[2016] UKFTT 185 (TC)

TC04971

Appeal number: TC/2014/06267

EXCISE DUTY – restoration – vehicle – tractor unit seized with goods and trailer belonging to others – refusal to restore tractor unit – whether owner the haulier as shown on CMR – whether tractor unit on lease to carrier – whether on facts decision not to restore "unreasonable" – held, insufficient evidence to demonstrate this – whether circumstances of seizure should be considered – no – reference to "blameworthiness" test in Gora considered – not applicable in present case – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

F LOHMANN GmbH **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE JOHN CLARK
PETER DAVIES

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 11 January 2016

Sadiyah Choudhury of Counsel, instructed by DWF Fishburns, for the Appellant

David Sawtell of Counsel, instructed by the Director of Border Revenue, for the Respondent

DECISION

1. The Appellant ("L") appeals against the refusal by the Respondent (referred to in this decision as "Border Force") to restore a tractor unit seized at the port of Dover on 28 April 2014.

The background facts

2. The evidence before us consisted of a bundle of documents, which included witness statements given for L by Mrs Lohmann and for Border Force by Mrs Deborah Hodge. Both these witnesses gave oral evidence. In addition, witness statements from two other witnesses were included in the bundle of documents, but neither of these witnesses attended the hearing. We consider below the extent to which the statements of these two other witnesses can be taken into account.

3. For reasons which we will explain later, the hearing was not completed within the allotted day, and we therefore directed that written submissions should be served within specified times following the hearing. Our consideration of the evidence takes into account the respective submissions of the parties.

4. From the evidence we find the following background facts; we consider other issues of fact, in particular where these were disputed, at later points in this decision.

5. On 28 April 2014 at the port of Dover, Border Force intercepted a vehicle, a Scania tractor unit with registration number GT S146, which was towing a trailer with registration number K3993. The driver was Viktors Petrovskis. The load was found to be empty vodka bottles.

6. Mr Petrovskis said that the load was glass and produced a CMR document. In response to questions from the Border Force officer, he replied that he had loaded the vehicle and that the haulier was "Lohmann DE".

7. Following enquiries made by Border Force, the goods, vehicle and trailer were seized for the following reason, as recorded in the officer's notebook:

> ""It is suspected that the glass bottles are counterfeit and had they not been intercepted would have been used in the production of illicit alcohol and thus avoid payment of UK excise duty."

8. On 4 May 2014, Border Force wrote to L to inform it that goods had been seized at Dover on 28 April 2014 in the presence of Mr Petrovskis and that a Seizure Information Notice had been handed to him. The letter explained that the tractor unit (referred to as "GTS146") and trailer K3993 had been seized on that date as being liable to forfeiture under s 141 of the Customs and Excise Management Act 1979 ("CEMA 1979") as they were carrying goods that were liable to forfeiture. The seized goods were 35,640 empty glass Smirnoff bottles; they had been seized as liable to forfeiture under s 170B CEMA 1979.

9. The letter enclosed a copy of Notice 12A.

10. On 9 May 2014, DWF Fishburns wrote on L's behalf to Border Force's National Post Seizure Unit, enclosing documentary evidence that L was the owner of the seized vehicle. They stated that L was a German registered company which hired out commercial vehicles.

11. On 16 May 2014, DWF Fishburns wrote to Border Force to make clear that their two letters should be construed as a notice of claim challenging the seizure of L's vehicle. They also asked that their letters should be treated as a formal request for restoration of the vehicle, should it be found to have been legally seized. They set out a number of reasons for that request. They explained that L had rented the vehicle for a period of one year to a Latvian transport company named Track Rent Latvia SIA ("Track Rent"), and enclosed a copy of the rental contract.

12. Border Force replied on 19 May 2014, explaining that before they could consider restoring any vehicle to L, they needed to be satisfied that L was the current owner. They asked for proof of ownership to be sent to them, if this had not already been done.

13. On 22 May 2014 DWF Fishburns wrote to Border Force to acknowledge their letter, and to state that they had already provided a copy of L's vehicle registration documentation; they attached a further copy in colour, and a copy with the relevant information translated to assist.

14. Further correspondence was exchanged concerning L's trading name. On 17 June 2014, Border Force wrote to DWF Fishburns in connection with the request for restoration, and asked for further information in order to consider that request. In the absence of a response, the request would be considered on the information which Border Force currently held. The letter continued:

> "This is your opportunity to bring to our attention any information that you would like us to consider in making the decision.
>
> It is for your client to make a case for restoration. If your client has any other information or paperwork relating to the above unit/trailer which support your request for restoration, please forward them to us at the above address as soon as possible."

15. DWF Fishburns replied on 7 July 2014. They explained that L was primarily a transport and logistics firm and that it would only hire or lease a vehicle to a known client of sufficient standing. L had had business dealings with Track Rent for approximately a year before leasing the lorry to them. They stated that L had no reasons for suspicion and was satisfied that Track Rent was bona fide and genuine. They had asked Track Rent's lawyers in Latvia to provide information as to the measures it took to ensure that it was providing its services to legitimate haulage companies, but had not yet received a reply. They asked Border Force to allow additional time for them to obtain additional information.

16. They stated that the lease had been orally terminated and that this would be followed up in writing as and when necessary.

17. They explained that this had been the first time that L had had any of its vehicles seized by Border Force, whether under its own operation or hired to other parties, since the foundation of L. The contract contained a clause stating that any damage caused by way of an accident or due to negligence and any repairs were the responsibility of the hirer. They enclosed a copy of the hire contract, together with an English translation.

18. On 27 August 2014 Border Force wrote to DWF Fishburns setting out the decision in relation to the request for restoration. The officer summarised the restoration policy for commercial vehicles. He stated that there had been a challenge to the legality of the seizure and that the condemnation hearing had not yet taken place. He had made his decision on the assumption that the court would find the seizure to have been lawful; if it were to decide otherwise, then the seized items (or their value) would be returned.

19. He referred to the information provided concerning the leasing of the vehicle to Track Rent; L was therefore purporting to be the lessor of the unit, and thus a third party in this case. However, L was shown as the haulier on the completed copy of the CMR. He was therefore not convinced that L had leased the unit; his belief was that L had acted as haulier and as such had been complicit in the offence.

20. His conclusion was that there were no exceptional circumstances that would justify a departure from the Border Force policy summarised in the letter. His decision, based on section 1 of the policy was that the tractor unit would not be restored.

21. DWF Fishburns replied on 1 September 2014. They noted the decision not to restore. However, this had been based on the assumption that L had been the haulier. This was incorrect. L had hired the vehicle to Track Rent, the haulier. L had had absolutely no involvement in or knowledge of the delivery in question.

22. The Border Force's decision had been justified by stating that L featured as haulier on the CMR. They attached a copy of the CMR in their possession; as could be seen from that document, L was not mentioned anywhere in it. They asked whether Border Force had a different CMR from that attached, and if so to disclose a copy to them.

23. Border Force treated that letter as a request for a review of the decision, and wrote on 5 September 2014 to give details of the review process. Their letter included the following paragraph:

> "If in the meantime you have any further *evidence* or *information* that you would like to provide in the [*sic*] support of this request then please send it to the Review Officers at the address shown at the top of this letter. This is your last opportunity to provide the Review Officers

with such information: if you do not provide it now it cannot be taken into account in the review."

