JUDGE SWAMI RAGHAVAN AND JUDGE THOMAS SCOTT)
[2020] UKUT 201 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/08/2021

Before :

LORD JUSTICE HENDERSON
LADY JUSTICE ELISABETH LAING
and
SIR DAVID RICHARDS

- -

Between :

AWARDS DRINKS LIMITED (IN LIQUIDATION)	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Mr Kieron Beal QC and Mr David Bedenham (instructed by **Morrisons Solicitors LLP**) for the **Appellant**
Mr Brendan McGurk (instructed by **the General Counsel and Solicitor to HMRC**) for the **Respondents**

Hearing dates : 21 & 22 April 2021

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Approved Judgment

Approved Judgment Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00 a.m. on Friday 6 August 2021

Lord Justice Henderson :

Introduction

1. The appellant, Awards Drinks Ltd ("Awards"), is a company incorporated and based in the United Kingdom. Until it went into members' voluntary liquidation on 26 June 2013, Awards carried on business as a wholesaler of beers, wines and spirits. A major part of that business, and the only part with which we are concerned, was carried on through bonded warehouses in France.

2. Awards was registered for VAT on 1 August 2002. Awards was also registered as a "high value dealer" under the Money Laundering Regulations 2003 with effect from 1 April 2004, and remained so registered until 2014. Awards ceased to be registered for VAT on 2 July 2013, having stopped trading after it went into liquidation.

3. Following a series of compliance visits and meetings with officers of the respondents ("HMRC"), two "best of judgment" assessments to VAT were made against Awards on 30 September 2014 and 5 November 2014 respectively. Each assessment was signed by an HMRC Investigator, Mr Ian Cathie, and contained this explanation:

> "I believe that you have not declared or we have not assessed the correct amount of VAT due for the periods shown below. This is because monies have been deposited in the UK for the sale of goods said to be made in non-UK bonded warehouses, and the monies said to be transported into the UK by cash couriers. However, subsequent HMRC checks reveal this scenario is not credible and the monies must have had a UK origin. Therefore the goods [*are*] subject to UK VAT at the standard rate.
>
> I have made assessments of VAT due under section 73 of the VAT Act 1994. This letter is our notice of those assessments."

4. Section 73(1) of the Value Added Tax Act 1994 ("VATA 1994") provides that:

> "Where a person has failed to make any returns required under this Act… or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

The two assessments were for VAT due in the 11 quarterly periods from December 2010 to June 2013 and totalled £6,573,391.

5. The quantum of the assessments was calculated by reference to information obtained by HMRC, including bank statements from Barclays Bank, which showed that between 1 January 2011 and 28 December 2012 there had been 1,311 separate deposits of cash totalling £32,650,305.89 made into the Barclays account of Awards at 42 separate branches in England and Wales. The average amount of each deposit was £22,500. The majority of the deposits were made at 3 branches in East London, but the other branches

were widely spread and included ones in Leigh in Lancashire, Blackwood in South Wales and Colchester in Essex.

6. Awards requested a review of the assessments, but they were upheld, following the review, on 6 January 2015. The assessments were later reduced, after an analysis by HMRC of Awards' accounting records showed that payments in excess of £5 million had been received electronically from customers with a UK trading address. In his letter of 23 December 2015 to Awards explaining the reduction, Mr Cathie said:

> "I have now arranged that these assessments will be reduced leaving only those transactions where HMRC consider that the origin of the payments has not been sufficiently evidenced. HMRC does not offer a positive case that the transactions which have been excluded from the computation were legitimately made. The details of this reduction are given in the attached schedule."

The schedule showed that the reduced assessments were based on payments in cash or by cheque apparently emanating from 12 entities in or near Calais, France. The entities included, for example, Mammouth Trading of 1320 Route de St Omer, 62100, Calais, France which had made cash deposits of £8,807,355.

The appeal to the First-tier Tribunal

7. Awards' appeals against the assessments were eventually heard by the First-tier Tribunal (Tax Chamber) (Judge John Brooks and Elizabeth Bridge) ("the FTT") in June 2018 over five days, with further written submissions received from the parties in July and August of that year. The FTT released its decision ("the FTT Decision") on 23 October 2018: see [2018] UKFTT 632 (TC).

8. The FTT explained the background in the introductory section of the FTT Decision:

> "2. The ground of appeal initially advanced by [*Awards*], and maintained until its closing submissions, was that these sums deposited into its UK bank accounts by couriers were payments for in-bond sales of alcohol from bonded warehouses in France to cash and carry operators in France. The money was paid in pounds sterling as that was the currency accepted by these outlets from UK "booze cruise" tourists. [*Awards*] contends that as there were no taxable supplies in the UK its appeal against the assessments should succeed.
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> 3. However, HMRC do not accept that this is the case and contend that, having traced the relevant supply chains, the goods sold by [*Awards*] had entered the UK as a result of an inward diversion fraud and supplies were made in the UK and therefore taxable but, as made unequivocally clear in a letter to the Tribunal of 9 May 2017, HMRC makes no allegation of fraud against [*Awards*]."

9. I will need to return later to some of the preliminary skirmishing which took place before the FTT hearing, and to the precise way in which HMRC formulated their case in their Amended Statement of Case dated 10 May 2017 and in their response to an application for further and better particulars dated 31 May 2017 ("the FBP Response").

