[2016] UKFTT 422 (TC)

TC05176

Appeal number: TC/2015/05968

EXCISE DUTY – restoration – vehicle and trailer seized with goods belonging to another – refusal to restore vehicle and trailer – whether sufficient evidence that rented to driver – whether owner aware of adaptations – whether hardship resulting from seizure exceptional – held, insufficient evidence to demonstrate that Border Force decision unreasonable – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JERZY BOGDAN KOWALSKI **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE JOHN CLARK
JOHN ROBINSON

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 12 April 2016

The Appellant was not present and was not represented

William Dean of Counsel, for the Respondent

DECISION

1. The Appellant, Mr Kowalski, appeals against a decision of the Respondent (referred to in this decision as "Border Force") to refuse restoration of his vehicle and trailer seized at Dover on 10 April 2015 when being driven by Andrzej Pogoda. That decision was upheld on review.

2. Mr Kowalski sent an email to HM Courts and Tribunals Service ("HMCTS") on 29 September 2015. His attached letter was headed "Request for a Statutory Review by Impartial Review Officer – Relating to Seizure Notice: E4459007 – 13105". That letter was interpreted by HMCTS as amounting to a notice of appeal; Mr Kowalski did not fill in the Notice of Appeal form normally required for the purpose of notifying an appeal to the Tribunal.

3. In an email to HMCTS dated 8 February 2016 he requested that the Tribunal should hear his case without his presence; he could not afford a lawyer in the UK, and was not financially able to travel from Poland to appear in front of the Tribunal.

4. In addition, in a letter dated 20 March 2016 addressed to the Judge at the hearing venue, that letter being handed to us before the start of the hearing, he asked to excuse his presence at the hearing. His letter made various points which we noted had been raised in the correspondence with Border Force, and gave further information concerning the hardship resulting from the loss of his vehicle; we take these matters into account in arriving at this decision.

5. Having seen this message from Mr Kowalski, we were satisfied that it was in the interests of justice to proceed with the hearing in his absence.

The background facts

6. The evidence consisted of a bundle of documents, including a witness statement given by Deborah Hodge, a Review Officer for the Respondent, and a series of exhibits to that statement. In addition, Mrs Hodge gave oral evidence. From the evidence we find the following background facts; where appropriate, we make specific findings on other matters at a later point in this decision.

7. On 10 April 2015 at the port of Dover Mr Andrzej Pogoda ("Mr Pogoda") was intercepted by Border Force officers while driving a Hyundai Santa Fe registration number ELW 8U98 ("the vehicle") and a Benderup trailer registration number ELW 82W6 ("the trailer").The passenger travelling with him was Lukasz Pogoda ("Lukasz").

8. On initial questioning, Lukasz and Mr Pogoda gave answers to different questions asked by the officer. Lukasz stated that they had come from Poland and were staying for two days in Swansea. He gave the following reason for the visit:

> "We buy engines from a crash for drift cars."

When asked whether that was their business, his reply was "Sort of".

9. He stated that he had been to the UK once before. Mr Pogoda explained that he did not have cash to buy engines, and indicated that he would use "cards". The two of them would stay in the car on the trip.

10. He stated that the vehicle belonged to a friend. Lukasz explained that the trailer belonged to the same friend.

11. The officer asked the two of them whether they had any alcohol or cigarettes or tobacco. Lukasz stated that he had six bottles of wine. He also stated that he did not have any cigarettes or tobacco.

12. The officer then asked the Pogodas to open the end of the trailer. Lukasz then opened both ends of the trailer. The officer then examined the floor of the trailer, which appeared to be thick, and checked underneath. Through a slit which he pushed he could see a red packet which he believed to be cigarettes. He then asked whether there were cigarettes in the trailer; Lukasz replied, "Yes".

13. The officer then removed the floor of the trailer, which revealed a quantity of cigarettes. He asked whether there were cigarettes in the car; Lukasz replied that there were cigarettes under the wheel. On inspection the officer found a quantity of cigarettes in a cut out spare wheel underneath the vehicle.

14. The total of cigarettes found in the vehicle and trailer was 46,000, of which 44,000 were in the trailer and 2,000 in the vehicle. The amount of excise duty calculated on the total quantity of cigarettes was £10,191.80.

15. The officer was satisfied that the excise goods (ie the cigarettes) were held for a commercial purpose, not being for the Pogodas' own use, and seized them under s 139 Customs and Excise Management Act 1979 ("CEMA 1979") as being liable to forfeiture under both regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and s 49(1)(a)(i) CEMA 1979. The officer also seized the vehicle and trailer under s 139(1) CEMA 1979 as being liable to seizure under s 141(1)(a) because it was used for the carriage of goods liable to forfeiture. The vehicle was also seized as being liable to forfeiture under s 88 CEMA 1979 as it was adapted or altered for the purpose of concealing goods.