24. On 13 October 2014, Mrs Hodge, the Border Force Review Officer, wrote to DWF Fishburns stating the conclusions of her review. Her conclusion was that L's tractor unit should not be restored.

25. As we deal in detail with that decision at a later point below, we do not summarise it here.

26. On behalf of L, DWF Fishburns gave Notice of Appeal to HM Courts and Tribunals Service on 12 November 2014.

Arguments for L

27. Ms Choudhury sought leave to admit Mrs Lohmann's second witness statement. Mr Sawtell had no objection to this, and accordingly it was admitted; it was agreed that discrepancies between the German original and the English translation would be explained in evidence.

28. Ms Choudhury also sought leave to admit a second copy of the vehicle registration document, showing that the date appearing on it was the date on which it had been produced, not the date of ownership of the vehicle. Mr Sawtell commented that it was "late in the day" for this to be produced and that it had not been before the Review Officer, but did not object to it being admitted.

29. Ms Choudhury went through the evidence in detail; we consider this later in the context of her submissions, and those of Mr Sawtell.

30. She indicated that there was probably not much dispute between the parties concerning the law, having read Mr Sawtell's skeleton argument. She submitted that the bottles were not excise goods, and that s 49 CEMA 1979 did not apply, nor the Alcoholic Liquor Duties Act, as no alcohol had been seized.

31. The seizure had been under s 170B CEMA 1979; the seizure information notice had referred to s 170B(2).

32. The vehicle had been seized under s 141(1)(a) CEMA 1979.

33. Ms Choudhury referred to Sch 3 CEMA 1979, in particular para 1(1) and (2)(b); paras 5 and 6 were especially relevant. She also referred to para 10(1).

34. In relation to the burden of proof, s 154 CEMA 1979 provided in sub-s (2)(b) and at the end of sub-s (2) that the burden of proof fell on the party other than Border Force.

35. It was made clear by s 152(b) CEMA 1979 that restoration was separate from condemnation proceedings.

36. The powers of review and appeal were set out in ss 14-16 of the Finance Act 1994 ("FA 1994"). The powers of the Tribunal were limited. Ms Choudhury referred to *Customs and Excise Commissioners v JH Corbitt (Numismatists) Ltd* [1980] STC 231 (HL), to *Lindsay v Customs and Excise Commissioners* [2002] STC 588 at [40], to *Revenue and Customs Commissioners v Jones and another* [2011] STC 2206, CA, and to *Gora and others v Customs and Excise Commissioners* [2004] QB 93.

37. The effect of *Gora* at [38]-[39], in which the Court of Appeal accepted the written submission for the Commissioners of Customs and Excise as to the jurisdiction of the Tribunal, was that the Tribunal was entitled to take into account all the evidence before it in determining whether a decision was reasonable, even if that evidence was not before the review officer. Ms Choudhury referred to *Tania Harris v Director of Border Revenue* [2013] UKFTT 134 (TC), TC02563, at [11], and to *Burton and others v Director of Border Revenue* [2015] UKFTT 0444 (TC), TC04616. In that case Border Force had contended that some of the arguments put forward by the appellants relied on facts which had already been considered by the magistrates' court in the condemnation proceedings; the Tribunal refused Border Force's strike-out application.

38. With reference to *McGeown International v Revenue and Customs Commissioners* [2011] UKFTT 407 (TC), TC01262, L did not dispute that the burden of proof rested with it as the Appellant.

39. Ms Choudhury made submissions on the facts of L's case, by reference to the law already referred to. We consider these submissions, together with those made by Mr Sawtell, at a later point in this decision.

Arguments for Border Force

40. Mr Sawtell referred to s 141(1) CEMA 1979. Under this provision, any vehicle used for the carriage of goods liable to forfeiture (such as the vodka bottles seized under s 170B CEMA 1979) was also liable to forfeiture.

41. He argued on the authority of *Jones* that it was not open to L to challenge the legality of the seizure in these proceedings; the only issue was whether the vehicle (ie the tractor unit) should be restored. The power to restore was contained in s 152(b) CEMA 1979.

42. It was Border Force's decision whether or not to restore the tractor unit. Restoration was an "ancillary matter", ie ancillary to the initial condemnation, as indicated by para 2(r) Sch 5 FA 1994. The jurisdiction of the Tribunal was established by s 16(4) FA 1994.

43. The test was whether the Border Force official making the decision could reasonably have arrived at that decision. Mr Sawtell referred to *Gora* at [38]-[39] and to *Corbitt* at p 239 (Lord Lane).

44. Proportionality had been considered in *Lindsay*; at [55] Lord Phillips MR had referred to the aim of the policy of the then Commissioners of Customs and Excise (now Her Majesty's Revenue and Customs, whose jurisdiction is concurrently exercised by Border Force) was the prevention of the evasion of excise duty that was imposed in accordance with European Community law. He continued

> "That is a legitimate aim under art 1 of the First Protocol to the Convention. The issue is whether the policy is liable to result in the imposition of a penalty in the individual case that is disproportionate having regard to that legitimate aim."

45. Under s 16(6) FA 1994, the burden of proof in the present appeal was on L.

46. For reasons which we will explain later, Mr Sawtell's submissions as to the facts and the applicable law had to be made after the hearing. As already indicated, we consider below his submissions together with those made by Ms Chowdhury on behalf of L.

47. As to matters of general principle, both parties agreed that the burden of proof fell on L. For the purposes of this hearing, Border Force did not contest the general point made in *Harris* and *Burton* that the tribunal was a fact finding Tribunal and that it was open to it to decide the primary facts and then decide whether, in the light of the Tribunal's findings, the decision on restoration was in that sense reasonable.

48. Mr Sawtell submitted, however, that notwithstanding the Tribunal's power to make findings of fact, its jurisdiction was still a reviewing one. Even if the Tribunal were to disagree with the Review Officer's decision, as long as that decision was one that could reasonably have been arrived at, it should be upheld; this followed from s 16(4) FA 1994.

Discussion and conclusions

49. It may assist L for us to explain in somewhat simplified terms the nature of the Tribunal's jurisdiction. Where a person has not challenged the legality of the seizure, or has begun the procedure to do so but has not pursued this to the stage of a "condemnation hearing" by the magistrates' court, it is not open to the Tribunal to consider the legality of the seizure. This was confirmed by the Court of Appeal in *Jones*.

50. As a result, the only question which this Tribunal can consider is the decision not to restore the tractor unit. Under s 16 FA 1994, the tribunal can only intervene where it is satisfied on the balance of probabilities that Border Force could not reasonably have arrived at that decision. The burden of proof falls on L. If the Tribunal concludes that Border Force could reasonably have arrived at that decision, the Tribunal has no power to do anything other than to dismiss the appeal.

51. Even where some aspect of the decision could be said to be erroneous on the grounds that Border Force failed to take relevant material into account, it is clear from the unanimous judgment of the Court of Appeal in *John Dee Ltd v Customs and*

Excise Commissioners [1995] STC 941 CA at 953 that this will not necessarily result in the appeal being allowed:

> "It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would *inevitably* have been the same, a tribunal can dismiss an appeal."

52. We accept Ms Choudhury's submissions based on *Gora* and *Harris*; the effect of *Gora* is that the Tribunal is entitled to take into account all the evidence before it in determining whether a decision was reasonable even if that evidence was not before the reviewing officer. Thus it is open to us to decide that Mrs Hodge's decision was "unreasonable" if we are satisfied as to this on the evidence before us, even if her decision as based on the materials before her was reasonable on the basis of those available materials.

