[2022] UKFTT 83 (TC)

TC 08414/V

EXCISE DUTY and VAT – appellant purchased Chanel suitcases for $14,399 – value on importation declared as $500 – suitcases seized – refusal to restore on basis that suitcases intentionally undervalued – preliminary issues as to whether Border Force had "pleaded and particularised" the Appellant's alleged dishonesty; whether Border Force was required to do so, and whether the Appellant could be cross-examined in relation to the alleged dishonesty – held: no such pleading or particularisation requirements in a restoration case – overall decision in favour of Border Force

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/03165

BETWEEN

KAREN LANGLEY **Appellant**

-and-

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE ANNE REDSTON
MS GILL HUNTER

The hearing took place on 9 August 2021 by video. A face to face hearing was not held because of the coronavirus pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was therefore held in public.

Mr Howard Watkinson of Counsel, instructed by JMW Solicitors LLP, for the Appellant.

Ms Rose Slowe of Counsel, instructed by the General Counsel and Solicitor to the Director of Border Revenue, for the Respondent.

After the hearing, supplementary written submissions were provided by Mr Watkinson on behalf of the Appellant, and by Mr Michael Newbold of Counsel and Ms Slowe on behalf of the Respondent.

DECISION

Summary

1. On 27 May 2020, Mrs Langley paid $14,300 plus postage of $99.10 for a set of three Chanel suitcases ("the suitcases"). However, when the suitcases were imported into the UK their value was declared to be $500. The suitcases were seized by the Border Force and Mrs Langley applied for their restoration. Officer Brenton refused restoration on the basis that there had been "a conscious attempt to evade import duties".

2. Mr Watkinson submitted that Officer Brenton's restoration decision was based on his assessment that Mrs Langley had acted dishonestly, and that if the Border Force wished to rely on dishonesty to justify and/or explain their decision, they had to "plead and particularise" that dishonesty in their Statement of Case, and had not done so. As a result, they were unable to justify their decision before the Tribunal or to cross-examine Mrs Langley on her alleged dishonesty, and her appeal should therefore succeed.

3. It was common ground that in ordinary civil litigation, pleading and particularisation of fraud or dishonesty is required. Our understanding of those terms is that the allegation must be early and explicitly set out in the Statement of Case or Grounds of Appeal, and must include the "facts, matters and circumstances relied on" in relation to the allegation, see *Three Rivers District Council v Bank of England* [2001] UKHL 16 ("*Three Rivers*"). The parties disagreed on whether the same requirements applied in a restoration case such as thus.

4. This decision therefore decides the following points as preliminary issues:

   (1) whether Officer Brenton had based his restoration decision on Mrs Langley's alleged dishonesty, and if so, whether the Border Force had pleaded and particularised that dishonesty;

   (2) whether the Border Force have to plead and particularise that dishonesty, such that a failure to do so means they are unable to rely on that allegation to justify and/or explain Officer Brenton's decision; and

   (3) whether a failure to meet pleading and particularisation requirements prevents the Border Force from cross-examining Mrs Langley on her alleged dishonesty, so that her witness evidence on that issue has to be accepted unchallenged.

5. The parties provided supplementary submissions, which the Tribunal considered together with the Bundle provided for the hearing; the parties' skeleton arguments, and the oral submissions made at the hearing.

6. We decided the preliminary issues as follows:

   (1) Officer Brenton had based his restoration decision on his assessment that Mrs Langley had been dishonest, and that dishonesty had not been pleaded or particularised in the Statement of Case.

   (2) However, the Border Force was not required to meet the pleading and particularisation requirements which apply to civil claims and certain tax and duty appeals, because:

      (a) the Tribunal's statutory jurisdiction is to decide whether the Border Force officer has reasonably arrived at the decision under appeal, and if not, to direct that the Border Force make a new decision. Our task is thus to consider the evidence on which the officer relied, together with any further evidence put forward by the

parties; make findings of fact, and then to decide in the light of those facts whether the officer's decision was reasonable. That jurisdiction is the same whether or not an officer's decision was based on his assessment that the appellant had been dishonest. The only issue before the Tribunal is the reasonableness of his decision, and it follows from that narrow jurisdiction that there is no obligation on the Border Force to meet the pleading and particularisation requirements which apply more generally in cases of fraud or dishonesty; and

(b) in restoration cases, the burden of proof is on the appellant. In *Awards Drinks v HMRC* [2021] EWCA Civ 1235 ("*Awards Drinks*"), Henderson LJ confirmed that where the burden of proof is on the appellant, there is no requirement for the respondent to plead or particularise the fraud or dishonesty, see the passages cited at §89ff.

(3) There was no requirement for the Border Force to meet pleading and particularisation requirements in order to cross-examine Mrs Langley on her alleged dishonesty: in *Awards Drinks* Henderson LJ said that "the allegation that a witness is dishonest must be put fairly and squarely to the witness in cross-examination before the tribunal can find the witness is dishonest, but does not need to have been pleaded in advance in cases where the burden is on the taxpayer".

7. At the end of this decision, we have set out directions relating to possible next steps in this appeal.

The legislation

8. Section 49 of the Customs and Excise Management Act 1979 ("CEMA") is headed "forfeiture of goods improperly imported", and subsection 1 sets out six situations in which goods are liable to forfeiture. These include at (1)(f), goods which are found "not to correspond with the entry made thereof"; in other words, goods which do not correspond with the entry made on the customs declaration form.

9. CEMA s 167 is headed "untrue declarations etc", and subsection 1 reads:

> "If any person either knowingly or recklessly
>
> (a) makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Commissioners or an officer, any declaration, notice, certificate or other document whatsoever; …
>
> being a document…produced or made for any purpose of any assigned matter, which is untrue in any material particular, he shall be guilty of an offence under this subsection and may be arrested; and any goods in relation to which the document...was made shall be liable to forfeiture."

10. CEMA s 139 is headed "Provisions as to detention, seizure and condemnation of goods, etc", and subsection (1) reads:

> "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."

11. Regulation 20 of the Postal Packets (Revenue and Customs) Regulations 2011 provides that CEMA s 139 and related provisions apply where "the contents of a foreign postal packet are not in accordance with the accompanying customs declaration".

12. CEMA s 152 gives "the Commissioners" the power to "restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under [the Customs and Excise] Acts". The Borders, Citizenship and Immigration Act 2009, ss 1 and 6 provides that this power can be exercised by the Border Force.