16. The officer read to Mr Pogoda as the driver a formal statement known as a "Commerciality Statement" and explained that they were not under arrest and could leave at any time. When asked whether they understood, both of them were recorded in the officer's notebook as having replied "No". When asked whether they wanted to stay for interview, Lukasz replied, "We want to go". The officer issued forms BOR156, BOR162, PN1, Notice 12A and form SEE 004C relating to the seizure to the vehicle and trailer; this specified that it should be handed as soon as possible to the owner of the vehicle.

17. Subsequently, in the manner described below, Mr Kowalski attempted to challenge the legality of the seizure in the magistrates' court, but was out of time to

do so. The goods, vehicle and trailer were therefore condemned as forfeit to the Crown by the passage of time under para 5 Sch 3 CEMA 1979, which deemed the excise goods to be held in the UK for a commercial purpose and not for own use.

18. In a letter received by Border Force on 11 May 2015 Mr Kowalski attempted to give a notice of claim relating to the seizure of the vehicle and the trailer. He stated that he enclosed proof of ownership of the vehicle and trailer, and an English translation of a hiring agreement relating to the vehicle and trailer expressed to be concluded on 1 April 2015 and to run until 30 June 2015. The hirer referred to in the agreement was Mr Pogoda.

19. On 11 May 2015 Border Force wrote to Mr Kowalski informing him that for an appeal against the validity of a seizure to be valid under para 6 Sch 3 CEMA 1979, it had to be received in writing by Border Force within one month of the seizure. As the seizure had been on 10 April 2015, any appeal request should have been submitted by 10 May 2015. This time limit was dictated by statute and could not be altered or extended.

20. In his letter to Border Force dated 25 May 2015 Mr Kowalski requested a letter confirming the confiscation or disposal of the vehicle and trailer. He also requested Border Force to send back the licence plates by mail, as he needed to return them to the Traffic Department. The plates and a document confirming confiscation or disposal, issued by the British Customs Office, were necessary to de-register the vehicle and trailer from the records of the Traffic Department in Poland.

21. On 2 June 2015 Border Force replied; they had contacted their Queen's Warehouse, which had confirmed that the vehicle and trailer were still held by Border Force. As a result, Border Force were unable to return the licence plates at that time. They commented that according to their records, Mr Kowalski had not requested the return (ie restoration) of the vehicle and trailer; if he wished to seek restoration he should write to them with his request and proof of ownership of the vehicle trailer.

22. Mr Kowalski responded by fax received by Border Force on 9 June 2015 indicating that he wished to request restoration of the seized items. They wrote on that date to acknowledge his request, and stated that before they could consider restoring any vehicle to him they needed to be satisfied that he was the current owner. They asked for proof of ownership.

23. Mr Kowalski replied by letter dated 16 June 2015, enclosing a copy of the Vehicle Card and a sworn translation, and corresponding documentation for the trailer. He sent further copies of the documentation which he had previously supplied to Border Force. He stated:

> "I would like to emphasise again that I was never aware of the purpose my vehicles would be used by the person renting from me.
>
> Had I had such knowledge, I would never have agreed to rent them out."

24. On 3 July 2015 Mr Kowalski responded to a questionnaire which had been sent to him by Border Force. He stated that he had been the owner of the vehicle since 10 December 2012. The vehicle was normally stored at his premises in Kurowice. He had known Mr Pogoda, who had been a good acquaintance of his, since 1993. He had rented his premises to Mr Pogoda and his family. The vehicle had been rented until 30 June 2015, after which Mr Pogoda was supposed to buy the car and trailer from Mr Kowalski. Mr Pogoda had signed the rental agreement for the vehicle and trailer at Mr Kowalski's home in Lodz. The only previous rental arrangement had been with Mr Pogoda, for the vehicle alone; this had been from 10 February 2015 to 30 March 2015. Mr Pogoda had stated that he would use the car and trailer to transport construction materials and spare parts for construction machines. As far as Mr Kowalski was aware, Mr Pogoda did not own another car.

25. In February 2015 the insurance had been extended to the whole territory of Europe for the purpose of buying construction materials in the Czech Republic and Slovakia and second hand parts and construction machine engines and parts in Germany and France. Mr Kowalski had been aware that the vehicle would cross the country borders. The rental agreement for the car and trailer was for PLN 1,000 per month. Any fines were to be payable by the hirer, Mr Pogoda. The rental period was to 30 June 2015. Mr Kowalski had had no knowledge of the items in the vehicle at the time of seizure; the articles which Mr Pogoda was entitled to transport were as already described. None of the goods seized were for Mr Kowalski and he made no use of them.

26. Mr Kowalski stated that he was the owner of a Mercedes B-Klasse, manufactured in 2006.

27. At the end of the questionnaire he set out personal details, including his occupation as "Musician", and signed his name.