53. If the Tribunal is satisfied on the evidence that the decision not to restore the vehicles is one which Border Force could not reasonably have arrived at, it can do one or more of the following:

(1) It can direct that the relevant decision is to cease to have effect from such time as it may specify;

(2) It can require Border Force to conduct a further review of the original decision, taking into account directions made by the tribunal, which may include the tribunal's findings made on the basis of the evidence;

(3) If the relevant decision has already been acted on or taken effect and cannot be remedied by a further review, it can declare the decision to have been unreasonable and make directions to prevent repetitions of the unreasonableness.

54. The practical effect of these restrictions is that a Tribunal does not have power to reverse a decision by Border Force to refuse restoration of items such as vehicles or excise goods. All that the Tribunal can do in practice is to order a further review, subject to any particular findings of fact that the tribunal has made. Thus if after considering the detailed evidence we reach the conclusion that Border Force could not reasonably have arrived at the decision, we cannot simply order Border Force to restore the tractor unit to L; in such circumstances, the only course would be to order a further review.

55. We agree with Mr Sawtell's submission that (notwithstanding the Tribunal's power to make findings of fact in relation to such appeals) our jurisdiction is a reviewing one, and that even if we were to disagree with the decision of Mrs Hodge, the Reviewing officer, we would have to uphold that decision if it was one that could be regarded as having been reasonably arrived at.

56. Mrs Hodge's decision on review was that the decision that the tractor unit should not be restored should be upheld. We set out in the following paragraphs the relevant parts of her review decision letter.

57. She referred to the duty of operators to take reasonable steps to prevent smuggling. She commented that L had attempted to distance itself from this event by claiming that the tractor unit was leased to Track Rent which acted as the haulier for the movement on behalf of Food Import & Export SIA. She set out her reasons for not accepting this claim. These were:

(1) When the vehicle had been intercepted on 28 April 2014, the driver had been asked by Border Force who the haulier was. He had responded by saying "Lohmann". She commented that there would be no reason for him to mislead the officer about this.

(2) The driver had produced a CMR dated 22 April 2014 for the movement. In boxes 16 and 23 "Lohmann Europa Trailer GmbH" was shown as the haulier. DWF Fishburns had now produced a different CMR purporting to relate to the movement in question. This document showed Track Rent in boxes 16 and 23 as the haulier and no stamp for Food Import & Export in Box 22. This document was dated 24 April 2014. Mrs Hodge noted that the signature in Box 23 was very similar to that of L on the CMR produced on the day and nothing like the signature and stamp for Track Rent on the rental agreement that DWF Fishburns had provided. There was the same spelling mistake on the delivery address on both documents.

(3) In relation to the alleged lease, Mrs Hodge saw that the lease was for a year commencing 1 January 2014 with monthly payments of 1,500 Euros, but she had not seen any evidence of payment under the lease. The vehicle registration document that DWF Fishburns had kindly provided was dated 21 February 2014, and therefore it appeared that the vehicle was registered in L's name seven weeks after the commencement of the lease.

(4) Mrs Hodge saw from the internet that L was involved in long distance transport, forwarding and building materials wholesale. There was no mention of vehicle leasing.

In the circumstances she had concluded that L was the haulier involved in this movement and that not to restore the tractor unit was reasonable considering the potential loss to the revenue.

58. She considered the question of hardship caused by the loss of the vehicle. She stated that the hardship would have to be exceptional for her to restore the vehicle under the relevant part of the Border Force policy. She did not consider that L had suffered exceptional hardship.

59. In her conclusion, she stated that in her opinion the application of the Border Force policy in L's case treated L no more harshly or leniently than anyone else in similar circumstances: non-restoration of the vehicle in these circumstances would be appropriate as she could find no reason to vary the policy not to restore in the present case. For the reasons set out in her decision, she upheld the original decision that the vehicle should not be restored.

60. She indicated that if L had fresh information that L and its advisers would like her to consider, they were asked to write to her. She emphasised that she would not enter into further correspondence about evidence that had already been provided.

61. As the Border Force policy was not summarised in her letter, we set out an extract from the policy as stated in the letter from Border Force dated 27 August 2014:

> "1) If the Commissioners are satisfied that the driver or haulier is knowingly involved in smuggling excise goods then:
>
> If the revenue involved is significant, on the first detection the vehicle may not be restored.
>
> In other cases, on the first detection the vehicle may be restored for a fee equal to 100% of the revenue involved; or the trade value of the vehicle (whichever is the lower). On the second detection the vehicle may be seized and not restored."

As the decision set out in that letter was to apply section 1 of the policy, we have not referred to the other paragraphs of that policy.

The parties' submissions

62. The parties made submissions on the various matters set out in the review letter, in the light of the evidence. We divide these by reference to the various matters mentioned, and then consider the position by reference to the totality of the evidence.

(a) The CMR and the interview with the driver

63. Ms Choudhury commented that L did not deny the importance of a CMR, as referred to in Mr Sawtell's written submissions. Nor did L deny the fact that the CMR produced by the driver when the movement was intercepted stated that L was the haulier or that a second CMR was subsequently produced which showed Track Rent to be the haulier. However, in L's submission the fact that the CMR provided by the driver stated that L was the haulier for the movement did not of itself make L the haulier.

64. Ms Choudhury referred to Mrs Lohmann's evidence in chief that the CMR in question was issued in Latvia. (We review that evidence below in the light of Ms Choudhury's submissions.)

65. Border Force relied on the fact that the second CMR was produced after the seizure. L did not deny this, but submitted that this was done in order to rectify the error in the first CMR, which stated it to be the haulier. The absence of signature by Food Import & Export was explained by the fact that it had been drawn up after the movement of the goods. Ms Choudhury submitted that it was clear from the evidence that both documents were produced by Track Rent and completed by Mr Petrovskis: both CMRs were produced in Latvia and the handwriting and signature on both of them was the same.

66. Ms Choudhury made submissions concerning L's explanation as to why Track rent had L's stamp; as this explanation was questioned by Mr Sawtell in his submissions, we deal with this below in the context of our consideration of Mrs Lohmann's evidence.

67. The Review Officer had relied on another reason for refusing restoration, namely the answer given by Mr Petrovskis when asked who the haulier was for the movement. The Review Officer was relying on the account of the conversation between Mr Petrovskis and the officer who intercepted the tractor unit, as recorded in that officer's notebook. Ms Choudhury questioned how accurate the account of the conversation was. The officer had not provided a witness statement.

68. Mr Sawtell emphasised the importance of the CMR document, and referred to the Convention on the International Carriage of Goods by Road, in particular Chapter III of that Convention. He listed a number of points set out in the Convention.

69. He submitted that the CMR which had accompanied the goods had been clear; it was L which had been the haulier. This was prima facie evidence that the contract of carriage was with L, and not with any other party.

70. Other circumstances supported the accuracy of the CMR that had accompanied the goods on 28 April 2014:

(1) When Mr Petrovskis was questioned, he named L as the haulier;

(2) The tractor unit belonged to L;

(3) L's stamps were on the CMR, which presumably had been checked and signed by both the driver and the sender;

(4) There was no official documentation that supported the lease agreement relied on by L, such as insurance, tax or vehicle registration. In fact, there was no third party documentation that supported L's case (such as a contract of carriage between Track Rent and L).