10. At this stage, it is helpful to refer to the description of inward diversion fraud given by a differently constituted FTT (Judge Falk, as she then was, and Mr Simon) in Dale Global Ltd v HMRC [2018] UKFTT 363 (TC), which was set out in the (present) FTT Decision at [6]:

> "50. In outline, alcohol diversion fraud is used to evade excise duty and VAT through abuse of the Excise Movement and Control System ("EMCS"), which permits authorised warehouse keepers to move excise goods from warehouse to warehouse within the EU on behalf of account holders, in duty suspense. Any movement requires the generation of an Administrative Reference Code ("ARC") within the EMCS, which must travel with the goods. The system has operated in electronic form since January 2011. An ARC number will typically last for a few days, and expires when the load is recorded on the system by the receiving warehouse as having been being delivered.
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> 51. Inward diversion fraud, … operates as follows. Alcohol originating in the UK is supplied under duty suspension to tax warehouses on the near continent, principally in France…. Once in the tax warehouse they will usually change hands a number of times and will often be divided up before being reconstituted. A supply chain is set up with a purported end customer based in France. Some of the goods will be consigned back to the UK in duty suspense using an ARC number. This is the "cover load". Within the lifetime of the ARC number further consignments of goods of the same description will purportedly be released for consumption in France, attracting duty at low French rates, but will in fact be smuggled to the UK using the same ARC number. These are the "mirror" loads, and this will carry on until the ARC number expires or one of the loads is intercepted by Customs, following which a new ARC number will be generated in a similar manner.
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> 52. Mirror loads are typically sold immediately following their arrival in the UK for cash. This process is known as "slaughtering". The UK customers may create false paper trails to generate the impression that the goods were supplied to them legitimately."

11. The only person who gave evidence on behalf of Awards at the FTT hearing was its founding director, Mr Paul Judd. We were told at the hearing before us by counsel who has appeared throughout for HMRC, Mr Brendan McGurk, without contradiction, that Mr Judd was not only a director of Awards at all material times, but also owned and controlled the company. The FTT formed a very unfavourable opinion of his evidence.

After saying that they had "no particular issue" with the evidence given by HMRC's witnesses, who included Mr Cathie, the FTT continued:

> "15. However, the same cannot be said of Mr Judd who we did not find to be a convincing or indeed a truthful witness. He appeared to change his evidence during cross-examination, e.g. initially saying that customers of [*Awards*] were cash and carry retailers who accepted cash in sterling from their "booze cruise" customers and describing how he had seen couriers collecting cash but subsequently saying that they were wholesalers suppling the cash and carry outlets but being unable to name the managers or operators of these businesses or the cash and carry operators they supplied. Also, his evidence was inconsistent e.g. he said both that he knew who his customers were as they were selling to booze cruise day trippers and that he had no knowledge of what happened to the goods after they left the account of [*Awards*] at the warehouse.
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> 16. Additionally, Mr Judd gave new evidence when cross-examined, e.g. he made serious allegations against a former employee of [*Awards*] in connection with criminal activities…. His evidence was also inconsistent, e.g. after stating that he had made "loads of declarations" to French Customs he subsequently said that [*he*] did so "infrequently". However, there was no evidence of any such declarations having been made by him or by the couriers said to have been sent to [*Awards*].
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> 17. Further, Mr Judd's assertions that HMRC officers had mis-stated the facts in almost every note of meeting or visit that had taken place, that letters from HMRC following such meetings or HMRC visits would only "include what they wanted to put" and would "never include everything" that he said and that a description of the business of [*Awards*] in a FAME Report that was exhibited to his witness statement was "not correct", was, in our view, simply not credible."

12. In the remainder of the FTT Decision, the FTT made some uncontentious findings of background fact at [19] to [24], before embarking upon a detailed review of the contacts between HMRC and Awards from 2004 to 2013, followed by a description of the deposits and cash movements and the evidence which had been given in relation to them (at [52] to [58]), and an analysis of the evidence regarding Awards' alleged "customers" (at [59] to [75]).

13. In the final main section of the decision, headed "Discussion and Conclusion", the FTT began by recording their agreement with counsel who then appeared for Awards that, at its heart, this was a simple case which had been made "needlessly complicated and confusing" by HMRC. They then reminded themselves of an important passage, which they had already set out, where Carnwath LJ gave guidance about the position on an appeal against a "best of judgment" assessment to VAT. The case in question was Khan v Customs and Excise Commissioners [2006] EWCA Civ 89, [2006] STC 1167, where

Carnwath LJ, delivering the lead judgment with which Buxton and Lloyd LJJ agreed, said at [69]:

> "The position on an appeal against a "best of judgment" assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:
>
> "The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right: See *Bi-Flex Caribbean Ltd v The Board of Inland Revenue* (1990) 63 TC 515 at 522-523 per Lord Lowry)."
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> That was confirmed by this court, after a detailed review of the authorities, in *Customs and Excise Comrs v Pegasus Birds Ltd* [2004] EWCA Civ 1015, [2004] STC 1509.
>
> …
>
> It should be noted that this burden of proof does not change merely because allegations of fraud may be involved (see e.g. *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635 at 642… per Mustill LJ)."

14. Having set out this guidance, the FTT continued:

> "78. The assessments in this case were made on the basis of the deposits made at various branches of Barclays Bank throughout the UK into the account of [*Awards*] which, HMRC say, relate to taxable supplies. These are, as in any other "best judgment" appeal, prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right.
>
> 79. The bona fides or rationality of the sum assessed by the "best of judgment" assessments in this case were not challenged. [*Awards*] simply contends the assessments are wrong saying it did not make taxable supplies in the UK. It asserts that it sold goods in France and that the sums lodged in its bank account related to in-bond sales of alcohol to cash and carry outlets in and around Calais. These outlets accepted cash in pounds, sterling, from UK tourists and "booze cruise" day trippers… [*Awards*] asserts that it and its customers arranged for the cash to be delivered by courier and deposited at various branches of its bank.

> 80. There was no positive documentary evidence adduced by [*Awards*], and nothing from the entities from which [*Awards*] was said to have received payments that they were genuine retail cash and carry operators or genuine wholesalers that had made any payments to [*Awards*]. There was a distinct absence of cash declarations to French Customs by couriers, customers or appellant. Moreover, cheques said to be from three different French Customers, Champion, Glass and Ducain were drawn on [*the*] same UK bank account.
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> 81. There was also, in our judgment, a complete lack of commerciality in the transactions said to have occurred. No costs analysis was provided by [*Awards*] comparing the costs of French banking facilities to cost of couriers despite this being requested by HMRC. It is, in our view, just not credible to contend, as [*Awards*] does, that French cash and carry operators would bear costs of couriers to banks throughout the UK without any recompense from [*Awards*]. Also, there was no rational explanation for cash deposits being made all around the UK but not in the branches nearest the channel ports or Eurotunnel terminus. In the absence of evidence, we cannot accept Mr Judd's assertion that this was because the Dover branch of Barclays would not accept cash payments. In addition, there was no evidence to connect any named courier with any of the deposits, nor was there any evidence of travel by any courier.
>
> 82. As a result, we find that the factual case advanced by and on behalf of [*Awards*] is not supported by the evidence and does not hold water. In our judgment it is not sufficient to displace the assessment which therefore remains "right". Having come to such a conclusion it is not necessary to address the legal submissions made on behalf of [*Awards*] as these were advanced on the basis of facts which we have found not to have been established i.e. that [*Awards*] sold the goods in France."