13. A restoration decision can be reviewed, see Finance Act 1994 ("FA94") ss 14 and 15, and a review decision can be appealed to the FTT under FA94 s 16. By FA94, s 16(8) and Sch 5, para 2(1)(r), restoration appeals are an "ancillary matter". FA94 s 16(4) provides:

> "In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—
>
> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
>
> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

14. In *Balbir Singh Gora v C&E Comms* [2003] EWCA Civ 525 ("*Gora*"), Pill LJ accepted that the provisions of FA94, s 16 do not oust the Tribunal's power to conduct a fact-finding exercise. Thus, the Tribunal can decide the primary facts, and go on to decide whether, in the light of its findings of fact, the restoration decision was reasonable. In *HMRC v Jones and Jones* [2011] EWCA Civ 824 ("*Jones*") Mummery LJ said at [71(7)] that he "completely agreed with the analysis of the domestic law jurisdiction position by Pill LJ in *Gora's* case".

15. FA94, s16(6) provides that the burden of proof in restoration appeals lies on the appellant, other than certain specific situations set out in that subsection, none of which apply to restoration appeals.

Facts not in dispute

16. At some point before May 2020, the suitcases were advertised for sale on E-bay by Ms Eleanor Dahan of West Hollywood, California. They were described as "NWT Chanel Coco trolley caviar luggage suitcase & travel carry-on bag xxl set".

17. In May 2020, Mrs Langley contacted Ms Dahan and after some discussion, agreed to purchase the suitcases for $14,300 plus postage of $99.10. The purchase was recorded on E-bay on 27 May 2020; E-bay also records that the suitcases were to be delivered to Mrs Langley at her home address. On the same day, Mrs Langley paid $14,399.10 to Ms Dahan via PayPal.

18. Ms Dahan placed the two smaller suitcases in an old cardboard box and the larger one in a black bin bag. She handed them over to UPS on 28 May 2020, where the two packages were combined. The consignment note was signed by Ms Dahan**.** It stated that the value of the goods was $500, and that they were "a gift". At some point Mrs Langley received a request

from UPS for a payment of £192.81 of VAT and import duty, based on the declared value of $500. Mrs Langley made that payment.

19. The suitcases arrived at Stansted on 3 June 2020. Officer Conway checked online as to their value, and determined that they were worth far more than $500 shown on the consignment note. On 4 June 2020, the Border Force issued Mrs Langley with a Notice of Seizure, describing the seized goods as:

(1) One (1) Chanel wheeled suitcase in silver;

(2) One (1) Chanel large handbag in silver;

(3) One (1) Chanel clutch purse in silver.

20. The Notice said that the suitcases:

> "have been seized as liable to forfeiture under section 49(1)(e) of the Customs & Excise Management Act 1979 as the goods imported do not correspond with the entry made thereof as per Taxation (Cross-border Trade) Act 2018. Furthermore, the goods are also liable to seizure under Section 167(1)(a) as an untrue declaration was produced to Customs in relation to the goods concerned."

21. On 5 June 2020, Mr Langley spoke to Officer Conway, and his note of that call says:

> "I spoke to Mr Langley on this date at 19.45. I explained the process for reclaiming the goods after consultation with HO Aves. I explained to Mr Langley that he should provide proof of the cost of goods, any other supporting evidence to HMRC [sic] and any paperwork he may have. He apparently had paid $14,800 from [sic] a female seller in the USA and they bought the goods from EBAY sight unseen. He said he would contact the National Postage Seizure Unit ["NPSU"]."

22. By a letter received by the Border Force on 9 June 2020, Mrs Langley asked for the restoration of the suitcases, and said that she had paid $14,399.10 for them, including postage of $99.10. On 16 June 2020, an NPSU officer wrote to Mrs Langley refusing restoration and saying:

> "As the thing described below [the suitcases] was not declared, the parcel was seized under section 139 of the Customs & Excise Management Act 1979 as liable to forfeiture under regulation 20 of the Postal Packets (Revenue & Customs) Regulations 2011. The goods below were liable to forfeiture under section 167(1)(a) of the Act as an untrue declaration had been made in relation to the value."

23. The letter also said:

> "I conclude that there are no exceptional circumstances that would justify a departure from the commissioners' policy as the goods seized were substantially undervalued. On the paperwork accompanying the consignment the goods were correctly declared as a luggage set. However, the declaration then gave the reason for export as a gift with a declared value of only $500.00usd, whereas the true value of the luggage set and the price you have evidenced you paid is $14,399.10. I can only conclude that this was a conscious attempt to evade import duties and I can confirm on this occasion the goods will not be restored."

24. Mrs Langley did not challenge the legality of the seizure in the magistrate's court. On 23 June 2020, the Border Force received a signed authority authorising JMW Solicitors LLP ("JMW") to act on Mrs Langley's behalf, together with a request to review the decision not to restore. JMW's letter disputed that Mrs Langley had consciously attempted to evade excise duty; his letter included the following paragraphs:

> "Our Client and her husband, Mr John Langley, have been open and honest with Border Force since the very start. Upon receipt of the Notice of Seizure dated 4 June 2020 Mr Langley disclosed to Border Force by telephone the value of the goods. At no point in the call or in the Notice of Seizure was the goods' declared value set out. Nevertheless he made no attempt to hide the goods' true value. Shortly thereafter our Client wrote to set out in detail the circumstances whereby the goods had been purchased and included proof of both the eBay order and the PayPal transaction.
>
> There is no evidence whatsoever that our Client had any part in the under declaration of the goods. It would make no sense for our Client to direct that the goods be stated to be worth $500 and then tell Border Force that its value is $14,300. As highlighted it is our Client and her husband who have brought the true value of the goods to your attention and provided evidence. In your letter dated 16 June 2020 you arrive at the conclusion that there was a 'conscious attempt' without making any attempt to understand or address the contents of our Client's letter.
>
> If there was a conscious attempt to evade duty it was certainly not by our Client. It also does not benefit the seller to under value the goods on the declaration as our Client was meeting all the costs of purchase and transport. Our Client has already made a payment of £192.81 on request by UPS. Our Client has subsequently made enquiries with the seller and it transpires that a mistake was most likely made by the seller and/or shipper: The seller, Eleanor Dahan, had been informed by our Client that the goods were being purchased for her by her husband as a belated birthday gift. The seller relayed this to UPS when preparing to send the goods. She was advised by UPS to declare the item as a gift. It appears that UPS put the value as $500 as it was the maximum value of a gift, despite being told by the seller that the value was $14,399 including what had been paid for shipping."