71. The second CMR was a dubious document for the following reasons:

(1) It was not clear how a second consignment notice that did not follow the goods had any validity;

(2) Despite being drawn up after 28 April 2014, it was backdated to 24 April 2014, ie two days after the first CMR;

(3) It was not signed by the sender;

(4) It was drawn up in response to the interception and seizure. Mr Sawtell submitted that it was a self-serving document as it was drafted as a CMR to show Track Rent as the haulier.

72. Mr Sawtell made submissions concerning the accuracy of the officer's notes, and referred to the absence of oral evidence either from Mr Petrovskis or from the officer. We consider these submissions below.

73. In Mr Sawtell's submission, L's explanation as to why Track Rent had L's stamp was unconvincing, and was not consistent with the evidence in Mr Petrovskis' witness statement. L had not called any witnesses from Track Rent.

74. For Border Force, Mr Sawtell suggested that the more straightforward explanation was the most likely; the CMR had L's stamp as haulier because L was the haulier.

75. We now set out our consideration of the parties' submissions as to the CMR and the interview with the driver, taking into account the oral evidence, Mrs Lohmann's witness statements and (to the extent appropriate) the witness statements of Mr Petrovskis (the driver) and Mr Otzulis, described in his witness statement as the managing director of Track Rent.

76. The CMR which accompanied the goods and was produced to Border Force on the day of the seizure shows L's stamp in boxes 16 and 23. There is a signature in Box 23 over L's stamp.

77. Mrs Lohmann, who said that she was a commercial employee of L and in charge of accounting, and that she did not make business decisions, stated in oral evidence that the signatures on that CMR were not L's. When L had received the CMR following the seizure, it had immediately complained to Track Rent, because the CMR showed L's stamp; this was wrong, as L did not accept this transport. It was not L's transport. She explained that Mr Petrovskis was allowed to take blank CMRs with him, but in no case with L's stamp. Mr Otzulis of Track Rent had a stamp in Riga, but was not allowed to use it except in relation to repairs and relevant purchases required to keep the vehicle running. It was sometimes necessary for Track Rent to prove details of the vehicle's owner. She emphasised that there was no contract which L had anything to do with concerning CMRs, so Track Rent was not allowed to use L's stamp on CMRs.

78. Mrs Lohmann's evidence raises various questions. If as L argued there was a lease of the vehicle (an issue which we consider separately below), the terms of the rental agreement were that diesel fuel, repairs and damage arising in an accident or due to negligence were to be at the expense of Track Rent, the lessee. We find it difficult to see why Track Rent would need L's stamp for any repair or maintenance costs. Although Ms Choudhury suggested in argument that Track Rent might need L's stamp to confirm L's authority for repairs, there was no documentary evidence before us of reasons to support this suggestion, and Mrs Lohmann did not explain the circumstances in which proof of details of the vehicle's owner might be required other than describing this as a "security matter".

79. Thus there is insufficient evidence to satisfy us that Track Rent needed to have L's stamp for the purposes of keeping the vehicle in running order.

80. Further, the suggestion that Track Rent had the stamp in its office for such purposes does not provide an explanation for a point raised in the witness statement of Mr Petrovskis, if any account is to be taken of that statement. (We put aside for the

moment the question of the extent to which that statement can be treated as evidence in the absence of his availability to undergo cross-examination.) He describes completing a CMR with Food Import & Export after collecting the goods, and states that he had no blank CMRs to complete, but luckily located some CMRs already stamped with L's details in the carrier section. He states that the signature on the CMR is his signature, and that this was a decision that he made with no reference to his employers.

81. There appears to be a degree of conflict between Mrs Lohmann's evidence that Mr Petrovskis was allowed to carry blank CMRs and his statement that he had no blank CMRs but had located some already stamped with L's details in the carrier section.

82. In addition, it is not clear why Mr Petrovskis or Track Rent came to have pre-stamped CMRs showing L's details or what reason there would have been to have such pre-stamped CMRs. The statement of Mr Petrovskis implies that he found such CMRs at the time when he collected the goods, which suggests that a batch of blank CMRs had been impressed with L's stamp and left in the vehicle. L's argument is that it was not involved as haulier; if its only relationship with Track Rent was as the provider of the vehicle, why would blank CMRs have been prepared showing its stamp in Box 16 (name and address of carrier) and Box 23 (stamp of the transport company, licence plate of the truck and signature of the driver)? What reason would Track Rent have had for pre-stamping a batch of blank CMRs with L's stamp? Mrs Lohmann stated that Track Rent was not allowed to use L's stamp on CMRs, but did not explain whether there were any safeguards to prevent the use of the stamp for this purpose.

83. We turn to the second CMR. We agree with Mr Sawtell's submission that a CMR which does not accompany the goods is of questionable validity. Under Article 5 of the CMR Convention, one copy of the CMR must accompany the goods.

84. It was clear from Mrs Lohmann's evidence that the second CMR was prepared after the seizure; L saw the original CMR and complained because of the use of L's stamp, and Track Rent prepared and sent the second CMR. Mr Sawtell drew attention to the date on the latter document, which was 24 April 2014, two days after the first CMR. As the seizure occurred on 28 April 2014 and, according to Mrs Lohmann's evidence, the second CMR was received by L a few days after the first, it is clear that the second CMR was backdated. The first CMR had been dated 22 April 2014. No explanation has been offered as to the reason for inserting a date different from that on the first CMR.

85. As Mr Sawtell mentioned, the second CMR was not signed by Food Import & Export, the sender.

86. Ms Choudhury submitted that it was clear from the evidence that both the original CMR and the second CMR were produced in Latvia by Track Rent and completed by Mr Petrovskis and that the handwriting and signature on both of them was the same. Mrs Hodge's view as expressed in the review letter was that the

signatures in Box 23 in the two CMRs were "very similar". We agree with that view. We have examined the signature of Mr Petrovskis on his witness statement (as well as his largely similar signature in the Border Force officer's notebook), and do not consider that these signatures resemble those on the CMRs, despite his indication at paragraph 23 of his witness statement that the signature on the CMRs was his signature. In the absence of any opportunity to hear evidence from Mr Petrovskis, we cannot be satisfied that the signatures in Box 23 of each of the CMRs were his.

87. Given these doubts concerning the second CMR and the fact that it was prepared after the event, we do not think that it can be relied on as evidence sufficient to demonstrate the absence of any relationship between L and the consignment.

88. We now turn to the interview with Mr Petrovskis, the driver, on the day of the seizure. The argument for L is that Mr Petrovskis speaks and understands very little English; he was not asked whether he needed an interpreter, or whether he understood the questions being put to him.

89. In his witness statement, Mr Petrovskis explained that he determined at some point in the interview that he was being asked who the vehicle belonged to; he was aware that the vehicle was owned by L, and told the officers that it belonged to L. He states that he was not asked, or did not understand that he was being asked, to identify the haulier. He would have had no chance of understanding the difference between the haulier and owner in a language which he did not understand.

90. We have considered whether we can attach any weight to the matters raised in his witness statement, given that he did not attend the hearing to give oral evidence. We regard it as significant that he did not sign the Latvian language version of his statement; instead, his signature appears at the end of the English language version. Had he been present at the hearing, it would have been possible for him to be asked about his reasons for signing the English language version. It would also have been possible to establish whether his witness statement was his own, and not merely prepared for him to sign. Without his oral evidence, we find that his witness statement carries little if any weight in these proceedings.