15. In retrospect, it may seem surprising that Awards' case proceeded any further after its comprehensive rejection by the FTT. As Carnwath LJ had clearly explained in the Khan case, the burden was firmly on Awards to displace the assessments, but Awards' case on how these very substantial amounts of cash in sterling had come to be deposited in its bank account across the country was disbelieved, as were the inconsistent versions put forward by Mr Judd for the first time in the witness box. Mr Judd was the only person to give evidence for Awards, and he was the person best placed to give a truthful account of what had happened. But his evidence was rejected, and his credibility left in tatters.

16. In those circumstances, Awards had not begun to show that the assessments were wrong, and there was on the face of it nothing to displace the natural inference that the cash deposits must, in one way or another, have represented the proceeds of sales made by or on behalf of Awards in the United Kingdom. It was natural to infer that the goods had been sold in the UK, because the proceeds were all in sterling and Mr Judd's explanation that they had been sold in France to British cash and carry customers had

been rejected. It was also natural to infer that the sales were made by or on behalf of Awards, because the proceeds were paid into Awards' trading bank account. The fact that the payments were, on so many occasions, and in so many locations, made in cash also lends support to HMRC's understandable suspicion that the goods had become involved in one or more inward diversion frauds, but there was no need (in principle) for HMRC either to allege or prove that this was the case. All they had to do was to rely on the conspicuous failure of Awards to produce an honest and credible account of how the sums in question had ended up in its bank account.

The appeal to the Upper Tribunal

17. The FTT refused Awards permission to appeal, as did the Upper Tribunal when it considered on paper Awards' long and discursive application. At a renewed oral hearing on 30 May 2019, however, permission to appeal was granted by Judge Jonathan Richards on the following two grounds:

> "(1) Ground 1 – The FTT erred in law in failing to conclude, in the light of [*Awards'*] unchallenged documentary evidence of transactions within bonded warehouses in France, that [*Awards*] could not have had sufficient possession and/or control of the goods to make taxable supplies of those goods in the UK. In particular the FTT should have concluded, having regard to the… unchallenged documentary evidence, that since [*Awards*] divested itself of possession and/or control of the goods while they were located outside the UK, to the extent those goods came into the UK, taxable supplies of them were effected by persons other than [*Awards*].
>
> (2) Ground 2 – The FTT erred in law in failing to give sufficient reasons for its decision."

18. In the reasons which he gave for granting permission, Judge Richards said he was satisfied that there was arguably a "missing step" in the FTT's reasoning:

> "If, as [*Awards*] alleges, it effected in-bond transactions that caused it to lose possession and control of the goods while they were located in France, then it is arguable that, even though it had rejected as untrue [*Awards'*] account of who its customers were and how they paid, the FTT needed to go on [to] explain how [*Awards*] came to make subsequent supplies of those goods in the UK. Moreover, if, as [*Awards*] alleges, it lost possession and/or control of the goods while they were outside the UK, it is arguable that, to the extent those goods were the subject of taxable supplies in the UK, those supplies must have been effected by persons other than [*Awards*] (so that [*Awards*] cannot have been liable for VAT on those supplies)."

19. The hearing of Awards' appeal took place before Judge Swami Raghavan and Judge Thomas Scott ("the Upper Tribunal") over two days at the beginning of March 2020. Awards was represented, as it had been before the FTT, by Mr Joseph Howard of

counsel. The Upper Tribunal released its decision ("the UT Decision") on 22 June 2020: see [2020] UKUT 201 (TCC), [2020] STC 2336.

20. In relation to ground 1, the Upper Tribunal found, after a careful review of the hearing before the FTT, that the various transaction documents which Mr Judd had exhibited to his witness statement ("the French Transaction Documents" or "FTDs") had been sufficiently challenged by HMRC at the hearing, and it was at least open to the FTT to find that possession and control of the goods had not been lost by Awards while the goods were in France: see [82]. The Upper Tribunal went on to hold, at [83]:

> "However, we would go further and conclude that the strength of the countervailing evidence was such that an FTT which relied only on the documentary evidence, so as to find possession and control had been lost, would have erred in law by reaching a decision which no reasonable tribunal, properly directed, could have reached."

21. In relation to ground 2, the Upper Tribunal considered that the FTT ought to have given at least a brief explanation of the reasons why it decided not to accept the FTDs at face value, and that to this limited extent there was an error of law in the FTT Decision: see the UT Decision at [88] and [89]. In those circumstances, the Upper Tribunal exercised its discretion to set aside the FTT Decision, and proceeded to remake the decision on the basis set out in [92]:

> "We accordingly remake the FTT Decision. The new decision adopts in its entirety the decision the FTT made but incorporates by way of addition the reasons we have set out above at [76] to [79] as to why the FTDs could not be taken at face value and did not therefore mean possession and control of the goods had been divested by [*Awards*]. The remade decision accordingly concludes that [*Awards'*] appeal against the assessment is dismissed."

