[2019] UKFTT 654 (TC)

TC07429

RESTORATION OF VEHICLE – Whether all relevant facts considered and irrelevant facts excluded – No – Whether inevitable that same decision would be reached on further review – No – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/06526

BETWEEN

MARIUSZ PIOTR SZABALA

Appellant

-and-

DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE DAVID BEDENHAM
SHEILA CHEESMAN

Sitting in public at Taylor House, London on 20 September 2019

Samuel Debruyne of the Bar of West-Vlaanderen, Belgium for the Appellant.

Kieran Coleman, counsel, for the Director of Border Revenue.

DECISION

INTRODUCTION

1. The Appellant appeals, pursuant to s16(4) of the Finance Act 1994 ("FA 1994"), against the refusal of the Director of Border Revenue to restore a vehicle that was seized pursuant to s139 of the Customs and Excise Management Act 1979 ("CEMA 1979").

BACKGROUND

2. On 21 September 2016, a Scania tractor and accompanying trailer ("the Vehicle") was intercepted at the Dover ferry port by officers of the UK Border Force. The Vehicle was searched and two people (described by Border Force as "clandestine immigrants") were found in what Border Force described as a "concealed compartment in the bunk above the front dash console area".

3. The Vehicle was seized under s139 CEMA 1979 on the basis that the Vehicle was liable to forfeiture pursuant to s88 CEMA 1979 because it had been "adapted…for the purpose of concealing goods". The Director submitted that where a vehicle has been so adapted it is liable to forfeiture regardless of the use (here, said to be the smuggling of people) to which the adaptation is put.

4. The driver of the Vehicle, who had told Border Force that he had entered the UK in order to pick up a static caravan, was apparently successfully prosecuted for "facilitation" (although we were not provided with any details of this, including the specific offence of which the driver was convicted).

5. The Appellant is the owner of the Vehicle.

6. By letter dated 19 February 2018, the Appellant (through Mr Debruyne) requested that the Vehicle be restored to him, stating that at the time of the seizure another person was driving the Vehicle, the Appellant "did not know the intentions of the driver", and the Appellant "did not give instructions to commit crimes". The Appellant also stated that €15,000 "were invested on the lorry (for professional use) for maximum safety and comfort." With the 19 February 2018 letter, the Appellant provided a number of documents including a copy of a "contract of lending for use" between the Appellant (as "Lender") and Bjorn Leuckx of Myr Drem LR Ltd (as "Borrower") said to have been entered into on 20 August 2016 and notarised on 26 September 2016.

7. On 28 June 2018, following a request by Border Force for further information, Mr Debruyne told Border Force that:

> "My client [the Appellant] is a farmer in Poland, with a tractor and trailer 'Scania', he lend his vehicle to the British company 'My Dream LR Ltd' (with owner and 'friend' Bjorn Leuckx)(with activities sales and transport of static caravans in the UK, Belgium and else in Europe in necessary); parties made a (registered) 'contract of lending for use' on 20/8/2016; it was forbidden to give the subject matter of the contract (the specific vehicle) for any other person to use, apparently, the borrower did not respect the contract…
>
> …
>
> The driver is unknown; only the borrower (My Dream LR Ltd) was and is known. The purpose and activities of My Dream LR Ltd were known as the sales and transport (national and international) of static caravans.
>
> …

> Client was in good faith, known Bjorn Leuckx as 'a friend', who visited client some times in Poland for Agrituristica holidays…
>
> …
>
> Client believed the vehicle would only be used to transport static caravans…
>
> …
>
> My client wanted to have his vehicle 'safe'…and UK-ready…so my client made a lot of costs (about €15,000) first to equip the vehicle correctly (see invoice of 'Auto Serwis')…"

8. On 30 June 2018, Border Force refused to restore the Vehicle. The Appellant requested a statutory review of the decision.

9. The Appellant said the delay between the date of seizure and the date of the request for restoration was due to language difficulties and the fact that he had real difficulties in speaking with the allocated Border Force officer. The Director did not accept this explanation for the delay but, nonetheless, considered and determined the restoration request and subsequent review request against which this appeal is now made.

THE DECISION UNDER APPEAL

10. On 20 September 2018, Border Force Officer Ross Thomas notified the Appellant by letter that, having conducted a review of the 30 June 2018 decision, he had also concluded that the Vehicle should not be restored. Mr Thomas's letter set out (1) Mr Thomas's understanding of the background of the case (2) "the policy on the restoration of seized vehicles" and (3) the reasons for his decision.

11. In relation to the background of the case, Mr Thomas's letter set put the facts summarised at paragraphs 2 and 4 above as well as noting that no challenge was made to the legality of the seizure.

12. In relation to the Border Force Policy in relation to seized vehicles, Mr Thomas's letter simply stated "a vehicle adapted for the purposes of concealing goods will not normally be restored, but in exceptional circumstances the vehicle may be restored for a fee to include the cost of removing the adaptation".