25. On 24 June 2020, the Border Force wrote to Mrs Langley, explaining the review process and inviting her to provide any further information in support of her request. No further information was received. On 3 August 2020, Officer Brenton issued his review decision, refusing restoration. His letter included the following passages:

> "I have read your letters, on behalf of your client, carefully to see whether a case for departing from the Border Force policies of non-restoration have been presented. The onus of making your case rests firmly with you/your client: it is not for Border Force to make the contrary case."

26. Officer Brenton then cited from paras [45] and [46] of *McGeown International v HMRC* [2011] UKFTT 407 (TC) ("*McGeown*"), set out later in this decision, and continued as follows (his underlining and italics; paragraph breaks added by the Tribunal):

> "In letters received from you, your client appears to lay blame on the seller or the shipping agent. In Border Force's experience, it is <u>common practice</u> for those attempting to distance themselves from the evasion to blame an agent or other third party in the supply chain.

> Furthermore, in your correspondence you state: *1) Our Client and her husband, Mr John Langley, have been open and honest with Border Force from the very start*. This 'openness and honesty' was post seizure. On the balance of probabilities, this could be seen as a further attempt to distance themselves from the evasion of import duty & VAT.
>
> In this I re-iterate your submission: *if there was a conscious attempt to evade duty it was certainly not our client…our client has already made a payment of £192.81 on request of UPS*. Your client was fully aware of the value of the goods being imported and would have been aware that import VAT at 20% and the duty that would be payable. It seems she didn't question the payment of £192.81.
>
> I am of the opinion, as was the Officer who made the original decision, that this was a conscious attempt to evade import duties. Furthermore, in regard to the under-declaration, despite your client's assertions, it was their responsibility to ensure that the Channel luggage was declared correctly. The fact that you suggest that it was the seller or agent who failed to do so, is matter for your client to take up with them if they wish."

27. Officer Brenton concluded:

> "My understanding of the evidence before me, on the balance of probabilities, is that these goods were intentionally undervalued to evade the import duties due of over £2,500. These goods were declared with a value of US$500 with a true value of US$14,399.10, a substantial undervaluation of US$13,899.10."

28. On 30 August 2020, Ms Dahan provided a witness statement; this was sent to Officer Brenton. On 8 September 2020, he reconsidered the review decision in the light of that evidence, but concluded that it did not cause him to change his decision that the suitcases should not be restored. He said (his emphasis):

> "I am of the opinion that the content of Ms Dahan's witness statement stretches the bounds of credulity beyond acceptable limits. It is alleged that in her desperate concern for the items being stolen or looted she deliberately insured over $14,000 of luggage for $500. Therefore, if her fears were fulfilled, your client would have received $500 compensation for an expenditure of $14,300. Also, despite Ms Dahan's assertions, this was **not a gift**. Your client was fully aware of the cost of these items and negotiated a reduced sale price with the seller Ms Dahan, therefore, there was no need to remove any price tags.
>
> With this further evidence before me I am satisfied that the only reason to risk insuring and declaring these goods as a gift with a value of $500 was to evade duties payable on import to the UK…Furthermore, it is clear that your client was in direct contact with Ms Dahan and would have had plenty of opportunity to ensure that the goods were declared correctly, which she failed to do."

Appeal to the Tribunal

29. Meanwhile, on 2 September 2020, JMW had filed a notice of appeal at the Tribunal on behalf of Mrs Langley. Under the heading "grounds of appeal", the Notice included the following:

> "1. There is no evidence that our Client, and her husband tried to evade taxes….
>
> 2. There is no evidence whatsoever that our Client had any part in the under declaration of the goods…"

30. The Border Force filed and served their Statement of Case on 29 October 2020. This submitted that the decision not to restore was one which could reasonably have been arrived at, for reasons which included the following:

(1) the onus of making the case rests solely with the Appellant;

(2) the Review Officer "asserts that it is common practice for those attempting to distance themselves from any evasion to blame an agent or other third party in the supply chain and that it is for the Appellant to ensure that the goods were declared correctly and the Appellant is legally responsible for the information on the declaration";

(3) the submission on behalf of the Appellant that she and her husband had been "open and honest" with the Border Force "on the balance of probabilities could be seen as a further attempt to distance themselves from the evasion of import duty and VAT"; and

(4) the Border Force "is of the understanding on the evidence before it that these goods were intentionally undervalued in order to evade the import duties of over £2,500".

31. On 10 May 2021, Mrs Langley filed and served a witness statement, denying she had been dishonest.

32. In her skeleton argument on behalf of the Border Force dated 16 July 2021, Ms Slowe said "Officer Brenton acted reasonably in concluding that this was a conscious attempt to evade import duties of over £2,500".

The adjournment of the Tribunal hearing and the preliminary issues

33. As is clear from the legislation set out earlier in this decision, in restoration cases such as this, the Tribunal's jurisdiction is limited to deciding whether the officer in question has made a decision which he "could not reasonably have arrived at", and if that is the case, the Tribunal is required to direct the Border Force to make a new decision.

34. In the normal course of such hearings, the appellant and the Border Force officer give evidence and are cross-examined; the parties' representatives make submissions; the Tribunal makes findings of fact, and if it decides the decision was unreasonable, directs the Border Force to make a new decision.

35. However, in this case, Mr Watkinson's main submission was that the appeal should be allowed, because:

(1) Officer Brenton had based his decision on his opinion that Mrs Langley had acted dishonestly. However, the Border Force had not properly "particularised and pleaded" that allegation in the Statement of Case, and so were unable, before this Tribunal, to contend that Officer Brenton's decision was reasonable; and

(2) the failure to particularise and plead the alleged dishonesty also meant that Ms Slowe was unable to cross-examine Mrs Langley on issues related to whether she had deliberately evaded the excise duty, and the relevant parts of her witness statement therefore stood unchallenged as evidence of fact in the case.

36. Ms Slowe submitted that (a) Mr Watkinson had misunderstood the nature of the Tribunal's jurisdiction; (b) the Border Force was not required to plead and particularise dishonesty, and (c) in any event if there was such a requirement, it had been met.