28. On 14 July 2015 Border Force wrote to Mr Kowalski setting out their decision that on this occasion the vehicle and trailer would not be restored. The officer was not satisfied that Mr Kowalski was an innocent third party or that he had taken reasonable steps to prevent smuggling in his vehicle. The officer concluded that there were no exceptional circumstances that would justify a departure from the Border Force's policy as the copy rental contract which Mr Kowalski had supplied did not show that he had taken reasonable precautions to prevent his vehicle or trailer being used for illegal purposes, and the officer did not find it plausible that Mr Kowalski could hire out a vehicle and trailer in Poland and that only nine days later it would be seized by Border Force in the UK fully adapted for smuggling a large amount of cigarettes.

29. Mr Kowalski wrote to Border Force on 10 August 2015 requesting a statutory review. (We set out his arguments below.) On 27 August 2015 a Border Force officer wrote to Mr Kowalski explaining the review process and inviting him to provide any further information in support of his request for a review. Nothing further was received by Border Force before Mrs Hodge wrote to Mr Kowalski on 2 September 2015 setting out her conclusion on review that the vehicle and trailer would not be restored. (We consider her conclusions below.)

30. As indicated above, Mr Kowalski sent an email to HMCTS on 29 September 2015, the attachments being his letter of the same date referred to above, a copy of his replies to the Border Force questionnaire (without the signature details), the review letter, and a photocopy of his identity card. He did not complete a Notice of Appeal form. His letter to HMCTS was in exactly the same form as his letter to Border Force dated 10 August 2015 requesting the review.

The law

31. We set out ss 49(1), 88, 139(1) and 141(1) CEMA 1979:

> "**49 Forfeiture of goods improperly imported**
>
> (1) Where—
>
> (a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being goods chargeable on their importation with customs or excise duty, are, without payment of that duty—
>
> (i) unshipped in any port,
>
> (ii) unloaded from any aircraft in the United Kingdom,
>
> (iii) unloaded from any vehicle in, or otherwise brought across the boundary into, Northern Ireland, or
>
> (iv) removed from their place of importation or from any approved wharf, examination station or transit shed; or
>
> (b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; or
>
> . . . , those goods shall, subject to subsection (2) below, be liable to forfeiture."
>
> "**88 Forfeiture of ship, aircraft or vehicle constructed, etc for concealing goods**
>
> Where—
>
> (a) a ship is or has been [in United Kingdom waters]; or
>
> (b) an aircraft is or has been at any place, whether on land or on water, in the United Kingdom; or
>
> (c) a vehicle is or has been within the limits of any port or at any aerodrome or, while in Northern Ireland, within the prescribed area,
>
> while constructed, adapted, altered or fitted in any manner for the purpose of concealing goods, that ship, aircraft or vehicle shall be liable to forfeiture."
>
> "**139 Provisions as to detention, seizure and condemnation of goods, etc**

(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard."

"141 Forfeiture of ships, etc used in connection with goods liable to forfeiture

(1) Without prejudice to any other provision of the Customs and Excise Acts 1979, where any thing has become liable to forfeiture under the customs and excise Acts—

(a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and

(b) any other thing mixed, packed or found with the thing so liable, shall also be liable to forfeiture."

Mr Kowalski's arguments

32. As Mr Kowalski did not complete a Notice of Appeal form, he has made no formal statement of his grounds of appeal.

33. His letter dated 30 April 2015 sought to make a claim against Border Force on the grounds of unlawful seizure; we comment on this in a later section of this decision.

34. A later letter from him to Border Force with the date "10 June 2015" handwritten at the top stated:

> "As I had written previously, I had not been aware of the purpose these vehicles would be used for by the person who rented it from me (please refer to the rental agreement)."

35. Taken together with his letter dated 16 June 2015 (see the extract quoted above), it appears that Mr Kowalski is arguing that he is an innocent and blameless third party and that the vehicle and the trailer ought to be restored to him.

36. We refer below to other points raised by Mr Kowalski.

Arguments for the Respondent

37. In its Statement of Case, the Respondent referred to the Court of Appeal decision in *Revenue and Customs Commissioners v Jones and Jones* [2011] EWCA Civ 824 at [71]. This made clear that excise goods were to be regarded as duly condemned if the owner did not challenge the legality of the seizure in the magistrates' court, or withdrew from such a challenge.

38. Mr Dean emphasised that the jurisdiction of the Tribunal in a restoration case was limited by the terms of s 16(4) of the Finance Act 1994 ("FA 1994"). The

jurisdiction was supervisory. The test was not what the Tribunal would have done, but whether the Tribunal was satisfied that Border Force could not reasonably have arrived at the decision not to restore the vehicle and trailer. Section 16(6) FA 1994 made it clear that it was for Mr Kowalski in the present case to show the Tribunal that the test was satisfied.