22. The reasons which the Upper Tribunal gave for concluding that the FTDs could not be taken at face value are no longer in dispute, so I can summarise them briefly. First, the FTT had made findings which evidenced the lack of any payment link to the purported French customers. For example, there was no evidence that any couriers were bringing money from France to the UK during the relevant period, or that any of the requisite customs declarations had been made. Secondly, the FTT had made detailed findings about the circumstances of the purported French customers, drawing on evidence of visits made to their alleged premises by HMRC officers in July and August 2013, and on reports from the French tax authorities regarding their attempts to contact those customers. The common theme from this evidence "was the lack of any sign that the customers were trading from the premises", and in some cases the premises were clearly unsuitable for a cash and carry business. For example, the address given for Mammouth Trading and three other of the alleged customers turned out to be "a serviced office which lacks storage space for goods." Thirdly, the FTT had found at ([59] of the FTT Decision) that since the early 2000s there had been a general decline in the market for "booze cruising" from the UK to cash and carry outlets in and around Calais, with many outlets having been closed or run down. Fourthly, there was no evidence from other bonded warehouses, or from suppliers, hauliers or the alleged cash couriers. The only

evidence on those topics was from the untruthful Mr Judd. Finally, the Upper Tribunal also relied on a number of additional factors identified by HMRC for treating the FTDs with caution. Those factors are listed in the UT Decision at [78], and included the fact that:

> "Some documents showed [*Awards*] was dictating what happened in practice to the goods even after their purported sale."

The appeal to this court

23. Undeterred by this second comprehensive defeat, Awards sought permission to appeal to this court on four grounds. Permission was refused by the Upper Tribunal on 29 July 2020, but permission was granted, on ground 1 only, by Rose LJ (as she then was) on 30 October 2020. Ground 1 is headed "Procedural irregularity leading to unfairness". It alleged that the Upper Tribunal misunderstood HMRC's case as pleaded before the FTT. The Upper Tribunal had recorded at [50] of the UT Decision that "HMRC's pleaded case was that the customers were mere buffers or conduits whose purpose was to give the appearance of an in-bond transaction and thus to facilitate the movement of the goods to the UK to be sold by or on behalf of [*Awards*]", whereas such a plea had been "expressly disavowed by HMRC" in the FBP Response. This was said to be an error of law and/or a clear procedural irregularity, which generated material unfairness and affected the remainder of the UT Decision. It also prevented the Upper Tribunal from rectifying an error of law which the FTT had necessarily made.

24. In her reasons for granting permission to appeal on this ground, Rose LJ appears to have treated it as an established fact that HMRC had indeed conceded that neither Awards nor agents of Awards had been involved in importing the goods into the UK. Whether that is the correct interpretation of the relevant passages in the FBP Response is, in my view, the key issue on the appeal. If such a concession had indeed been made by HMRC, then, as Rose LJ said, there is "a potential contradiction" with the conclusion of the Upper Tribunal at the end of [41] that it was for Awards to show that it had lost possession and control of the goods, and a question whether it was still open to the Tribunals to conclude that a taxable supply had been made by Awards.

25. The grounds on which Rose LJ refused permission were (in brief) that there had been procedural unfairness in the treatment of the FTDs, that the Upper Tribunal had erred in forming its own conclusions on the evidence, and that the procedural irregularities and unfairness before both Tribunals infringed general principles of EU law. In her reasons for refusing permission, Rose LJ expressly stated that:

> "The appeal should go forward on the basis that the FTDs are not genuine documents."

Further, in rejecting the third ground, Rose LJ said:

> "The UT was entitled to go on to remake the decision rather than remit it to the FTT. The UT held that the evidence was overwhelming that there had been no genuine transactions in France and therefore that [*Awards*] had not lost possession and control of the goods."

26. It follows that the focus of the appeal to this court is on the alleged unfairness to Awards said to arise from a misunderstanding by the Upper Tribunal of HMRC's pleaded case. This makes it necessary for us to examine in some detail how the parties pleaded their respective cases in the FTT. Before doing so, however, I need to return to the topic of the burden of proof on an appeal against a best of judgment assessment, and the extent to which it is open to HMRC to run a case which is consistent with, or even entails, fraud on the part of the taxpayer, without either pleading or undertaking the burden of establishing the fraud.

27. I also record at this stage that, after its defeat in the Upper Tribunal, Awards changed its legal team. Neither Awards' present solicitors (Morrisons Solicitors LLP) nor counsel who appeared for Awards at the hearing before us (Mr Kieron Beal QC, leading Mr David Bedenham) were involved at any earlier stage of the proceedings.

The burden of proof and questions of fraud

28. I have already quoted from the guidance given by Carnwath LJ in the Khan case about the burden of proof on an appeal against a "best of judgment" assessment to VAT. As I have noted, the FTT had that guidance well in mind, and they applied it when coming to their conclusions: see [13] and [14] above. The guidance included this important reference to allegations of fraud, which for convenience I will repeat:

> "It should be noted that this burden of proof does not change merely because allegations of fraud may be involved (see e.g. *Brady (Inspector of Taxes) v Group Lotus Car Companies PLC* [1987] STC 635 at 642… per Mustill LJ)."

29. Brady v Group Lotus Car Companies PLC [1987] STC 635, [1987] 3 All ER 1050 ("Brady"), concerned estimated assessments to corporation tax raised by HMRC on the taxpayer companies ("Lotus"). The circumstances that gave rise to the assessments were a notorious public scandal which arose from the arrangements made by a businessman, Mr De Lorean, for the design and manufacture of a sports car in Northern Ireland. The background facts were summarised by Dillon LJ, giving the leading judgment in this court, as follows:

> "In 1978 the taxpayer companies became involved in the notorious affair of the De Lorean Motor Car. There were three relevant agreements all dated 1 November 1978. The first was an agreement between [*DLRP*] of America, [*DLMC*] of Northern Ireland and a company called GPD Services Inc (GPD). GPD agreed to provide its services for design, test and calculation work for the purpose of developing a sports car, the DMC 12, and it was provided that Lotus Cars Ltd and Mr Chapman himself [*Mr Colin Chapman, the driving force behind Lotus*] would be engaged in doing the work. The second was a letter agreement whereby Lotus Cars Ltd warranted and guaranteed to [*DLRP*] and [*DLMC*] the timely and full performance of each and every obligation of GPD under the first agreement. The third was an agreement between GPD and Lotus Cars Ltd whereby Lotus Cars Ltd agreed to carry out research, design and development work in connection with the DMC 12 prototype