91. Mr Sawtell submitted that the Tribunal had not heard the oral evidence of Mr Petrovskis or of the officer who spoke to him. There was no mention by Mr Petrovskis that he needed an interpreter, and he was able to describe the load as glass. He answered a number of questions as to whether he loaded the pallets and whether they were sealed. He subsequently signed the officer's notebook. In the absence of Mr Petrovskis, and given that the burden of proof was on L, Mr Sawtell requested the Tribunal to reject the submission that Mr Petrovskis did not understand the Border Force officer.

92. Ms Choudhury questioned how accurate the officer's notebook record was, and commented that Mr Petrovskis's signature was at the top of a blank page; all his answers were short, one-word responses, and there was no record of him being asked if he understood the questions or if he required an interpreter. She submitted that it was not possible to ascertain from this record whether Mr Petrovskis understood that

he was being asked to identify the haulier. She argued that in those circumstances, his evidence that he did not understand the question was to be preferred. She suggested in the alternative that, if he did understand the question, a possible reason why he stated that L was the haulier was to protect Track Rent; contrary to the Review Officer's assertion, he did have a reason to mislead.

93. We re-emphasise that the burden of proof is on L. We have concluded that little if any weight should be given to Mr Petrovskis's witness statement, and it therefore follows that it is not appropriate for us to prefer his evidence that he did not understand the question put to him concerning the haulier. As Mr Sawtell argued, the officer's notes were written up almost contemporaneously with the conversation. We find that there is insufficient evidence to show that the officer's account was incorrect in any way or that Mr Petrovskis did not understand the question being put to him.

(b) The lease agreement and the vehicle registration document

94. Mr Sawtell argued that the lease agreement (ie the rental contract sent by DWF Fishburns to Border Force on 16 May 2014, and sent again on 7 July 2014 together with an English translation) had no legal effect and that L did not lease the vehicle to Track Rent. He referred to L's accounting records as considered in oral evidence, considered below. He pointed out that there was no readily available documentation for the period up to January 2014 save for L's own internal accounting documents, and no documentation for the period thereafter save for the lease agreement.

95. Ms Choudhury argued in her written submissions in reply that, without expressly saying so, Border Force was alleging that the lease agreement was a sham within the definition given by Lord Diplock in *Snook v West Riding Investments Ltd* [1967] 2 QB 786 at 802C. The burden of proving the existence of a sham rested on the party making such an allegation; Ms Choudhury referred to *Hitch v Stone* [2001] STC 214 at [32], and to *National Westminster Bank v Jones & ors* [2001] BCLC 98 at [39]. She argued that it was for Border Force to show that the lease agreement was a sham and that Border Force had failed to discharge that burden. Ms Choudhury argued that the allegation made in oral evidence by Mrs Hodge that the alleged document had been made in order to distance L from the transaction should have been put to Mrs Lohmann. Ms Choudhury drew attention to the rule in *Browne v Dunn* (1894) 6 R 674 relating to the need to cross-examine a witness where the court was to be asked to disbelieve a witness.

96. In L's submission the lease agreement was not a sham; the arrangement under which the tractor unit was provided to Track Rent was of longer standing, as it had been the subject of a previous agreement.

97. In response to L's written submissions in reply, Mr Sawtell provided a further submission to deal with the specific issue concerning the need for the allegation that the lease agreement was a sham to be put directly to Mrs Lohmann in cross-examination. He argued that as Mrs Lohmann had not been concerned with the creation of the document or the actual contractual agreement between L and Track Rent, it being her husband who had apparently been involved, she was unable to

answer questions dealing with this point. As a result, it would have been unfair to put this line of questions to her and there was no obligation to do so.

98. He emphasised that the burden of proof in this case was on L. All of the material that could prove its case was, or had been, in its possession. As part of its case, L claimed that the tractor unit was leased to Track Rent. This was disputed by Border Force. It was open to the Tribunal to hold that, as a matter of fact, L had not discharged the burden of proof. He referred to *Francis v Wells and Churchill Insurance Company Ltd* [2007] EWCA Civ 1350 at [26].

99. He submitted that even if this was wrong and the burden was in fact on Border Force to satisfy the Tribunal that the lease agreement was not intended to create legal relations, the burden had been satisfied for the reasons previously advanced in Border Force's written submissions.

100. We consider the lease agreement and the vehicle registration document on the basis of the parties' submissions and the evidence.

101. Mrs Hodge referred in her review decision to the absence of any evidence of payments under the lease. The evidence before us consisted of accounting documents and invoices from L's records. The invoices were for five months in 2013, namely July to November, together with a translation of the last invoice. The rental amount for each month was 750 Euros. The related accounting documents were internal documents from within L's accounting system, and not independently created banking documents such as third party bank statements. Mrs Lohmann explained in her oral evidence that these records showed L's requests to Track Rent for the amounts claimed.

102. The lease agreement included in the bundle was dated 1 January 2014 and expressed to be valid from 1 January 2014 to 31 December 2014; the monthly rental was 1,500 Euros. Thus the invoices included in evidence did not relate to this lease agreement. In her evidence, Mrs Lohmann explained that before 2014 Track Rent was renting the tractor unit on the basis of an oral agreement in the sum of 750 Euros per month. She thought that L had first agreed to lease the vehicle to Track Rent in 2012. In her evidence in chief, she stated that no payments had been made under that arrangement before 2013. However, in cross-examination she said she thought that 17 invoices had been raised up to December 2013. After entering into the 2014 rental agreement, Track Rent had requested that, due to financial pressures, the rental should be reduced to 750 Euros per month. Track Rent had made no payments in 2014, as it was in economic difficulty. For this reason, L had not sent Track Rent any invoices or rental demands in 2014.

103. The accounting records in evidence refer only to the five months from July 2013 to November 2013 inclusive. As a result, there is no means of establishing from the documentary evidence how many payments were made under the pre-2014 arrangement, and thus of establishing which (if either) of Mrs Lohmann's statements in oral evidence is to be taken as a more accurate description of the relationship. In addition, as Mr Sawtell commented and as we have already indicated, these

accounting records were internal documents; there was no external documentation to verify the accounting entries.

104. It is therefore clear on the basis of Mrs Lohmann's evidence that L could not produce any evidence of payments made by Track Rent pursuant to the lease agreement. The last payment under the previous leasing arrangement (an arrangement for which Mrs Lohmann stated that no record of any written documentation could be found) was made in November 2013. There was no evidence of any payment for December 2013, so that for that month and for the period between the commencement of the lease agreement and the date of the seizure, no payments of rental were made.

105. Mrs Lohmann's evidence was that Track Rent had wanted to buy the tractor unit, and that this was the reason for the lease agreement specifying the increased monthly rental of 1,500 Euros. She stated that "The unit should not have been running for longer under Lohmann". It would have been registered under Track Rent's name and not that of L. L and Track Rent had wanted to end the rental arrangement, but this had not happened.