39. Mr Kowalski had provided no formal evidence; if his letter dated 10 August 2015 were to be accepted as evidence, it was a statement of truth. Mr Kowalski was not present at the hearing to be tested on points from the papers and to give his own answers; in his absence, it was not possible to test the credibility and reliability of such answers.

40. Mr Dean made submissions on factual issues, in particular in relation to the matters considered by Mrs Hodge in her review decision. We consider those factual issues below.

41. In the context of the test under s 16(4) FA 1994, Mr Dean referred to the principle in *John Dee Limited* [1995] STC 941 concerning the effect of a failure by the relevant body to take into account additional material; where it was shown that, had the additional material been taken into account, the decision would *inevitably* have been the same, a tribunal could dismiss a supervisory appeal of this nature.

Discussion and conclusions

42. As Mr Kowalski was not present at the hearing, we think it advisable, in order for him to understand the position, that we should 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*.

43. As a result, the only question which this Tribunal can consider is the decision not to restore the vehicle and trailer. 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. As Mr Dean submitted, the burden of proof falls on Mr Kowalski. 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.

44. 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.

45. 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 its decision not to restore the vehicle and trailer, we cannot simply order Border Force to restore the vehicle and trailer to Mr Kowalski; in such circumstances, the only course would be to order a further review.

46. We agree with Mr Dean'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 as the Reviewing officer, we would have to uphold that decision if it was one that could be regarded as having been reasonably arrived at.

47. We have already referred to Mrs Hodge's conclusion in her review letter that the vehicle and trailer should not be restored. We set out below the relevant parts of her letter.

Ms Hodge's letter and oral evidence

48. She set out the background to the case; we have described much of this. She referred to the documents given to Mr Pogoda at the time of the seizure, and stated:

> "As you have not challenged the legality of the seizure (because your appeal was late) the things are duly condemned as forfeit to the Crown by the passage of time under paragraph 5 of schedule 3 of CEMA and any excise goods are confirmed as held in the UK for a commercial purpose (not for own use)."

49. In her consideration of restoration, she had not considered the legality or the correctness of the seizure itself, as there had been an opportunity for the lawfulness of the seizure to be raised in the magistrates' court.

50. Her starting point was that the seizure of the vehicle and trailer was lawful, it was adapted, and the excise goods involved were commercial (not for own use). She examined the circumstances of the case to determine how to apply the relevant Border Force policy.

51. Mr Kowalski had not disputed that both the vehicle and trailer were adapted, but had attempted to distance himself by claiming that the vehicle was rented to Mr

Pogoda. However, Mr Pogoda had not mentioned this on the day of the seizure; he had just said that it belonged to a friend. He did not say that he was leasing it or that there was any formal agreement between him and Mr Kowalski.

52. Originally Mr Kowalski had stated that the vehicle was rented from 1 April 2015, but more recently he had claimed that the car alone had been leased before that, from 10 February 2015. He had not provided any evidence of payment of the rental or any deposit required or any action which he had taken against Mr Pogoda as a result of the seizure.

53. Mrs Hodge referred to other journeys made by Mr Pogoda. In addition to this trip in the course of which the vehicle was seized, Mr Pogoda had travelled to the UK on 19 March 2015 and also on 28 March 2015, returning early the following morning. She expressed the view that both of these trips had given Mr Pogoda the opportunity to smuggle goods. Mr Kowalski had explained that a car mechanic could accomplish a lot within one week and therefore could easily have adapted it within the nine days of the rental agreement. She commented that this might be true, but it was unlikely that a friend would act that way without Mr Kowalski's knowledge. Mr Kowalski was clearly still in touch with Mr Pogoda, as mentioned in Mr Kowalski's letter to Border Force dated 10 August 2015.

54. The quantity of cigarettes seized would have cost approximately £16,000 on the UK market, and even if Mr Pogoda had only made a profit of £3 per pack, this would mean a profit of almost £7,000. If he had imported similar quantities of cigarettes on his two previous trips, he would have been likely to have made £14,000. Mrs Hodge therefore considered that Mr Kowalski's redress should be with Mr Pogoda.

55. She explained that if the vehicle were owned by a third party who was not present at the time of the seizure, and that party could show that he was both innocent of and blameless for the smuggling attempt, then consideration might be given to restoring the vehicle for a fee. If in addition to being both innocent and blameless the third party demonstrated that he had taken reasonable steps to prevent smuggling in the vehicle then consideration could be given to restoring it free of charge. Mrs Hodge was not convinced that Mr Kowalski was innocent and blameless of the offence or had taken reasonable steps to prevent his vehicle from being used for smuggling. In her view the "lease agreement" was part of an attempt to circumvent the non-restoration policy. She therefore declined to restore the vehicle and trailer to Mr Kowalski.