> sports coupé which was to be manufactured by [*DLMC*]. Under this third agreement a good faith deposit of £2m was paid to Lotus Cars Ltd on 6 November 1978, but was refunded in April 1979.
>
> GPD was a Panamanian company… It had an address in Geneva and a bank account, but neither facilities nor experience for research, design or development work on sports cars. It received, however, on the signing of the first agreement, a total of some $17.65m from [*DLMC*] and [*DLRP*]. It is now known that some $8.5m were paid out to Mr De Lorean personally, but a balance of $9.15m or thereabouts remained unaccounted for.
>
> Since it was plain that the work which GPD had contracted to do for [*DLMC*] and [*DLRP*] had in fact been done by Lotus Cars Ltd, the Revenue were concerned to enquire whether any of the monies thus received by GPD had come to the hands of the taxpayer companies or either of them, or their officers, in addition to sums for work done admittedly received by [*Lotus*] directly from [*DLMC*]. The Revenue consequently carried out a lengthy investigation into the books of [*Lotus*]. In the upshot, on 16 December 1983 the Revenue made a number of estimated assessments on [*Lotus*]… "

30. The appeals of Lotus against the assessments were heard by the General Commissioners, who took the view that the two outstanding assessments ought to be discharged, and ordered accordingly. Their reason for taking this course, as Dillon LJ explained at 639e:

> "was that the outstanding assessments could only be justified if there had been fraud on the part of the taxpayer companies or their officers, that, if fraud was in question, the onus was on the Revenue to prove the fraud and that the Revenue had failed to discharge that onus."

31. On the Revenue's appeal by case stated to the High Court, the decision of the General Commissioners was reversed and an order made remitting the case for a complete rehearing before the Special Commissioners, at which evidence not previously led (and which had come to the knowledge of the Revenue in the interim) could be adduced. In ordering a rehearing on these terms, Sir Nicolas Browne-Wilkinson V-C was influenced by the decision of this court in Meek v Fleming [1961] 2 QB 366 which established the principle that where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour, it would be wrong to allow him to retain the judgment thus unfairly procured: see [1987] STC 184 at 198g-h and 201b-c.

32. In holding that the General Commissioners had misdirected themselves on the burden of proof, Sir Nicolas Browne-Wilkinson V-C said at 197f:

> "In my judgment the position was that the burden lay throughout upon Lotus to show that the assessments were wrong… if the

> Inland Revenue showed circumstances which cast doubt on the whole position, the correct question which the commissioners should have asked themselves was not: "Have the Inland Revenue proved fraud?" but "In all the circumstances, including the background circumstances, the documents and the oral evidence, have Lotus shown the assessments to be wrong?" At no stage in my judgment could any shift in the evidential burden require the Revenue positively to prove fraud in order to succeed; all that is required, even if the evidential burden be shifted, would be for the Revenue to show circumstances which might lead the commissioners in doubt on a balance of probabilities, whether Lotus (either itself or through its officers) in fact received or was entitled to receive payments giving rise to the assessments."

33. The decision of the Vice-Chancellor was upheld on Lotus' further appeal to this court. As Dillon LJ explained, where (as in Brady, and as in the present case) the assessments are made in time, the burden lies on the taxpayer from the start to displace the assessments: see Hudson v Humbles (1966) 42 TC 380 at 384 and Haythornthwaite & Sons Ltd v Kelly (1927) 11 TC 657 at 667. Dillon LJ continued, at 640b:

> "Estimated assessments may be made by an inspector where the taxpayer has failed to make any return at all and the inspector has no idea what the taxpayer's taxable income truly is or they may be made where the inspector suspects that the taxpayer has concealed part of his income whether by fraud, wilful default or mere mistake. In either case, if the assessment is made in due time, the onus to displace the assessment is on the taxpayer throughout."

34. In his concurring judgment on this part of the case, Mustill LJ discussed the potentially misleading concept of a shift in the evidential burden of proof at 643-644. In that context, he said at 644a:

> "It may well be that, if the taxpayer companies' version does not correspond with the true facts, it must follow that someone was guilty of fraud. This does not mean that by traversing the taxpayer companies' case the revenue have taken on the burden of proving fraud. Naturally, if they produce no cogent evidence or argument to cast doubt on the taxpayer companies' case, the taxpayer companies will have a greater prospect of success. But this has nothing to do with the burden of proof, which remains on the taxpayer companies because it is they who, on the law as it has stood for many years, are charged with the task of falsifying the assessment. The contention that, by traversing the taxpayer companies' versions, the Revenue are implicitly setting out to prove a loss by fraud, overlooks the fact that, in order to make good their case, the Revenue need only produce a situation where the commissioners are left in doubt. In the world of fact there may be only two possibilities: innocence or fraud. In the world of proof there are three: proof of one or other possibility

> and a verdict of not proven. The latter will suffice, so far as the Revenue are concerned."

35. After finding an apt analogy with the law of insurance, which he discussed at 644c-f, Mustill LJ continued (ibid):

> "Before leaving this part of the case, I should mention the contention that there is a presumption of innocence which operates in any case where the defendant, by controverting the case put forward by the plaintiff, impliedly suggests that he has been guilty of dishonest conduct. I do not accept this argument. The fact that the possibility of fraud is on one side of the case will of course require the tribunal to take particular care when weighing the evidence, given the seriousness of any finding which puts in question the honesty of a party to a civil suit (see Hornal v Neuberger Products Ltd [1957] 1 QB 247). At the same time, I cannot accept that this bears on the burden of proof. The burden is material only to the question of which party succeeds if the tribunal is left in doubt. I can see no reason why the rule which entails that the taxpayer should fail in such a situation needs to be completely turned round simply because the alternative explanation of the facts to that advanced by the taxpayer is one which is explicable only on the ground of dishonesty on his part.
>
> I therefore conclude without hesitation that the commissioners were in error in stating that it was for the Revenue to prove fraud if the taxpayer companies' claim for an adjustment of the assessments was to be defeated."

36. The third member of the court, Balcombe LJ, agreed on the burden of proof issue, for similar reasons which he expressed (more briefly) at 646-647.

37. Brady was a case about direct taxation, not VAT, but I can see no reason why the same principles should not apply to a "best of judgment" assessment to VAT made under section 73 of VATA 1994. The guidance given by Carnwath LJ in the Khan case may have been technically obiter on this point, but he regarded the position on an appeal against such an assessment as "well-established" and cited Brady with apparent approval. In my respectful view, he was clearly right to do so.