37. Both parties agreed that it was in the interests of justice to adjourn the hearing for further submissions, and that the issues raised by Mr Watkinson met the tests set out in *Wrottesley v*

HMRC [2015] UKUT 0637 ("*Wrottesley*") at [28], so that the Tribunal should first decide those issues. If that decision did not determine the case, there would be a further hearing.

Wrottesley

38. We considered for ourselves whether the issues met the criteria set by *Wrottesley*. These are set out in italics below, together with our reasons for deciding that they were met.

(1) *The power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly*. This is acknowledged. However, for the reasons set out below, it was in the interests of justice to exercise that power.

(2) *The power should only be exercised where there is a "succinct, knockout point" which will dispose of the case or an aspect of the case*. If Mr Watkinson's submissions were correct, the appeal was likely to be determined in Mrs Langley's favour on the papers.

(3) The point must be a succinct one so must be capable of being decided after a relatively short hearing (as compared to the rest of the case) and without significant delay, which is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The tribunal should be particularly cautious on matters of mixed fact and law. The issue was covered in the hearing with supplementary written submissions; the second and third issues were points of law, and none of the relevant facts was in dispute.

(4) Whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing of the remainder of the case. In our judgment, no.

(5) *Whether there is any potential for overall delay, making allowance for the possibility of a separate appeal on the preliminary issue*. There is a possibility of an onward appeal against this decision. However, had we continued with the appeal and decided the substantive case, the chances of an onward appeal would in our judgment have been greater.

(6) *Whether determination of the preliminary issue may result in there being no need for a further hearing*. Our view was that, if Mrs Langley were to win on the preliminary point, the case could be determined on the papers; if she were to lose, it would be a matter for her whether she wished to continue with the appeal and be-cross-examined on her evidence.

(7) *The Tribunal should at all times have in mind the overall objective of the Tribunal Rules, namely to enable the tribunal to deal with cases fairly*. In our judgment, it was in the interests of justice to adjourn the appeal for submissions on these issues and resolve them, because:

(a) if the Border Force were right, it would not have been fair and just to decide the appeal without their counsel having the opportunity to cross-examine Mrs Langley; and

(b) if Mrs Langley was right, there would have been no need for her to be cross-examined.

We considered whether to adjourn, direct written submissions, and then resume the hearing having told the parties our conclusion, but decided it was in the interests of justice to provide a written determination of the issues, with the right to appeal.

39. We now turn to the parties' submissions on the issues, both as made in the hearing and subsequently.

Mr Watkinson's submissions on behalf of Mrs Langley

40. Mr Watkinson submitted at the hearing that:

(1) an allegation of dishonesty has to be properly particularised and pleaded, in line with the principles set out by Lord Millett in *Three Rivers*; this applied to restoration cases where the Border Force were seeking to establish facts to justify their decision;

(2) the Border Force "have not advanced any proper plea of dishonesty or fraud" against Mrs Langley; and thus

(3) the Border Force were unable to justify their decision by saying that Mrs Langley had deliberately evaded the duty; they were also unable to cross-examine her on that issue, and as a result Mrs Langley had to win her appeal.

41. The principles in *Three Rivers* to which Mr Watkinson referred were set out by Lord Hope in that judgment as follows:

> "184. It is well established that fraud or dishonesty… must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence…This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.
>
> 185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal…
>
> 186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

42. Mr Watkinson also relied on *Borisov v Border Force* [2017] UKFTT 306 (TC) ("*Borisov*"), a decision of Judge Geraint Jones QC and Mr Menzies-Conacher. The FTT said at [11] of the judgment:

> "In the Review Letter it was stated that the Reviewing Officer had concluded that the appellant was complicit in the attempt to evade excise duty upon the importation of excisable goods into this country. This raises the subsidiary point as to who bears the burden of proving what is, undoubtedly, an allegation

> of dishonesty or complicity in fraud on the part of the appellant. On behalf of HMRC [sic] it was submitted that by reason of section 16(6) FA1994, the appellant bears the onus of disproving dishonesty or complicity in fraud once that issue has been trailed by HMRC."

43. At [12], the FTT sets out the extract from *Three Rivers* cited above, and then said at [13]:

> "It is true to say that the legal burden of proof rests upon the appellant throughout. We appreciate the foregoing citation deals primarily with rules relating to pleading and not specifically to where the burden of proof lies. However, it underscores the proposition that if fraud or dishonesty is pleaded and that pleading is a non-essential averment to a cause of action or to the defence to a cause of action, the burden is upon he who so alleges to plead it properly and, we are satisfied, to prove it…It must be remembered that the appellant bears the onus of proving that the decision reached upon Review was unreasonable. If, as a sub-issue, or as one reason for contending that its decision was reasonable, HMRC alleges dishonesty or complicity in fraud was involved on the part of the appellant, there can be no doubt that HMRC bears the burden of proof on that discrete issue."

44. Mr Watkinson submitted that this was the position in Mrs Langley's case. The suitcases had been seized in reliance on both CEMA s 49(1)(e) on the basis that the goods did not correspond with the entry on the customs declaration form, and also in reliance on s 167(1)(a), on the basis that the form had been completed dishonestly, see §20. Thus, the dishonesty argument was "one reason" why in the Border Force's submission Officer Brenton's decision was reasonable. and that submission therefore needed to be properly particularised and pleaded. However, the Statement of Case did not state that Mrs Langley was dishonest, and the Border Force were therefore, in his words, "shut out from raising it". The Statement of Case contained only one arguably relevant reference, namely that Border Force was "of the understanding on the evidence before it that these goods were intentionally undervalued in order to evade the import duties of over £2,500". If this was an attempt to plead dishonesty, it was in his submission insufficiently particularised.

45. He added that although Ms Slowe had submitted in her skeleton that there had been "a conscious attempt to evade import duties", it was not possible to plead dishonesty by way of a skeleton argument, and in any event that submission too was insufficiently particularised.

Mr Newbold and Ms Slowe's response on behalf of the Border Force

46. Ms Slowe made oral submissions at the hearing in response to Mr Watkinson, and the Border Force later provided a written submission drafted by Mr Newbold and Ms Slowe. The Border Force's case rested in part on the relevant legislative provisions and in part on the case law, in particular *McGeown,* which Officer Brenton had cited in his review decision, *Awards Drinks* and *Behzad Fuels v HMRC* [2019] 4 WLR 104 ("*Behzad*").