56. She had also paid particular attention to the degree of hardship caused by the loss of the vehicle. She sympathised with Mr Kowalski's difficulties. She explained that hardship was a natural consequence of having a vehicle seized and that she would consider only exceptional hardship as a reason not to apply the policy that a vehicle should not be restored. Mr Kowalski had stated that his wife had a vehicle, and therefore in the circumstances Mrs Hodge did not consider that Mr Kowalski had suffered exceptional hardship by the loss of the vehicle. She concluded that in all the circumstances there was no reason to disapply Border Force's Policy of not restoring the vehicle.

57. Under the heading "Conclusion" she stated:

> "I am of the opinion that the application of the policy in this case treats you no more harshly or leniently than anyone else in similar circumstances and have not found sufficient and compelling reasons to offer restoration."

58. After stating that she had decided to uphold the original decision that the vehicle and trailer should not be restored, she included the following paragraph:

> "If you have *fresh* information that you would like me to consider then please write to me: however, please note that I will not enter into further correspondence about evidence that has *already* been provided."

59. In oral evidence, Mrs Hodge indicated that she had seen Mr Kowalski's letter to HMCTS dated 29 September 2015, but that it had not been received until after she had made her review decision. Mr Kowalski had referred to the rental agreement. She was not convinced that the vehicle was technically rented. Mr Kowalski had provided no evidence of payment of the rentals to him. Mrs Hodge commented that she had often seen cases in which rental agreements were downloaded from the internet and printed for use in restoration cases. The copy of the agreement in the bundle was an English translation. There had been a number of Polish documents in the Border Force file when she had received it; they had meant nothing to her. She commented that at the time of the seizure, Mr Pogoda had not mentioned that the vehicle and trailer were leased.

60. She had not seen or received any evidence apart from what had been said when the vehicle was seized from Mr Pogoda. She was not aware that Mr Kowalski had taken any action at all against Mr Pogoda following the seizure. The rental agreement did not contain any clause to the effect that if the hirer was caught smuggling, the agreement would be terminated.

61. In her view, the rental agreement had been produced after the event to distance Mr Kowalski from the seizure, not to protect himself. The indications suggesting production after the event were that Mr Pogoda had merely said that the car was borrowed. In addition, Mr Kowalski had referred to the vehicle having been borrowed before; it had only been when he was asked that he had produced information relating to this.

62. In her view, Mr Pogoda had been allowed to use the vehicle and trailer as and when he required them, but the arrangement did not form any legal agreement. In order for her to be satisfied that a rental agreement was truly in force, it would have been necessary for her to have independent evidence in the form of bank statements.

63. Nothing had been heard from Mr Pogoda since the seizure; he could have said that Mr Kowalski did not know about this use of the vehicle and trailer.

64. Mrs Hodge commented that Mr Pogoda had told the officer that he and Lukasz were in the UK to buy engines. She questioned why they would come to the UK for car engines when it would be much more expensive to buy them here than in Poland.

65. She did not accept that Mr Kowalski rented the vehicle to Mr Pogoda. If Mr Kowalski was not aware of Mr Pogoda's use of the vehicle and trailer for the purpose of transporting the seized goods, his redress would be against Mr Pogoda.

66. Mr Kowalski had stated in his letter that he had not seen his vehicles for nine days. Mrs Hodge thought it highly unlikely that he did not know about the adaptations; leaving aside the seizure, once the vehicle and trailer were to have been returned to him following the end of the agreement, it would have been obvious that the vehicle and trailer had been adapted. She thought it more likely that he would have been aware. She commented that it was easier for a person not travelling to claim that they were an innocent third party.

67. Mr Kowalski had indicated that he was able to rent the vehicle to Mr Pogoda as Mr Kowalski was using his wife's car at the time (a 2006 Mercedes B Class) while she was recovering from varicose veins surgery on her right leg; she had since recovered and Mr Kowalski really needed his vehicle back, so that they could both resume their work. Mrs Hodge's view was that as his vehicle had been rented to another person, he did not need it, and thus the question of exceptional hardship did not arise. Mr Kowalski had also indicated that he intended to sell the vehicle to Mr Pogoda, in which event Mr Kowalski would not have had been in a position to use the vehicle.

68. Mrs Hodge referred to the large sum of money involved. The vehicle had travelled to the UK twice before, and it appeared likely that cigarettes had been imported on those occasions, so she did not consider it disproportionate not to restore the vehicle and trailer. If they were to be restored, there was a prospect of future use for the same purpose.

69. In response to the Tribunal's questions, Mrs Hodge did not know whether the modifications to the trailer had involved welding; she had not seen photographs of the modified trailer. She confirmed that the use of rental agreements in similar cases had become increasingly common.

Mr Dean's submissions on fact

70. Mr Dean submitted that Mrs Hodge had followed the operation of Border Force's policy, which was that a vehicle adapted for the purposes of smuggling would not normally be restored. This was a sustainable and reasonable rule, taking account of the damage to the UK revenue caused by smuggling. If the vehicle and trailer had not been seized, they could have been used again for the same purposes; there had been two previous visits. Mrs Hodge had been guided by but not constrained by the policy.