38. A related question is whether there is any obligation on HMRC to plead an allegation of fraud, with the necessary particularity, in a case where the burden of displacing the assessment remains throughout on the taxpayer, but HMRC wish to rely on the possibility, or even the certainty, that some form of fraud must have been committed when testing the evidence adduced by the taxpayer. In my view, it is clearly implicit in Brady that this question must be answered in the negative.

39. I had occasion to consider the question myself when sitting as a judge of the Upper Tribunal on an interlocutory appeal in the Ingenious Games litigation, which at that stage was part-heard before the FTT: see Ingenious Games LLP and Others v Revenue and Customs Commissioners [2015] UKUT 105 (TCC), [2015] STC 1659. If I may be

forgiven for repeating what I there said, under the heading "Is it necessary for HMRC to plead dishonesty?":

> "62. At the heart of the Appellants' amended case is the proposition that it is not open to HMRC to put allegations of dishonesty (or other serious forms of misconduct) to their witnesses, or to invite the FTT to make adverse findings of fact on such a basis, unless the relevant allegations have been pleaded with full particularity and the Appellants have been given a proper opportunity to respond to them.
>
> 63. In cases where the burden of proof lies on HMRC to establish fraud or dishonesty, these principles undoubtedly apply in the same way as they would in ordinary civil litigation. Examples include cases where HMRC wished to make assessments to income tax outside normal time limits on the ground (before 1989) of fraud or wilful default under s36 of the Taxes Management Act 1970, or (in the modern world) where, relying on principles developed by the Court of Justice of the European Union, they wish to deny a VAT-registered trader his otherwise incontrovertible right to deduct input tax because of his alleged participation in, or connection with, "missing trader" (or MTIC) fraud.
>
> 64. The present case, however, is not of that nature. It is common ground that the burden of proof lies on the Appellants to displace the closure notices issued to them by HMRC within normal time limits… It is for the Appellants to adduce such evidence as they think fit with a view to discharging the burden which throughout lies on them.
>
> 65. The IFP2 Information Memorandum is one of the pieces of documentary evidence relied upon by the Appellants as supporting their case on this issue. HMRC were under no obligation to accept it at face value, when it was disclosed to them, and they were fully entitled to cross-examine the witnesses for the Appellants who had been involved in its preparation in order to test its reliability and examine the assumptions on which it was based. HMRC were not obliged to give advance notice of the lines of questioning which they intended to pursue with the witnesses, and still less were they obliged to plead a positive case of dishonesty in preparation of the Memorandum before putting questions to the witnesses which, depending on how they were answered, might in due course provide a foundation for the FTT to draw such a conclusion. The obligations which lay on HMRC were in my judgment of a different nature. First, as a matter of professional duty, counsel may not put questions to a witness suggesting fraud or dishonesty unless they have clear instructions to do so, and have reasonably credible material to establish an arguable case of fraud. Secondly, as the FTT rightly recognised,

> it is not open to the tribunal to make a finding of dishonesty in relation to a witness unless (at least) the allegation has been put to him fairly and squarely in cross-examination, together with the evidence supporting the allegation, and the witness has been given a fair opportunity to respond to it. Important though these obligations are, they are quite different from, and do not entail, a prior requirement to plead the fraud or misconduct which is put to the witness. If it were otherwise, a party would be obliged to serve an amended statement of case before attempting to expose a witness as dishonest in cross-examination, and the element of surprise which can be a potent weapon in helping to expose the truth would no longer be available."

40. In the present case, the Upper Tribunal clearly had these principles well in mind. In a section of the UT Decision, headed "Proof, pleadings and dishonesty", they referred extensively to Brady and Ingenious Games at [30] to [35], before concluding:

> "36. Two principles emerge from *Ingenious* and *Brady*:
>
> (1) The burden of showing an assessment is incorrect remains on the taxpayer throughout the appeal. This is so even if the circumstances of the case are such that there either must, or may, have been some fraudulent conduct on the part of the taxpayer which is relevant to the tax liability.
>
> (2) The allegation that a witness is dishonest must be put fairly and squarely to the witness in cross-examination before the tribunal can find the witness is dishonest, but does not need to have been pleaded in advance in cases where the burden is on the taxpayer.
>
> 37. The fact that no authority was cited in *Ingenious* for that latter proposition reflects that it is a long-held and established principle: *Browne v Dunn* (1893) 6 R 67 explains that the principle is grounded in fairness. That principle was approved by the Court of Appeal in *Markem Corporation v Zipher Ltd* [2005] EWCA Civ 267."

41. With these principles in mind, I now turn to examine how HMRC pleaded their case before the FTT.

HMRC's pleaded case before the FTT

42. Our bundles do not contain the original directions which the FTT presumably gave for the lodging of statements of case, nor do we have copies of any pleadings apart from Awards' original grounds of appeal against the assessments, HMRC's Amended Statement of Case dated 10 May 2017 and the FBP Response of 31 May 2017. It is, however, apparent from the papers which we do have that Awards' original grounds of appeal were very thin, amounting to little more than an assertion that HMRC were not

entitled to assess VAT in respect of goods sold or traded by Awards outside the UK, an allegation that the assessments were speculative, and a contention that:

> "In respect of trading outside the UK the appellant would be and is entitled to repatriate funds to the UK without thereby incurring any VAT liability in respect of trading that has taken place outside the UK."

Those grounds were signed by leading counsel then appearing for Awards, Mr Geraint Jones QC.

43. It is also apparent from correspondence in the bundle that HMRC's original statement of case did, at least in some sense, appear to plead a positive case of fraud or dishonesty, and that this led to an application by Awards dated 9 November 2016 seeking the following relief:

> "(i) That HMRC be barred from taking any further part in these proceedings on the basis that its defence has no reasonable prospect of success; or, in the alternative
>
> (ii) That HMRC be required to amend its Statement of Case so that they (a) set out their case as to the basis on which it is said that the Appellants' supplies should be subject to UK VAT law and (b) provide particulars of any allegations of fraud or other serious wrongdoing."