The legislation

47. The Border Force emphasised two points from the legislative provisions set out earlier in this decision. The first was that the FTT's jurisdiction on appeal was limited to deciding whether the officer had acted reasonably in refusing to restore the goods (FA94 s 16(4)); the second was that burden of proof was on the appellant (FA94 s 16(6)).

McGeown

48. In *McGeown* the appellant had appealed a review decision in which Officer Brenton had said the appellant was "actively involved" in smuggling and "complicit" in the concealment which had triggered the seizure, see [29] and [30] of the FTT's decision.

49. The FTT (Judge Huddleston and Mr Adrain) said:

> '[45]….it is the function of this Tribunal only to consider if HMRC have erred in law, or if they have taken a decision which is so unreasonable that no other Review Officer would have come to the same conclusion.
>
> [46] The burden of proof in relation to that question, very firmly rests with the Appellant…the Appellant appeared to suggest that the onus of proving alleged unlawful activity rested with HMRC. That is simply not the case. HMRC were within their powers to seize the Vehicle. HMRC then have a very clear statutory discretion as to the terms on which a vehicle once seized may be restored (or not) and this appeal is only concerned with the examination of whether, on the facts, that discretion was properly exercised."

50. Although *McGeown* is an FTT decision, and so not binding on us, in the Border Force's submission it was highly persuasive, as it had been followed in other cases. Mr Newbold and Ms Slowe invited this Tribunal to take the same approach as in *McGeown*: in other words, find that there is no obligation on HMRC to prove fraud, but instead it was for Mrs Langley to show that the Border Force's discretion had not been properly exercised.

Award Drinks

51. In *Award Drinks*, the appellant appealed against two "best judgement" VAT assessments. These had been based on various cash deposits which HMRC believed were the profits of "inward diversion" alcohol fraud. Henderson LJ gave the only judgment, with which Laing and Richards LJJ both agreed. He considered in particular *Brady v Group Lotus Car Companies PLC* [1987] 3 All ER 1050 ("*Brady*") and his own earlier judgment in *Ingenious Games v HMRC* [2015] UKUT 105 (TCC) ("*Ingenious*").

52. His citation from *Ingenious* included the following passages, under the heading "Is it necessary for HMRC to plead dishonesty?":

> "62. At the heart of the Appellants' amended case is the proposition that it is not open to HMRC to put allegations of dishonesty (or other serious forms of misconduct) to their witnesses, or to invite the FTT to make adverse findings of fact on such a basis, unless the relevant allegations have been pleaded with full particularity and the Appellants have been given a proper opportunity to respond to them.
>
> 63. In cases where the burden of proof lies on HMRC to establish fraud or dishonesty, these principles undoubtedly apply in the same way as they would in ordinary civil litigation…
>
> 64. The present case, however, is not of that nature. It is common ground that the burden of proof lies on the Appellants to displace the closure notices issued to them by HMRC within normal time limits…It is for the Appellants to adduce such evidence as they think fit with a view to discharging the burden which throughout lies on them…
>
> 65. The IFP2 Information Memorandum is one of the pieces of documentary evidence relied upon by the Appellants as supporting their case on this issue. HMRC were under no obligation to accept it at face value when it was

> disclosed to them, and they were fully entitled to cross-examine the witnesses for the Appellants who had been involved in its preparation in order to test its reliability and examine the assumptions on which it was based. HMRC were not obliged to give advance notice of the lines of questioning which they intended to pursue with the witnesses, and still less were they obliged to plead a positive case of dishonesty in preparation of the Memorandum before putting questions to the witnesses which, depending on how they were answered, might in due course provide a foundation for the FTT to draw such a conclusion. The obligations which lay on HMRC were in my judgment of a different nature. First, as a matter of professional duty, counsel may not put questions to a witness suggesting fraud or dishonesty unless they have clear instructions to do so, and have reasonably credible material to establish an arguable case of fraud. Secondly, as the FTT rightly recognised, it is not open to the tribunal to make a finding of dishonesty in relation to a witness unless (at least) the allegation has been put to him fairly and squarely in cross-examination, together with the evidence supporting the allegation, and the witness has been given a fair opportunity to respond to it. Important though these obligations are, they are quite different from, and do not entail, a prior requirement to plead the fraud or misconduct which is put to the witness. If it were otherwise, a party would be obliged to serve an amended statement of case before attempting to expose a witness as dishonest in cross-examination, and the element of surprise which can be a potent weapon in helping to expose the truth would no longer be available."

53. At [40] of *Award Drinks,* Henderson LJ set out and adopted the two principles identified by the UT as derived from *Brady* and *Ingenious,* namely:

> "(1) The burden of showing an assessment is incorrect remains on the taxpayer throughout the appeal. This is so even if the circumstances of the case are such that there either must, or may, have been some fraudulent conduct on the part of the taxpayer which is relevant to the tax liability.
>
> (2) The allegation that a witness is dishonest must be put fairly and squarely to the witness in cross-examination before the tribunal can find the witness is dishonest, but does not need to have been pleaded in advance in cases where the burden is on the taxpayer."

54. The Border Force submitted that there was no material difference between a case such as *Award Drinks,* where the appellant had the burden of establishing that the VAT best judgement assessment was wrong, and a restoration case such as this, where the burden of proof is imposed on the appellant by statute. It follows that the respondent does not need to plead fraud, and can cross-examine the witnesses as long as the allegation is put "fairly and squarely" to the witness.

Behzad

55. In *Behzad,* HMRC had withdrawn approval for the appellant company to be a registered dealer in controlled oil ("RDCO"), on the basis that fuel on its premises had been "laundered" to remove chemical markers which identified it as "red diesel". HMRC had also seized and refused to restore three vehicles. The FTT (Judge Richards and Mrs Newns) said at [60] (their emphasis):

> "Given that the Company is seeking to establish that HMRC's decisions were unreasonable, to the extent that it wishes to rely on the fact that it was not involved in the laundering of the fuel, it has the burden of establishing that fact. We do not consider that the Company has discharged that burden. However, that should not be interpreted as a positive finding that the Company

> was involved in the laundering of fuel. Nor should it be interpreted as a finding that the Company's witnesses of fact were dishonest or gave misleading evidence. As we have said, we found those witnesses to be both reliable and honest."