71. Mr Kowalski had given his answers in the questionnaire. He had had an opportunity to put his points to Mrs Hodge as the Review officer before she made her decision. Nothing new had been provided. There was no further evidence. It had not been possible to cross-examine Mr Kowalski.

72. Mr Dean commented on the matters raised by Mr Kowalski:

(1) In respect of the rental agreement, Mr Dean submitted that Mrs Hodge had been within the scope of reasonable conclusions when she had come to the conclusion that there had been no rental agreement. Mr Pogoda had not stated that he was a lessee of the vehicle and trailer.

(2) Mr Kowalski had initially referred to having rented the car and trailer to Mr Pogoda on 1 April 2015. It had only been at a later stage that Mr Kowalski had provided the earlier agreement dated 10 February 2015. There had been no evidence of payment pursuant to either rental agreement. There had been no basic checks or protections, no deposit, no protection for Mr Kowalski against illicit use; there was nothing in the agreement to say that if there was illicit use of the vehicle and trailer, the agreement could be terminated. There was no evidence of any action being taken against Mr Pogoda. Mr Dean commented that there was no redress in England; he was not aware of the position under Polish law. The "wrongdoing" (ie the illicit use) had taken place in this country.

73. It appeared that there had been no substantive enquiry at all by Mr Kowalski of Mr Pogoda. There was no independent evidence relating to acceptance of liability. It was notable that there was no evidence from Mr Pogoda, the driver. Mr Dean submitted that the Tribunal was entitled to ask the question, if Mr Pogoda was accepting full fault, what was the objection to him putting in full evidence? Mr Dean asked that the Tribunal should put little or no weight on what Mr Kowalski said about Mr Pogoda.

74. Mr Dean submitted that it was unlikely in all the circumstances for the trailer to have been adapted without Mr Kowalski's knowledge, and that it was not unreasonable for Mrs Hodge in all the circumstances to have drawn that conclusion.

75. He further submitted that Mr Kowalski had not been innocent of and blameless for the event. Mr Kowalski had certainly not taken steps to prevent smuggling. He had had no control over what Mr Pogoda was transporting, or over checking the vehicle and trailer. Mrs Hodge had been entitled to take into account all the circumstances, including wider trends in the circumstances of other cases. This had been a smuggling attempt of which Mr Kowalski was likely to have been aware.

76. In relation to the rental agreement, it would have been obvious to Mr Kowalski if the vehicle and trailer had been returned that alterations to them had been carried out. There had been a one day gap between the two agreements; presumably the vehicle would have been returned at the end of each contract. The second agreement did not refer to Mr Pogoda buying the vehicle; this would have been the point at which Mr Kowalski would have seen the vehicle.

77. On the question of exceptional hardship, it was natural that seizure of a vehicle could result in hardship. Under the Border Force policy, hardship had to be exceptional in order to justify a decision to restore a vehicle. In Mr Kowalski's case, he had another vehicle. He had stated (in his email dated 8 February 2016 to HMCTS) that he had lost his job in December 2015 and was currently unemployed. In his letter dated 10 August 2015 requesting a review, he had stated that he had been left with no vehicle to continue his work. However, according to his replies to the Border Force questionnaire, he had stated that after the rental period to 30 June 2015, Mr Pogoda was supposed to buy the car and trailer from him. Mr Dean commented that as a result, Mr Kowalski would not have had the vehicle and trailer at the time of his review request even if they had not been seized.

78. Mr Dean referred to the issue of proportionality. The value of the vehicle and trailer had to be compared to the amount of duty involved; the amount at risk to the revenue had been over £10,000. This was not a lorry trailer. The vehicle and trailer had been adapted for smuggling, which meant that there were risks on every occasion that they crossed the border. Given that risk, it was not disproportionate for Border Force to seize them, or to refuse to restore them. He submitted that the Tribunal could not reach the conclusion that Border Force's refusal to restore them was "unreasonable".

Our review of the evidence

79. We consider whether Mr Kowalski has succeeded in discharging the burden of proving that Border Force's decision was one at which it could not reasonably have arrived (ie that the decision was, in more colloquial and less accurate terms, "unreasonable").

80. His case has various similarities to that of *F Lohmann GmbH v Director of Border Revenue* [2016] UKFTT 0185 (TC), TC04971. In that case, the appellant had no independent proof of rental payments having been made under the lease agreement. The agreement contained no restrictions on the use of the vehicle, and did not contemplate the possibility of the vehicle being seized by any country's border officials or customs authorities. The driver was not present at the hearing to give evidence or be cross-examined. The owner of the goods had not come forward to challenge the legality of the seizure.