106. In terms of the burden of proof falling on L, the absence of payment under the lease agreement introduces some doubt as to the extent to which the lease agreement should be taken as sufficient evidence to demonstrate the reason for Track Rent being in possession of the tractor unit. We do not consider it appropriate to refer to the lease agreement as a sham, although we do not interpret Mr Sawtell's submissions as going that far. The question is whether, in the absence of payment under the previous arrangement of the 750 Euros due for December 2013 and in the absence of any payment at all in 2014, the lease agreement can be regarded as having the effect of binding the parties to its terms; as it was an agreement between L, a German company, and Track Rent, a Latvian company, this raises a question of the proper law governing that agreement, which is a matter on which we have had no evidence or submissions. It is therefore inappropriate for us to speculate on the effectiveness of the lease agreement in the absence of any payment pursuant to its terms; without further evidence, we are unable to make a finding that Border Force was "unreasonable" in not being satisfied as to the effect of that agreement.

107. Mr Sawtell referred to the absence of evidence as to when the lease agreement was signed. We note that a copy of the lease agreement (in German, and without an English translation) was sent to Border Force by DWF Fishburns on 16 May 2014, relatively soon after the seizure. Thus it was readily available at that point. We consider it more likely than not that the lease agreement had been signed before the seizure; to suggest otherwise would amount to accusing L of manufacturing evidence, which would have serious implications, and we therefore decline to follow the implications of Mr Sawtell's comment. Our conclusions are that the lease agreement was in existence before the seizure, but also that we are not satisfied that there is sufficient evidence of it having been carried into effect.

108. Mrs Hodge referred in the review decision to the registration document for the tractor unit being dated 21 February 2014. We are satisfied on the basis of Mrs Lohmann's evidence that this was not the date of registration of the unit, but the date

on which the document was produced. Ms Chowdhury handed us a previous version showing the document production date 14 July 2010; Mrs Lohmann explained that her husband had had to obtain the 2014 version because he had been unable to find the earlier one. We accept Mrs Lohmann's evidence on this point.

109. This raises the question whether Border Force's decision, as based on incorrect understanding of the 2014 version produced by DWF Fishburns with their letter dated 9 May 2014, was one which was "unreasonable" in the manner described by Lord Lane in *Corbitt* at p 239:

> "It [ie the tribunal] could only properly do so if it were shown the commissioners had acted in a way which no reasonable body of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight."

110. The date of issue of the 2014 version of the registration document was, as now shown by the evidence at the hearing, an irrelevant matter. As we have stated, *Gora* and *Harris* make clear that we are able to take into account evidence which was not before the Border Force officers.

111. We find that this element of Mrs Hodge's decision was, with the benefit of the hindsight afforded to us by reference to the further evidence, "unreasonable". However, that does not necessarily mean that it is appropriate for the decision to be referred back for further review on this ground. We have referred to *John Dee*; the question is whether the decision arrived at by Mrs Hodge would inevitably have been the same if this evidence had been provided to Border Force when considering the decision. She stated in evidence that she now accepted that the registration document produced to her by DWF Fishburns was a re-issuing of the document.

112. We find that, in the context of the remainder of the evidence, the Border Force decision would inevitably have been the same if evidence had been provided to Border Force at the time to show that the registration date of the tractor unit predated the lease agreement. Following *John Dee*, we do not consider this to be a basis for referring the decision for further review.

(c) The business agreement between Track Rent and L

113. Mr Sawtell submitted that the Tribunal had been provided with almost no direct evidence concerning L's relationship with Track Rent. Mrs Lohmann had stated in evidence that it was her husband, L's managing director, who handled L's relationship with Track Rent. As a result, it was Mr Lohmann who dealt with the purported lease agreement, dealt with agreements about the carriage of goods with Track Rent, and made business decisions generally.

114. He argued that Mrs Lohmann's evidence was necessarily second hand. L had had the opportunity to call Mr Lohmann but chose not to.

115. Mr Sawtell commented that L had taken no action against Track Rent for the loss of the tractor unit. He argued that this cast doubt both on the written lease agreement and on the arrangement between Track Rent and L; why did Track Rent operate L's tractor unit for no payments?

116. L had not given a cogent explanation of the relationship between it and Track Rent. No witnesses had been called to give a clearer explanation of the connection between the two companies.

117. Mr Sawtell referred to the absence of any proceedings by L against Track Rent; there was no documentary evidence that L had ever made a written complaint to Track Rent. Mrs Lohmann had referred to telephone calls being made.

118. In Mr Sawtell's submission, Mr Petrovskis's presence did not rule out L being the haulier.

119. Far greater weight should be placed on the contemporaneous documentary evidence, namely the CMR naming L as the haulier, the fact that L owned the tractor unit, the lack of any payments from Track Rent to L at the material time and the fact that Mr Petrovskis named L as the haulier.

120. Ms Chowdhury responded to Mr Sawtell's submission that there was no direct evidence as to the relationship between Track Rent and L; in giving evidence, Mrs Lohmann had referred to "we", and explained that she was referring to herself and her husband. Ms Choudhury argued that Mrs Lohmann's evidence could not be dismissed as second hand when the person with first-hand knowledge was her husband, with whom she worked in the company.

121. In relation to Track Rent, Mrs Lohmann's evidence was that it was in financial difficulties. This raised the question whether taking action against it would be worth while. In addition, Mrs Lohmann had stated in cross-examination that L was waiting for the outcome of the present proceedings before doing so.

122. As to the absence of payments for use of the vehicle, Mrs Lohmann's evidence was that L would have brought the arrangement to an end shortly if the seizure had not occurred. She also stated that L had been unable to recover the tractor unit because it was outside Germany.

123. Ms Choudhury argued that the invoices and account statements were evidence of a business relationship between Track Rent and L that had existed prior to January 2014. The employment contract dated 28 June 2013 showed that Mr Petrovskis, who was driving the tractor unit at the time of the seizure, was a Track Rent employee.

124. In considering the evidence concerning the question of the relationship between Track Rent and L, the first question for us to consider is the extent to which weight should be given to the witness statement of Mr Otzulis, described in that statement as the managing director of Track Rent. He was not present to give oral evidence at the hearing. As a result, it was not possible for him to be questioned as to whether the

statement was his own, and not merely prepared for him to sign, or on any other matters relevant to L's appeal.

125. As with Mr Petrovskis's statement, we find that without oral evidence from Mr Otzulis, his witness statement carries little if any weight in these proceedings.

126. In any event, his statement contains limited comment as to the relationship between Track Rent and L. He states that there is no formal connection between L and Track Rent beyond the rental agreement and transportation work, and that the owners of L have no financial interest in Track Rent, financial or otherwise, and vice versa. He comments that to suggest that L was the haulier or would have had any knowledge of this transport is entirely incorrect and unreasonable.

127. We put aside his statement and consider instead the evidence given by Mrs Lohmann. She made clear that she was not involved in making business decisions; these were made by her husband. On the question whether Mr Lohmann could have given evidence, we read nothing into the decision that he should not do so, even though he was present at the hearing. We note from copies of correspondence on the Tribunal file that the hearing of this appeal was originally listed for September 2015, but that this had had to be postponed, for two reasons. One was the non-availability of Mrs Hodge on the relevant day, and the other was that as Mr Lohmann had recently been hospitalised, Mrs Lohmann would be unable to give evidence. The latter may or may not be connected with the absence of evidence from Mr Lohmann, although there is no reference in the correspondence to the question of his inability to attend the September 2015 hearing.