56. The FTT nevertheless upheld HMRC's decision. They said at [98]:

> "Even if we had made a positive finding that the Company was not involved in the actual laundering of fuel, HMRC's decision would still have been reasonable as the presence of laundered fuel on the premises would indicate that the Company's procedures, due diligence or monitoring of staff were not of sufficient standards to justify the high level of trust that HMRC had put in it."

57. The appellant appealed, and the UT (Judges Berner and Herrington) allowed the appeal on the basis that HMRC had not properly considered proportionality, and issued directions for HMRC to make new decisions. The UT also said at [104] that given (a) the FTT's findings as to the honesty of the witnesses; (b) the FTT's inability to make a positive finding that the appellant was involved in the laundering, and (c) the fact that the reasonableness of the decision did not rest on a belief in culpability, "the new reviews should be conducted on the basis that the Company was not involved in the laundering of fuel". HMRC appealed to the Court of Appeal.

58. Henderson LJ gave the only judgment, with which Hamblen and Green LJJ both agreed. He said at [59] (his emphasis):

> "I find it hard to understand what justification there could be for requiring the review to proceed on the basis that the Company was *not* involved in laundering of fuel, when the 2016 FTT deliberately decided to leave the question open. That was in my opinion a perfectly tenable position for the 2016 FTT to adopt, in circumstances where the question which they had to consider was whether the restoration decision could not reasonably have been made. In my view, fairness requires that the further review directed by the Upper Tribunal should start from the same inconclusive position, and HMRC should be at liberty both to consider the fresh evidence advanced by the Company, and to review the history of the matter from 2009 to 2013, without being obliged to assume from the outset that the Company was *not* involved in the laundering of fuel."

59. In the context of Mrs Langley's case, the Border Force submitted that:

> "Had it been for HMRC to establish that fuel laundering had taken place in *Behzad Fuels*, it would have been a necessary consequence of the FTT's decision that HMRC had failed to prove this and that any further review should be on the basis that the company had not been involved in fuel laundering. That the Court of Appeal permitted the matter to be re-reviewed on the factual basis identified by the FTT supports the argument that it was for the company to show unreasonableness even in the context of HMRC making allegations of fraud."

The submission overall

60. Taking into account the legislation and the case law cited above, the Border Force submitted that it was for Mrs Langley to show that Officer Brenton's decision was unreasonable, and that did not change just because the refusal to restore was based on Officer Brenton's belief that she had acted dishonestly. Where the respondents have the burden of

proof, there was no requirement for the Border Force to meet the pleading and particularisation requirements necessary in an ordinary civil claim (see *Ingenious* at [63] cited above).

Mr Watkinson's Reply

61. Mr Watkinson said that *Award Drinks* was not a relevant authority, because it considered only the position where "no positive case of dishonesty was made by the Crown, but instead the Crown wished to test the veracity of the appellant's account". Similarly, in *Behzad*, HMRC's case did not depend on the appellant company having been involved in the laundering of the fuel. In contrast, Officer Brenton's decision rests on his belief that Mrs Langley had been dishonest.

62. Mr Watkinson also drew attention to a submission made by HMRC before the Court of Appeal at [51] of *Behzad*, which we consider below. He asked the Tribunal to find that there was "no authority whatsoever for the proposition that the [Border Force] can avoid the ordinary pleading requirements for such allegations".

The first preliminary issue: the Tribunal's view

63. The first preliminary issue was:

(1) whether Officer Brenton had based his restoration decision on Mrs Langley's alleged dishonesty, and if the answer to that question was yes,

(2) whether the Border Force had pleaded and particularised that dishonesty in accordance with the requirements set out in *Three Rivers*.

64. Mr Watkinson was clear that the answer to the first of these questions was "yes" and the answer to the second was "no". In her oral submissions, Ms Slowe asserted that the answer to the second question was "yes", but the Border Force's written submission did not respond to either question.

Officer Brenton's decision

65. We agree with Mr Watkinson that Officer Brenton based his restoration decision on Mrs Langley's alleged dishonesty, because:

(1) his review letter said that "these goods were intentionally undervalued to evade the import duties due of over £2,500" and "this was a conscious attempt to evade import duties". His re-review letter said that "the only reason to risk insuring and declaring these goods as a gift with a value of $500 was to evade duties payable on import to the UK". His decision was therefore made on the basis that the undervaluation had been deliberate and thus dishonest; and

(2) he rejected the possibilities that Ms Dahan and/or UPS were responsible for the deliberate undervaluation, saying in the review letter that Mrs Langley "appears to lay blame on the seller or the shipping agent. In Border Force's experience, it is common practice for those attempting to distance themselves from the evasion to blame an agent or other third party in the supply chain". In his re-review letter, Officer Brenton rejected the evidence in Ms Dahan's witness statement, saying it "stretches the bounds of credulity beyond acceptable limits". By rejecting these other possibilities, he had decided that Mrs Langley was dishonest.

Pleading and particularisation

66. It is clear from *Three Rivers* that the normal requirements, where fraud or dishonesty is alleged, are that the allegation must be:

(1) clearly and explicitly stated, or as Lord Hope says "distinctly alleged". Lord Hope added that "if the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'", because "such language is equivocal"; and

(2) the party making the allegation must set out the "facts, matters and circumstances relied on" in relation to the allegation, and must identify any fact which "tilts the balance and justifies an inference of dishonesty".

Pleading and particularisation in the decision letter?

67. We considered whether Officer Brenton had pleaded and particularised the dishonesty, and if he had done so, whether this met the requirements.

68. As we have found above, his letters explicitly state that there was "a conscious attempt to evade import duties". By rejecting the possibilities that either Mrs Dahan or UPS were responsible, he placed that responsibility on Mrs Langley.

69. He stated that his conclusion was based on the following:

(1) Mrs Langley "was fully aware of the value of the goods being imported and would have been aware that import VAT at 20% and the duty that would be payable" but "it seems she didn't question the payment of £192.81";

(2) the suitcases were "not a gift", and "the only reason to risk insuring and declaring these goods as a gift with a value of $500 was to evade duties payable on import to the UK"; and

(3) Mrs Langley "was in direct contact with Ms Dahan and would have had plenty of opportunity to ensure that the goods were declared correctly" but did not do so.