81. In relation to the latter point, we consider that it was perhaps somewhat misleading in Mr Kowalski's case for Border Force to refer in their letter dated 11 May 2015 to the possibility of him challenging the legality of the seizure. In the absence of a challenge by the owner of the goods, the goods would inevitably be condemned; this follows from the application of Sch 3 CEMA 1979, in particular the combination of para 5 (which deems the goods to have been condemned if no notice of challenge has been given within the time limit) and para 10, which requires that if a person claims that the goods are not liable to forfeiture, that person (or that person's solicitor) must swear that the goods were the claimant's property. As a consequence, it would not be possible for the third party owner of the vehicle and trailer to challenge the forfeiture of the goods in order to escape the application of s 141(1)(a)

CEMA 1979, which makes the vehicle and trailer also liable to forfeiture. The deemed condemnation of the goods on the grounds that they were confirmed as held in the UK for a commercial purpose, and not for own use, automatically results in the vehicle and trailer being regarded as having been used for the commercial importation of excise goods without payment of duty, and there is no basis on which Mr Kowalski as owner of the vehicle and trailer can question their forfeiture.

82. We are fully aware that questions concerning the legality of the seizure are not (generally speaking) matters for these Tribunals, and simply comment on Border Force's letter dated 11 May 2015 on the grounds that the lateness of Mr Kowalski's appeal against the seizure, which arrived the day after the expiry of the one month time limit (despite Mr Kowalski's subsequent statement, which we are unable to verify, that he had posted all the required documents by Polish airmail registered letter on 30 April 2015) would have made no difference to the ultimate outcome, which was that as the owner had not come forward to challenge the seizure, the goods were deemed to be condemned and consequently the vehicle and trailer were confirmed as liable to forfeiture.

83. We return to the question of restoration. In his letter dated 10 August 2015 requesting a review (and in his identical letter to HMCTS dated 29 September 2015) Mr Kowalski questioned the conclusion of the Border Force officer who had written on 14 July 2015 to inform him that the vehicle and trailer would not be restored. Mr Kowalski stated:

> "The Officer reviewing my case declined to restore my possessions, justifying this decision that the vehicle was adapted for smuggling and seized on the border checkpoint "only 9 days after I rented it out".
>
> I find this logic hard to believe – I have not seen my vehicles for 9 days and I had no idea they were adapted for smuggling. After the Border Force confiscated the said vehicles, I have inquired [*sic*] with the renter what adaptations he had made and he claimed that he had cut part of the spare wheel in the car (which is fitted in the back, under the car's floor) in order to put six boxes of cigarettes and fitted the trailer with a double bottom. I do not know how truthful his answer was and what adaptations were truly made, but I believe that professional car mechanics (or whoever makes such modifications to vehicles) can accomplish a lot within a week (between the date of renting and the date of seizure."

84. Mr Kowalski continued:

> "In addition, the Officer handling my case has mentioned that I had not taken reasonable precautions to prevent my property from being used for illegal purposes in the contract. I have used a standard rental agreement, used by millions of people in Poland and I was not aware that I should put a clause about using my property for illegal purposes – it is not required in Poland and I had truly no idea that my property would be used for illicit purposes. I have rented my car to Mr Pogoda before and it was always returned in unchanged condition, so I had no reasons to believe that this time anything would be different. He also

> stated verbally what purpose he would be using my property – for transporting car and construction machines parts."

85. We have considered Mr Kowalski's arguments on adaptation, which we interpret as amounting to a contention that Border Force's conclusion as to the implausibility of his lack of awareness of the adaptations was unreasonable. We have referred to Mrs Hodge's evidence, and to Mr Dean's submissions based on her evidence. We are not satisfied that Mr Kowalski has shown Border Force's conclusion on this issue to have been unreasonable. In particular, on the assumption that the rental agreement was effective (a matter on which we express our conclusions at a later point) the vehicle and trailer were due to be returned to Mr Kowalski at the end of the rental period, ie 30 June 2015. What explanation would Mr Pogoda have given to Mr Kowalski for the changes to the vehicle and trailer? How likely would it have been that Mr Pogoda could carry out work (or arrange for work to be carried out) to put both the vehicle and the trailer back into their original condition, even if this were possible? Could Mr Kowalski have been unaware of what his friend Mr Pogoda had done or caused to have done to the vehicle and trailer? We see no reason to question the approach which Border Force took in relation to this issue. We emphasise that we heard no evidence either from Mr Kowalski or Mr Pogoda to suggest that this approach was unreasonable.

86. In relation to the rental agreement, we do not consider Border Force's doubts to have been unreasonable. Mr Kowalski has produced no evidence of any payments under the rental agreement. Mr Pogoda made no mention of a rental arrangement when he was asked on 10 April 2015; he simply stated that it was a friend's car. The rental agreement was not produced until Mr Kowalski wrote to Border Force on 30 April 2015. The earlier rental agreement in respect of the vehicle alone, expressed to be for the period 10 February 2015 to 30 March 2015, was not provided to Border Force until Mr Kowalski sent in his replies to the Border Force questionnaire on 3 July 2015. We do not consider it unreasonable for Mrs Hodge to have taken the view, based on observation of a number of other cases, that it was becoming more common for owners of vehicles to produce rental agreements as a means of seeking to distance themselves from the seizure of goods with a view to increasing the chance that their vehicles would be restored.