128. Mrs Lohmann explained that Track Rent was a newer company, formed by Mr Otzulis in place of a company with which L had had contact over a period of several years. Under the arrangements with that previous company, it carried out transportations for L. It was the haulier. She did not know what had happened to that company; it had ceased to exist. Track Rent had contacted L as a continuation of the business relationship that had existed with the previous company.

129. We find that the evidence as to the business relationship between Track Rent and L was very limited. Mrs Lohmann acknowledged that it was Mr Lohmann who took the business decisions, and it might have assisted us to have his direct evidence as to the negotiations as between L and Track Rent.

130. Ms Choudhury argued that the existence of the employment contract between Mr Petrovskis and Track Rent showed that Mr Petrovskis, who was driving the vehicle at the time of the seizure, was a Track Rent employee. Mr Sawtell argued that this involved a slender chain of logic, to conclude that this was evidence of Track Rent rather than L being the haulier. Mr Sawtell submitted that Mr Petrovskis's presence certainly did not rule out L being the haulier.

131. Mr Petrovskis was not present to be cross-examined on his evidence, and we have therefore concluded that no significant weight should be given to his witness statement. The document which he refers to as his employment contract, together with

an English translation of the Latvian original, is the exhibit to his statement. We have also concluded that we can attribute no significant weight to the statement of Mr Otzulis. As a result, we have no means of testing the strength of the employment contract as evidence in relation to this appeal. In addition, we accept the logic of Mr Sawtell's submission; even if it can be established that Mr Petrovskis was an employee of Track Rent at the time of the seizure, it does not automatically follow that he was acting in that capacity at that point, and thus this does not rule out the possibility that his statement to Border Force that L was the haulier was correct.

132. Our conclusion in respect of the business relationship between Track Rent and L is that there is insufficient evidence as to that relationship to conclude by reference to it that the Border Force decision was one which no reasonable body could have arrived at.

(d) The legality of the seizure

133. Mr Sawtell questioned, in the light of L's acceptance that it could not dispute the legality of the seizure, why it had raised questions about that issue. L had challenged the seizure and had subsequently withdrawn that challenge. No party had come forward to declare ownership of the bottles. He referred to *Jones*, and to the deeming provisions in Sch 3 CEMA 1979. As Mrs Hodge had commented in her evidence and in the review letter, the legality of the seizure and the underlying facts relating to the legality of the seizure were not a matter falling within the scope of her decision. He submitted that Mrs Hodge's erroneous reference in her letter to s 139(1) CEMA 1979 instead of s 170B CEMA 1979 was irrelevant.

134. Ms Choudhury submitted that notwithstanding the decision in *Jones*, it was open to the Tribunal to determine the level of blameworthiness attributable to L in respect of the seizure, as stated in *Gora*. L was asking the Tribunal to find that even if the seizure was legal, L had no involvement in this movement of goods. In considering this, the Tribunal was asked to bear in mind that L could not successfully challenge the seizure of the tractor unit when it was not in a position to challenge the seizure of the bottles (or even of the trailer in which they were found). This was the result of the following: para 10 Sch 3 CEMA 1979, which provided that only the owner of the goods could challenge the seizure; the deeming in para 5 Sch 3 CEMA 1979 where there was no challenge by the owner; and s 154(2)(b) CEMA 1979, which imposed the burden of proof in respect of certain matters on the person challenging the seizure. She argued that the question was directly relevant to the issue of blameworthiness, on which the Tribunal was being asked to make findings of fact.

135. She referred to Mr Sawtell's statement in his written submissions that notice of seizure of the tractor unit and the vodka bottles was given to the driver on 28 April 2014. This was not correct; Ms Choudhury argued that the evidence showed that he was employed by Track Rent. If he was now being put forward as the person whose offence resulted in the seizure, this did not accord with Border Force's argument that L was involved in this offence. In her submission, it appeared that Border Force had failed to serve a valid notice of seizure as required by para 1(1) Sch 3 CEMA 1979

because they considered that Mr Petrovskis was an employee or agent of L so that notice was not required under para 1(2)(b) Sch 3.

136. The fact that no valid notice of seizure had been served meant that it was open to L to argue that the deeming provision in para 5 Sch 3 CEMA 1979 did not apply. However, it would then be open to Border Force to serve a notice of seizure. L would have difficulty in challenging the seizure; as it was not the owner of the bottles, it could not challenge the seizure of the bottles or, consequently, of the tractor unit.

137. We have considered Ms Choudhury's submissions in the light of the factual issues referred to above. We have concluded that the status of Mr Petrovskis as an employee of Track Rent, if that were to be established on the basis of sufficient evidence, would not preclude him from acting in some other capacity on behalf of L in relation to the shipment of the glass bottles. If, as Border Force decided at the time of the seizure, he was acting on L's behalf as he stated to the officer, the procedure adopted by Border Force was the appropriate one to be followed.

138. We have considered the factual position before addressing the legal issues. As both parties accepted, it follows from *Jones* that once the deeming provisions in Sch 3 CEMA 1979 have taken effect, it is not open to L to challenge the legality of the seizure.

139. Ms Choudhury referred to *Gora* as permitting the Tribunal to determine the level of blameworthiness attributable to L in respect of the seizure. We question whether it is correct to derive that proposition from *Gora* without further qualification. In his judgment at [38], Pill LJ set out the written submission provided by counsel for Customs and Excise, which was unanimously accepted by the Court of Appeal as an appropriate view of the jurisdiction of the tribunal. This referred to the possibility of a party challenging a restoration decision on the grounds that it was based on an unreasonable policy. It then follows though the steps which would be necessary for that party to take, and how the tribunal would deal with the process.

140. As we read the submission set out at [38], the references at sub-paragraph 3(d) onwards to the tribunal considering the question of blameworthiness in the light of the facts are conditional on the tribunal having previously determined that the restoration policy is "unreasonable" because of the failure of that policy to take account of the party's alleged level of blameworthiness.

141. Having reviewed all the submissions made on behalf of L in support of its appeal, we do not consider that L has made any submission challenging the Border Force restoration policy as contained in paragraph 1 of that policy (cited above).That paragraph makes no reference to blameworthiness. In the absence of any challenge to the policy, we take the view that it is not open to us to consider the question of blameworthiness.

142. In case for any reason that view proves to be erroneous, we consider the extent to which L's conduct involved blameworthiness. We have looked at the lease agreement; this contains no restrictions on the use of the tractor unit and nothing to

deal with the possibility of the unit being seized by any country's border officials or customs authorities. The reference to responsibility for damage due to negligence being at the expense of the lessee does not amount to a limitation of the use of the unit.

143. In its letter dated 17 June 2014, Border Force asked DWF Fishburns for the following information:

> "1. Details of what measures your client takes to ensure they are leasing/hiring to legitimate haulage companies.
>
> 2. If your client has terminated the lease hire agreement with SIA Truck Rental [*sic*], please forward a copy of the letter of termination.
>
> 3. Also, can you please inform us if your client has previously hired any vehicles to companies resulting in a unit or trailer being seized by Border Force.
>
> 4. Does your client have a term in the lease/hire agreement that states if Border Force seize the tractor unit, it would put the lessee/hirer in breach of their contract with them."