70. Officer Brenton's letters therefore set out particular factors on which he relied in coming to his decision. However, the requirements in *Three Reivers* must be met by the *pleadings.* In a tax and duty context, the pleadings are the Grounds of Appeal and the Statement of Case, because these are the documents which set out the parties' arguments and the facts and law on which they base those arguments.

71. Of course, in tax and duty cases, the appellant is appealing against a decision taken by the Crown, so the position is different from a normal civil claim. But in *Ingenious* at [63] Henderson LJ said that pleading and particularisation requirements "undoubtedly" apply in such cases "in the same way as they would in ordinary civil litigation", subject to the burden of proof point, which we consider below. Thus, the mere fact that the appeal is against a decision made by an officer of the Crown does not prevent the pleading and particularisation requirements from applying.

72. We considered whether the pleading and particularisation requirements could be met by being included in the officer's decision. Neither party made submissions on that point, and our decision on the second and third preliminary issues mean that we do not have to resolve it in order to come to an overall conclusion. However, we noted the following:

(1) The purpose of the pleading and particularisation requirements is "to give the party opposite sufficient notice of the case which is being made against him" and to inform the other party of "the primary facts which will be relied upon" to justify the allegation. In a tax or duty appeal, the officer's decision letter will normally set out both the allegation and the facts relied on.

(2) However, when the case comes to the Tribunal, the Crown may select from the various points made by that officer and plead only one of them, and/or may put forward new evidence of facts. On occasion, the entire basis of the Crown's case changes after the decision letter.

73. Therefore, in our judgment, the inclusion of a specific allegation of dishonesty in the decision letter together with the factors on which that allegation is based, only meets the pleading and particularisation requirements if the relevant parts of that decision letter are explicitly imported by reference into the Statement of Case.

Pleading and particularisation in relation to Mrs Langley?

74. We again agree with Mr Watkinson that the Statement of Case does not plead or particularise Mrs Langley's alleged dishonesty. Instead, it says only (our italics):

(1) that Officer Brenton "*asserts* that it is common practice for those attempting to distance themselves from any evasion to blame an agent or other third party in the supply chain";

(2) Mrs Langley's submission that she and her husband had been "open and honest" with the Border Force "*could be seen as* a further attempt to distance *themselves* from the evasion"; and

(3) the Border Force "is *of the understanding on the evidence before it* that these goods were intentionally undervalued".

75. There is thus no specification of the evidence on which the Border Force are relying, and there is not even any clear identification of Mrs Langley (rather than her husband) as the person responsible for the evasion.

76. We also agree with Mr Watkinson that it is not possible to plead dishonesty for the first time in a skeleton argument, and that in any event, that provided for the hearing on behalf of the Border Force did not do so. The skeleton only says "Officer Brenton acted reasonably in concluding that this was a conscious attempt to evade import duties of over £2,500".

Conclusion on the first preliminary issue

77. For the reasons set out above, we find that Mr Watkinson is correct on the first issue. Officer Brenton based his decision on Mrs Langley's dishonesty, but the Border Force have not pleaded and/or particularised that dishonesty in their Statement of Case.

The second preliminary issue: the Tribunal's view

78. The second preliminary issue was whether, in a case such as this, where the Border Force officer's decision rested on an allegation of fraud or dishonesty, the Border Force has to plead and particularise that fraud or dishonesty, such that a failure to do so means that they are unable to rely on that allegation to justify the officer's decision

79. We have decided this issue in favour of the Border Force (a) because of the nature and extent of the Tribunal's jurisdiction, and (b) because Mrs Langley has the burden of proof. We explain our conclusions below.

Jurisdiction

80. Our starting point is the Tribunal's statutory jurisdiction, set out at FA94 s 16(4). In *Jones* at [43], Mummery LJ described it as follows:

> "The appeal tribunal on an appeal is confined to a power, where the tribunal are satisfied that the HMRC could not have reasonably arrived at the decision it did, to require HMRC to conduct a further review of the original decision: section 16(4)(b)."

81. In *Behzad* at [6], Henderson LJ said that the Tribunal's jurisdiction was "unusually circumscribed", and summarised the position at [60]:

> "The test which an appellate tribunal has to apply under section 16(4) is one of satisfaction that the decision in question could not reasonably have been arrived at."

82. The statute therefore dictates that our only task is to decide whether Officer Brenton's decision was reasonable. In order to do so, we must ask the following questions (see *C&E Comrs v J H Corbitt (Numismatists) Ltd* [1980] 2 WLR 753 at p 663):

(1) Did Officer Brenton reach a decision which no reasonable officer could have reached?

(2) Does his decision betray an error of law material to the decision?

(3) Did he take into account all relevant considerations?

(4) Did he leave out of account all irrelevant considerations?

83. Officer Brenton decided, on the basis of the evidence before him, that Mrs Langley was knowingly involved in the fraudulent evasion of duty, and for that reason he decided not to restore the suitcases. The Tribunal's task is to consider the evidence on which he relied, together with any further evidence put forward by the parties (see *Gora*), and then make findings of fact. We are not prevented from considering the reasonableness of his decision because it explicitly alleges that Mrs Langley was dishonest, whether or not the basis for that belief have been set out in the Statement of Case.

84. In coming to that conclusion we have not overlooked Mr Watkinson's reliance on the following submission made by HMRC before the Court of Appeal in *Behzad* at [51] (his emphasis):

> "There are in principle three possible positions that may be adopted by a fact-finding tribunal in respect of an RDCO and its involvement in the laundering of oil detected at its premises and in its vehicles. First, it may be asserted by HMRC, and found to be proved, that the RDCO was fraudulently involved in the laundering of the oil. Secondly, the RDCO may assert that it was innocent of any involvement, and having heard the evidence the tribunal may agree. Thirdly, however, the tribunal may find itself unable to reach a positive conclusion either way, being persuaded of neither the RDCO's guilt nor its innocence."

85. Mr Watkinson pointed out that Henderson LJ had not disagreed with that summary, and said Mrs Langley's case was covered by the first of the three options because the Border Force had asserted that she was fraudulently involved in the evasion of duty. HMRC themselves had accepted in the above passage that, where this was the position, it must be "found to be proved" that the appellant had acted fraudulently.

86. We do not agree with his submission, because:

(1) the passage on which Mr Watkinson relies was not part of the Court's determination, but a submission by counsel for HMRC; and

(2) The focus of the passage was on the three possible conclusions to which *a tribunal* can come: it begins: "There are in principle three possible positions that may be adopted by a fact-finding tribunal". HMRC's counsel was not making a submission about the nature or scope of pleadings, but about the different conclusions which a tribunal could reach.