87. As in *Lohmann*, it is not sufficient for a vehicle owner to produce a rental agreement; to satisfy the evidential burden, it is necessary to have independent evidence of the actual payment of the specified rentals by the hirer to the owner. Internal records are not sufficient; what is required is evidence in the form of bank statements or other similar independent documentation, and possibly other evidence to verify the documentation produced.

88. In his letter dated 20 March 2016 addressed to the Judge, which was in largely identical terms to those of his email to HMCTS dated 8 February 2016, he referred to Mrs Hodge's conclusion on review that

> ". . . I must have known about the illegal operation attempt, based on the fact that I did not sue Mr Pogoda for damages. This is a completely false deduction. I have not sued Mr Pogoda, as the car has been seized

> by the Border Force illegally and I requested a restoration. Until this case is finalised – I have no base to sue Mr Pogoda for damages. Even if he did attempt to smuggle anything – it does not equal that my vehicle should be taken away from me, unless it can be proven that I had anything to do with the smuggling, or I could profit from it in any way."

89. We do not think that it was unreasonable of Mrs Hodge to take note of the absence of any claim against Mr Pogoda. Mr Kowalski did not provide Border Force with any explanation of his reasons for not having made any claim, nor had he given any indication that, in the absence of restoration, he had any alternative plans to seek some form of compensation from Mr Pogoda for the loss of the vehicle.

90. In any event we are satisfied, on the basis of Mrs Hodge's evidence, that her decision to confirm the refusal to restore the vehicle and trailer would inevitably have been the same if Mr Kowalski had told her of his reasons for not having made a claim against Mr Pogoda. As a result, if her reference to the lack of any claim could be regarded as an irrelevant consideration, it is clear from *John Dee* that this does not render her decision unreasonable.

91. We have already dealt with the other matters raised in that part of Mr Kowalski's letter dated 20 March 2016; he is not able to challenge the legality of the seizure, and thus in that context his state of knowledge or otherwise as to the activities of Mr Pogoda is not a matter that is open to consideration by this Tribunal.

92. The other matter referred to by Mr Kowalski was the hardship caused as a result of the seizure of the vehicle and trailer. He argued that although he had rented them to Mr Pogoda, he now needed them as his wife had recovered from surgery and now needed her car, the Mercedes B-Class.

93. Again, we do not find Border Force's approach to this question to have been unreasonable. Mr Kowalski had stated to Border Force that he had rented the vehicle and trailer to Mr Pogoda, and that after the end of the rental term Mr Pogoda was supposed to buy them from him. On the basis of that statement, and on the basis that Mr Kowalski's wife had the Mercedes, Border Force concluded that Mr Kowalski had not suffered exceptional hardship. We do not view this conclusion as unreasonable, particularly as there was at the very least a degree of inconsistency between the statement that the vehicle and trailer were to be sold and the contention that Mr Kowalski needed the vehicle to be returned to him. Further, no specific reasons were given by him to justify his claim for the return of the trailer.

94. In the light of our finding in the previous paragraph, we do not consider that his more recent change in circumstances, as described in his email to HMCTS dated 8 February 2016 and his similar letter to the Judge, affects the position. He stated that in December 2015 he had lost his job and that he was currently unemployed; that does not explain away the inconsistency to which we have referred, nor is there any additional explanation of his need for the vehicle in the absence of any current employment. Without additional evidence as to his position, rather than statements

amounting only to mere assertions, there is no basis on which we could conclude that Border Force's decision not to restore the vehicle could be regarded as unreasonable.

95. In addition, s 88 CEMA 1979 renders liable to forfeiture a vehicle constructed, adapted, altered or fitted in any manner for the purposes of concealing goods. Both the trailer and the vehicle had been adapted in such a manner. As Mrs Hodge stated in her review letter, the Border Force policy for adapted vehicles is non-restoration. Given the possibility that the vehicle and trailer might be used again for the same purpose in the event that they were restored, we consider it to have been a reasonable decision for Border Force to refuse restoration in the circumstances of this case.

96. In addition to considering these specific issues, we have also considered whether in all the circumstances of Mr Kowalski's case there are any broader grounds for concluding that the decision of Border Force not to restore the vehicle and trailer was a decision which Border Force could not reasonably have arrived at. We are not satisfied that there is any evidence to support such a conclusion.

Outcome of the appeal

97. As we are not satisfied that the decision of Border Force not to restore the vehicle and trailer was "unreasonable", Mr Kowalski's appeal must be dismissed.

Right to apply for permission to appeal

98. 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: 16 JUNE 2016