144. In their reply dated 7 July 2014, DWF Fishburns responded:

> "1. Our client is primarily a transport and logistics firm and would only hire or lease a vehicle to a known client of sufficient standing. IN this particular case, our client had business dealings with SIA Track Rent for approximately a year prior to leasing the lorry to them. Our client had no reasons for suspicion and was satisfied that the company was bona fide and genuine.
>
> 2. The lease agreement has been orally terminated and this will be followed up in writing as and when necessary.
>
> 3. This is the first time that our client has had any of their vehicles seized by Border Force, either under their own operation, or hired to other parties, since the foundation of the company.
>
> 4. The contract contains a clause that any damage caused by way of an accident, repairs and gross negligence is the responsibility of the hirer."

145. Mrs Lohmann explained that L had had dealings over a period of five years with the previous company run by Mr Otzulis, and that the contact had continued through Track Rent. She did not know what had happened to the previous company.

146. We have heard no evidence to suggest that any investigations were carried out by L into the predecessor company or Mr Otzulis or Track Rent, or to find out why his previous company had ceased operations.

147. Our conclusions as to blameworthiness on L's part in relation to the matters giving rise to this appeal are that L did not take sufficient precautions to minimise or avoid the risk of the tractor unit being used for purposes which might result in its seizure. To the extent that blameworthiness may be relevant to L's appeal, we consider that it must accept some share of the blame.

(e) Other factors referred to by the Review Officer

148. Mr Sawtell referred to Mrs Hodge's evidence confirming that the new material provided by L did not change her decision.

149. He emphasised that L had not provided large amounts of documentation to Border Force, and referred to the indications in Border Force's letters that it was for L to make its case for restoration.

150. He referred to the date of registration of the tractor unit, as considered above; Mrs Hodge had confirmed that the acceptance of the earlier date did not affect her decision.

151. In relation to the signatures on the two CMRs, Mrs Hodge could only consider what she was given at the time of the review. Mr Sawtell commented that in Border Force's submission, the lease agreement and the two CMAs remained very questionable documents.

152. Ms Choudhury referred to Border Force's concession that Mrs Hodge had been wrong in relation to the date of registration of the tractor unit. Mrs Hodge's decision had therefore been based in part on a conclusion on which she had never been entitled to rely because it was based on a complete misinterpretation of the registration document. In L's submission, this showed that once Mrs Hodge had formed the view that the lease agreement was a sham and L was the haulier, she jumped to a conclusion regarding the registration document. Border Force might submit that this was a minor point, but Ms Choudhury argued that it epitomised Mrs Hodge's approach to the entire issue.

153. We accept Mr Sawtell's submission that the documentation provided by L to Border Force was relatively limited. Further documentation has been provided in the course of L's appeal, although we have found such additional documentation of limited assistance.

154. The translation of the vehicle registration document provided by DWF Fishburns with their letter dated 22 May 2014 made no reference to the significance of the date at the bottom of the left-hand column. Mr Sawtell submitted that if L had provided a fully translated version of that document, this would not have arisen. We think that even if there had been a full translation, some form of further explanation would have been needed to confirm that this date was merely the date of issue of that version of the document.

155. We do not accept L's submission that Mrs Hodge's decision was coloured by considering that the lease agreement was a sham and that she had jumped to a conclusion regarding the registration document. We deal below with the approach to be taken in relation to the evidence considered generally rather than by reference to discrete subject areas.

156. We have considered the questions concerning the two CMRs by reference to all the materials before us; as confirmed by *Harris*, we are in a position which differs

from that of Mrs Hodge as the Review Officer, in that we have access to materials which were not available to her. We do not need to repeat our conclusions concerning the CMRs.

157. In her review decision, Mrs Hodge referred to the absence of any reference on L's website to vehicle leasing. In the light of Mrs Lohmann's evidence that the agreement with Track Rent was a "one-off" transaction, we do not consider the absence of a website reference to be a factor of any significance in relation to the review decision. To the extent that Mrs Hodge might be said to have taken into account an irrelevant matter, our view, following *John Dee*, is that we do not consider that the decision not to restore the tractor unit would have been affected if Mrs Hodge had taken no account of the lack of reference to leasing on L's website; we find that her decision would inevitably have been the same.

(f) The totality of the evidence

158. Mr Sawtell referred in his written submissions to Mrs Hodge's evidence confirming that the new material provided by L in the course of its appeal did not change her decision. We accept that evidence; however, the test for us to apply is whether L has satisfied us, on the evidence before us, that Border Force's decision not to restore the tractor unit was a decision which no reasonable body could have arrived at.

159. We have referred to the evidence by reference to the subject headings used by the parties in their written submissions. In the case of each of those subject headings, we have arrived at the view that there is insufficient evidence to bring us to such a conclusion. We emphasise that clear evidence is required to show that a decision of a body such as that of Border Force in this case is, to use the less than accurate shorthand term, "unreasonable".

160. In addition to looking at the position by reference to those subject headings, we think it necessary to consider the decision not to restore in the light of the evidence as a whole, to see whether on more general grounds that decision was "unreasonable".

161. Without repeating what we have already said about each of the separate subject areas, our overall conclusion after looking at the evidence as a whole is that there is insufficient evidence to persuade us that Border Force's decision not to restore the tractor unit was one which no reasonable body could have arrived at.

162. We emphasise that the reason for our conclusion is the insufficiency of evidence. We do not regard L's case as implausible; had there been more evidence to support it, we might have been in a position to make different findings.

Outcome of the appeal

163. As we are not satisfied that Border Force's decision not to restore the tractor unit was "unreasonable", it follows that L's appeal must be dismissed.

Time estimates for the hearing

164. We find it necessary to comment on the length of time allowed for the hearing. Both parties estimated the hearing time required to be one day.

165. This proved to be wholly inadequate. Ms Choudhury's opening for L took the whole of the morning. Mrs Lohmann's evidence was given in German, and so an interpreter was needed. Inevitably, the time taken for her evidence was extended by the time required for questions and answers to be translated as appropriate from English to German and vice versa. Although we sat until about 17.15, all that could be done on the day of the hearing was to hear the evidence from Mrs Lohmann and from Mrs Hodge. To avoid going part heard, we decided that the only practical course was to ask the parties to provide written submissions after the hearing, on the basis of an agreed timetable.

166. We should point out that the original intention was for two other witnesses to give evidence, namely Mr Petrovskis and Mr Otzulis. Had Mr Petrovskis attended, an interpreter would have been needed to translate to and from Latvian. In the case of Mr Otzulis, it appears from his witness statement that he would have been able to give evidence in English.

167. Clearly, if both these witnesses had also attended, the required hearing time would have been considerably longer, and the one-day time estimate would have proved even less adequate. There would have been no choice other than to go part heard without even having completed the hearing of the evidence for both parties.

168. The parties' time estimates were accepted by the Tribunals Service, as there would have been no reason for it to question those estimates. In our view, it is the responsibility of the parties to give adequate time estimates, and to give notice that they need to be adjusted if it becomes clear that they may have become insuffiicient. Further, where oral evidence is to be given, such estimates need to take into account a realistic assessment of the time required to hear that oral evidence. Where interpreters are required, any such assessment must build in a sufficiently generous further length of time to allow for the additional translation time.

169. We hope that parties involved in other appeals will note our comments and avoid giving rise to difficulties such as those which we have encountered. There are considerable disadvantages in dealing with an incomplete hearing by means of written post-hearing submissions; the difficulties arising where an appeal goes part heard can be even greater.

Right to apply for permission to appeal

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

"Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 15 March 2015