87. In our judgment, it is clear from the nature of the Tribunal's jurisdiction that when a person appeals against a restoration decision, the Border Force has only to put forward the officer's reasons as set out in the decision letter.

88. The appellant, here Mrs Langley, has the opportunity to put forward her own evidence, including by way of witness statements; if the officer is tendered as a witness, the appellant's counsel can cross-examine him. Then it is for the Tribunal to find, on the basis of all the evidence, whether the officer's decision was unreasonable.

The burden of proof

89. FA94, s 16(6) provides that the burden of proof in restoration appeals lies on the appellant. The Border Force relied on the following passages from *Ingenious,* reaffirmed in *Award Drinks,* where Henderson LJ said:

> "63. In cases where the burden of proof lies on HMRC to establish fraud or dishonesty, these principles undoubtedly apply in the same way as they would in ordinary civil litigation…
>
> 64. The present case, however, is not of that nature. It is common ground that the burden of proof lies on the Appellants to displace the closure notices issued to them by HMRC within normal time limits…It is for the Appellants to adduce such evidence as they think fit with a view to discharging the burden which throughout lies on them…"

90. We reject Mr Watkinson's submission that *Award Drinks* is not a relevant authority because "no positive case of dishonesty was made by the Crown, but instead the Crown wished to test the veracity of the appellant's account". In the above citation from, Henderson LJ made a statement of principle which was not limited to the facts of either *Ingenious* or *Award Drinks.*

91. There are also other passages in *Award Drinks* which further confirm our view. At [57] Henderson LJ cited the following extract from the UT judgment (italics in the original; the underlining is ours):

> "We agree with HMRC that [*Awards'*] suggested analysis impermissibly reverses the burden of proof. It rests on the assumption that HMRC had to plead fraud against [*Awards*], in order to come to a conclusion that the assessment, based on [*Awards'*] possession and control of the goods, should be upheld. The point falls squarely within [*Brady*], which confirms <u>the burden remains on the appellant to show the assessment was incorrect even if that conclusion may, or indeed *must*, involve fraud</u>.."

92. Henderson LJ began the next following paragraph by saying "I respectfully agree with those observations, which in my view provide a complete answer to Awards' case on this appeal". He added:

> "HMRC were fully entitled to take their stand on the principles established in *Khan, Brady* and *Ingenious Games*, and to leave it to Awards to provide, if it could, a credible alternative explanation for the very substantial cash payments into its bank account in the UK."

93. We find that the position is the same in a restoration case. Even where the officer's decision "must" involve fraud, the burden remains on the appellant to show that the decision was unreasonable, and the pleading requirements which apply to normal civil litigation are irrelevant.

94. Mr Watkinson also relied on the FTT's statement in *Borisov* that:

> "if, as one reason for contending that its decision was reasonable, HMRC alleges dishonesty or complicity in fraud was involved on the part of the appellant, there can be no doubt that HMRC bears the burden of proof on that discrete issue."

95. However, it is clear from *Award Drinks* that this is not correct. Instead, the burden lies on the appellant throughout. In any event, the FTT in *Borisov* held that the pleading requirements had to be met where the dishonesty was "one reason for contending that its decision was reasonable". Mr Watkinson submitted that this was the position in Mrs Langley's case, because the suitcases had been seized in reliance on two separate grounds: they did not correspond with the entry made on the customs declaration form (CEMA s 49(1)(e)) and the declaration had been made dishonestly (CEMA s 167(1)(a)). However, those were two alternative grounds for the *seizure*. But Mrs Langley's appeal is against not the decision to seize the suitcases, but against Officer Brenton's decision not refuse restoration. That decision was based on his belief that the goods "were intentionally undervalued to evade the import duties". Thus, this was not a case where dishonesty was "one reason" for the Border Force's decision: instead, it was the reason.

The third preliminary issue: cross-examination

96. The third preliminary issue was whether the person against whom dishonesty had been alleged could be cross-examined by the Border Force, even if the alleged dishonesty had not been "particularised and proved". Mr Watkinson submitted that this was the position, and that as a result Mrs Langley's witness statement, which denied dishonesty, would have to be accepted as factually correct.

97. It is clear from *Award Drinks* that Mr Watkinson is not correct. As set out above, the second of the two principles identified by Henderson LJ was that:

> "The allegation that a witness is dishonest must be put fairly and squarely to the witness in cross-examination before the tribunal can find the witness is dishonest, but does not need to have been pleaded in advance in cases where the burden is on the taxpayer."

98. In restoration cases the burden is on the appellant, see FA94, s 16(6), and it follows that there is no bar to the Border Force cross-examining Mrs Langley, as long as the requirements in *Ingenious* at [65] are met, namely that "the allegation has been put to [her] fairly and squarely in cross-examination, together with the evidence supporting the allegation, and [she] has been given a fair opportunity to respond to it".

Conclusion

99. For the reasons set out above, we decided that Officer Brenton had refused to restore the suitcases because he had decided that Mrs Langley had been dishonest, and the Border Force had not pleaded or particularised that dishonesty in their Statement of Case. However, we went on to find that the Border Force was not required to meet the pleading and particularisation requirements set out in *Three Rivers*, and that Mrs Langley could be cross-examined in relation to that allegation of dishonesty.

Appeal rights

100. 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.

Directions

101. Mrs Langley is to inform the Tribunal, and copy the Border Force, whether she is continuing with her appeal against Officer Brenton's decision, by the later of:

(1) 14 days after the latest date for applying for permission to appeal this decision (see §100); and

(2) if permission to appeal this decision were to be given, 28 days after the final resolution of that appeal.

102. If Mrs Langley confirms she is continuing with her appeal against Officer Brenton's decision, by 14 days from the date she provided the information in §101, the parties are to provide the Tribunal and each other with the following information:

(1) dates to avoid for a hearing to determine the appeal, during a period which begins one month after the date on which the information in §101 is provided, and which ends after six further months;

(2) their estimate of the length of time required for the hearing; and

(3) whether they would prefer the hearing to be on a face-to-face basis in London, or by video, and the reasons for their preference.

ANNE REDSTON
TRIBUNAL JUDGE
Release date: 09 NOVEMBER 2021