44. This was, on the face of it, an extraordinary application for Awards to make. In the first place, the suggestion that HMRC were obliged to file a "defence" with a "reasonable prospect of success" completely ignored the burden of proof which lay on Awards to displace the assessments. Secondly, the basis upon which the "best of judgment" assessments were made had already been explained by Mr Cathie: see [3] above. Thirdly, as the authorities which I have reviewed demonstrate, there was no obligation on HMRC to provide particulars of any allegations of fraud or wrongdoing.

45. The application was heard by FTT Judge Jennifer Dean on 3 April 2017. In her decision released on 19 April 2017, she noted that HMRC had already given notice of their intention to amend the statement of case, and a draft amended version had been served on the Tribunal and Awards on 20 March 2017, but no formal written application had yet been made. Appropriate directions were therefore given for the determination of HMRC's application to amend, and Judge Dean proceeded to deal with the debarring application on the basis of HMRC's statement of case in its original form.

46. The rest of her decision shows that the authorities which I have reviewed were canvassed in argument before her, but Awards maintained the submission that it was incumbent on HMRC to plead a case of fraud with full particularity. Judge Dean unsurprisingly declined to make a debarring order against HMRC, taking the view that although their statement of case was, in parts, poorly worded, the burden still lay on Awards to displace the assessments. As she rightly said, in paragraph 45 of her decision:

> "The issue that the Tribunal will have to determine in due course is whether the Appellant has displaced the assessments, not

> whether the Appellant was knowingly or dishonestly involved in fraud."

47. It appears that HMRC's application to amend their statement of case then led to a further hearing before the FTT on 8 May 2017, at which the parties were again represented by Mr Jones QC and Mr McGurk. On the following day, 9 May 2017, HMRC Solicitor's Office wrote to FTT Judge John Brooks, who had conducted the hearing on the previous day. The letter emphasised that HMRC were not obliged to plead or prove fraud against Awards, but explained that they did seek to prove the wider circumstances of the supply chains in relation to which Awards was involved, because HMRC contended that those circumstances were consistent with inward diversion fraud and HMRC would seek to show that the monies deposited in Awards' UK bank accounts could not have been paid by its alleged French customers. The writer added:

> "That is the long and the short of HMRC's case."

48. The letter went on to explain that:

> "HMRC wishes to reduce the scope of its application to amend its Statement of Case in order that there can be no doubt that fraud is not alleged specifically against the Appellant…"

A list was then given of various amendments which HMRC no longer wished to pursue, and the letter concluded by asking the FTT to permit the amendments in that limited form.

49. In its final form, for which permission was evidently granted, HMRC's Amended Statement of Case unambiguously contended that the assessments had been made in respect of goods which HMRC considered that Awards had sold or traded within the UK. An amendment to paragraph 1 stated:

> "For the avoidance of doubt, HMRC contends that the monies lodged in the Appellant's UK bank accounts relate to taxable supplies made for consideration in the UK."

To similar effect, paragraph 3 pleaded that:

> "Supply chains have been traced to tax losses, and HMRC contend, instead, that the deposits relate to taxable sales of goods made by or on behalf of the appellant in the UK."

50. Paragraphs 7 and 8 then explained the general nature of outward and inward diversion fraud, and paragraph 9 pleaded that:

> "The purported supply of alcohol by the Appellant to alleged French customers in the circumstances giving rise to this appeal bear all the hallmarks of inward diversion. Those circumstances are set out immediately below. For the avoidance of doubt HMRC do not accept that they were "customers" in the sense of being parties who received a taxable supply at all and/or insofar as they made no payment for those alleged supplies. Therefore,

> any reference herein to the Appellant's "customers" is for ease of reference and should be understood accordingly."

51. The factual and procedural history was then reviewed in paragraphs 10 to 25, followed by sections dealing with the relevant law in VATA 1994 and the contentions made by Awards in its grounds of appeal. The final section, running from paragraphs 33 to 53, set out HMRC's case, explaining in considerable detail why HMRC were unable to accept the truth of Awards' version of events. For example, the amendments to paragraph 40 included this passage:

> "The funds received by the Appellant arise upon the sale of the goods once diverted into the UK: the transactional documents as between the Appellant and those from whom it claims to receive payment in cash or cheque are arranged to give the impression of taxable supplies being made in France. To that extent, they are sham transactions. HMRC do not accept that taxable supplies were made in France and the amounts received by the Appellant relate to the taxable supply of those goods within the UK."

52. One might have thought that HMRC's Amended Statement of Case, read in the light of the relevant authorities, set out with more than sufficient clarity the general nature of the case that HMRC were proposing to rely upon in response to Awards' exiguous grounds of appeal. Nevertheless, Awards' immediate reaction was to make a request for further information which led to the FBP Response. Many of the requests were, in my view, unreasonable and vexatious, because they asked HMRC to provide detailed information about transactions for which it was the duty of Awards to provide an honest and credible explanation if it wished to displace the assessments. Perhaps unwisely, however, HMRC decided to respond to the requests, although in doing so, if Awards' ground of appeal to this court is correct, they contrived not only to mislead the Upper Tribunal but also to engender a serious procedural irregularity before that tribunal. In considering whether that was indeed the effect of the FBP Response, it is in my judgment essential to read the relevant replies in the context of HMRC's Amended Statement of Case and the principles to be derived from the authorities. So read, as I shall explain, I am convinced that there is no substance to Awards' complaint.

53. The passages in the FBP Response upon which Awards now places reliance are the following:

Request 1

Request: "2. In respect of each and every lodgement of monies that is alleged to relate to taxable supplies made for consideration in the UK, particularise by whom and when each such taxable supply was made."

Reply: "2. HMRC does not know the identity of those who made the taxable supplies in the UK, the consideration from which was paid into the Appellant's UK bank account… HMRC positively avers that the payments were not made by the alleged French cash and carry customers".

Request 2

Request: "2. If it is alleged that taxable sales of goods were made in the UK on behalf of the appellant, identify by whom and when each such taxable supply is alleged to have been made"

Reply: "2. HMRC cannot – and does not need to – identify the person who made the taxable supply in the UK or the date on which it was made."

Request 4

Request: "2. For the avoidance of doubt whether all or any of the persons, firms or companies [*said to have diverted the relevant goods into the UK*] are alleged to have been acting as agent for the Appellant."

Reply: "2. HMRC's case is that the Appellant's goods were only sold for consideration in the UK and that that consideration was what comprised the deposits in the Appellant's UK bank accounts. Those supplies were, to that extent, made on behalf of the Appellant."

Request 6

Request: [*In relation to HMRC's plea that*] "the indications are that the supplier of the goods or the purported French customer divert the alcohol back into the UK under cover of a single ARC number which is used on more than one occasion to facilitate inward diversion", particularise…. (2) "whether the Appellant is alleged to be the supplier to whom reference is here being made"… (5) "whether any [*person, firm, or agent is*] alleged to have so acted as agent for the Appellant… ."

Reply: "2. The "supplier" of the goods is not a reference to the Appellant but a reference to the Appellant's own suppliers.

3. HMRC does not allege, since it does not need to allege, that the supplier, as explained, is the Appellant's agent as regards the inward diversion of the goods to the UK which it originally supplied to the Appellant.

…

5. HMRC does not allege, since it does not need to allege, that the Appellant's alleged French cash and carry customers were the Appellant's agents as regards the inward diversion of the goods to the UK."

54. The FBP Response was settled by Mr McGurk. In the introductory section of the FBP Response, Mr McGurk explained that HMRC had already set out their detailed case in the Amended Statement of Case, and he made it clear that no positive case of fraud was being pursued against Awards. He added that the evidence served by Mr Judd, even after receipt of HMRC's detailed statement of case, was "still astonishingly thin": it "set out no positive case and merely sought to criticise HMRC's contentions as speculative.". Paragraph 7 of the Response then said:

> "On the basis that HMRC considers that its case, as set out in the Amended Statement of Case is clear, HMRC considers that it is not required to provide further particulars. Moreover, HMRC is not required to provide responses to requests that are

> disproportionate, as many of the Appellant's requests are. Without prejudice to the fact that HMRC's case is clear, it responds to the Appellant's requests as set out below."

55. In their written submissions to this court, counsel for Awards submit that, on an objective analysis, HMRC's pleaded case was not that the goods were moved to the UK and then sold on behalf of Awards. Rather, their case was that Awards' supplier or the purported French customer diverted the goods to the UK, and that this was not done by them as Awards' agent. Consistently with that case, the plea that the goods were sold "on behalf of" Award was meant to indicate only that the money paid by the UK purchasers was deposited into Awards' bank account: hence the passage in the reply to request 4 which stated that "Those supplies were, *to that extent*, made on behalf of the Appellant" (emphasis supplied).

56. I cannot accept this submission. It seems clear to me, when the FBP Response is read in full, in the context of the Amended Statement of Case, and in the light of the authorities, that HMRC were maintaining their fundamental contention that the cash paid into Awards' UK bank account represented the proceeds of sales made by or on behalf of Awards in the UK. As I have already said, that would be the natural inference to draw, in the absence of any credible alternative explanation, from the simple fact that such large sums of cash, in sterling, were paid into Awards' business bank account in many different locations in the UK: see [16] above. In view of the introductory section of the FBP Response, and the fact that the burden lay on Awards throughout to displace the assessments, I am satisfied that Awards could not sensibly have understood any of the responses upon which they now seek to rely as amounting to an unequivocal acceptance by HMRC that the supplies in question were *not* made by agents on behalf of Awards in the UK, and were *not* made in circumstances where Awards still retained possession and control of the goods.

57. All of this was well understood by the Upper Tribunal, who rejected similar arguments advanced to them by counsel who then represented Awards. At [41], the Upper Tribunal said:

> "We reject Mr Howard's arguments. We agree with HMRC that [*Awards'*] suggested analysis impermissibly reverses the burden of proof. It rests on the assumption that HMRC had to plead fraud against [*Awards*], in order to come to a conclusion that the assessment, based on [*Awards'*] possession and control of the goods, should be upheld. The point falls squarely within [*Brady*], which confirms the burden remains on the appellant to show the assessment was incorrect even if that conclusion may, or indeed *must*, involve fraud. Even accepting [*Awards'*] submission that it could not have supplied in the UK without possession and control of the goods, fraud did not need to be pleaded in order for a conclusion to be reached which entailed [*Awards*] retaining possession and control. We agree with HMRC it is a non-sequitur to say that because HMRC did not run a positive case on fraud they are taken in addition to concede that the appellant lost possession and control. The burden remained at all times on the appellant to discharge. It was for [*Awards*] to show it lost possession and control of the goods."

58. I respectfully agree with those observations, which in my view provide a complete answer to Awards' case on this appeal. In his oral submissions in reply, Mr Beal QC candidly accepted that Awards' case boiled down to a single question of construction of the FBP Response, which (it was said) significantly modified HMRC's position as previously set out in the Amended Statement of Case. In particular, Mr Beal argued that HMRC had, by virtue of the FBP Response, nailed their colours to the mast of positively averring the existence of an inward diversion fraud, as a result of which Awards must have lost possession and control of the goods before they were sold in the UK. However, for the reasons which I have already given, I do not consider that to be a fair or reasonable reading of the FBP Response. It follows that there is, in my judgment, no substance to the alleged procedural unfairness upon which Awards' sole ground of appeal is premised. HMRC were fully entitled to take their stand on the principles established in Khan, Brady and Ingenious Games, and to leave it to Awards to provide, if it could, a credible alternative explanation for the very substantial cash payments into its bank account in the UK. This is what Mr Judd attempted to do, in his written and oral evidence, but his evidence was rejected as untruthful and worthless for all the reasons exposed by the Tribunals in their decisions.

59. Mr Beal QC wisely eschewed any appeal to the merits in his skilful submissions to us. He advanced some interesting legal arguments, but since they were all based on what I consider to be a misinterpretation of the FBP Response, and, upon a consequential reversal of the burden of proof in cases of the present type, I consider that it would be inappropriate for this court to engage with them.

Disposal

60. If the other members of the court agree, I would dismiss the appeal.

Lady Justice Elisabeth Laing:

61. I agree.

Sir David Richards:

62. I also agree.