13. In relation to the reasons for his decision, Mr Thomas's letter stated:

> "It is for me to determine whether or not the contested decision should be confirmed, varied or cancelled. The policy should be applied firmly, but not rigidly, so as to allow an exercise of discretion on a case by case basis, and to ensure that my decision is not constrained by it.
>
> …
>
> In considering restoration I have looked at all the circumstances surrounding the seizure but I have not considered the legality or correctness of the seizure itself...Having had an opportunity of raising lawfulness of the seizure in the magistrates' court one does <u>not</u> have a second chance of doing so at tribunal or statutory review…
>
> Turning now to your request for the restoration of the vehicle…
>
> The vehicle had an adaptation, capable of concealing illicit goods; policy therefore dictates that it should not be restored. However, as I am not constrained by policy, I shall further examine the evidence in order to decide

whether there are exceptional circumstances in this case on order to deviate from the policy.

…"

before continuing:

"I note from the contracts between [the Appellant] (Lender) and Mr Bjorn Lueckx – My Dream LR Ltd (Borrower) the contract provides for:

- A "free of charge use" relating to both tractor unit and trailer.

  The contract therefore appears to provide no commercial financial gain or recompense. I consider it implausible not to receive financial payment or recompense of some description given that [the Appellant] allegedly invested €15,000 into making the vehicle safe for use in the UK.

- The contract, concluded on 20 August 2016, was for an unspecified period of time.

  There appears to no contractual period, terms of use or carriage and no details of financial penalty or contractual termination should either party be in breach of contract.

- It is forbidden to give the subject matter of the contract for any other person to use.

  [The Appellant] appears not to have taken any reasonable steps to ensure the commercially legitimate contractual use of the vehicle and compliance thereof and appears to have simply abdicated any responsibility of governance.

- The subject matter of the contract is permitted solely in the territory of the state.

  [The Appellant] appears not to have taken any reasonable steps to undertake any periodic checks regarding where the vehicle had been operated, its condition or roadworthiness thereby abdicating any responsibility of governance.

  Furthermore, you state in your letter of 10 August that [the Appellant], a farmer in Poland, loaned his vehicle to the British company My Dream LR Ltd with the director and former friend Bjorn Leuckx with activities sales and transport of static caravans in the UK, Belgium and elsewhere in Europe if necessary. Consequently it would appear that there was a real and high likelihood the vehicle would be used in places other than the territory of the contracted state of Poland. This is also commented on by you in your letter of dated 28 June 2018.

  Your client does not appear to have undertaken any background checks regarding the borrower or the borrower's company My Dream LR Ltd. Had he done so, he could have checked the UK.GOV website for Companies House, where he would have seen from information in the public domain that My Dream LR Ltd, Director Mr Bjorn Leuckx, was issued with a notice of compulsory strike off on 8 March 2016, The Company was eventually dissolved via compulsory strike off on 28 February 2017. This should have at least raised some concerns as to the suitability of a contractual agreement without stringent terms, conditions and governance thereof.

- Any repairs in the duration of the lending for use are made by the borrower at his own expense and he shall return the subject matter of the contract in a not worsened condition.

  Fair wear and tear is unlikely to result in a vehicle, used for an unspecified time, being returned in other than a deteriorated condition and the vehicle would ultimately depreciate in value, In this specific instance, the cab had been adapted for smuggling.

- The borrower is responsible for any accidental loss of the subject matter of the contract if he uses it in any way that is in conflict with the contract or its purpose.

  It would appear your client had no reasonable measures of governance in place to ensure compliance with the contract.

- The borrower is obliged to return the subject matter of the contract to the seat of the lender immediately after the expiry of the contract.

  I have not been made aware that the contract has in fact terminated via a contract termination notice. Therefore the contract appears to remain extant.

  Indeed some considerable time elapsed between the seizure of the vehicle and a request for restoration.

  Lastly, no mention has been provided concerning what measure your client took to recover his vehicle from the borrower or what legal action he initiated for either a breach of contract or to determine the whereabouts of the vehicle from the borrower. Again, this appears to indicate a complete abdication of responsibility for the use and return of the vehicle.

> I have also paid particular attention to the degree of hardship caused by loss of the vehicle. One must expect considerable inconvenience as a result of having a vehicle seized…I do not regard either the inconvenience or expenses caused by the loss of the vehicle in this case as *exceptional* hardship over and above what one should expect…"

14. Mr Thomas's letter went on to conclude "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 I can find no reason to vary the policy not to restore in this case."

THE APPELLANTS' CASE

15. In his Notice of Appeal, the Appellant raised the following issues:

(1) Border Force has failed to prove that the Vehicle had been adapted;

(2) the Appellant did not know the driver of the Vehicle and did not know of his intentions (and, in evidence, it was made clear that the Appellant's position was that he did not know of the adaptation prior to being notified of the seizure); and

(3) loss of the vehicle would cause severe hardship.

DIRECTOR OF BORDER REVENUE'S CASE

16. On behalf of the Director of Border Revenue, Mr Coleman submitted that the issue in this appeal was whether the decision not to restore as upheld on review was one that could not reasonably have been arrived at.

17. Mr Coleman further submitted that in considering whether the decision not to restore was one that could not reasonably have been arrived at, it is not open to the Tribunal to find that the Vehicle had not been "adapted…for the purpose of concealing goods", because that question has already been determinately answered by operation of the deeming provisions contained in Schedule 3 CEMA 1979.

18. Mr Coleman went on to submit;

(1) that the "contract of lending for use" was uncommercial and, looking at all the circumstances, appears to have been a sham arrangement entered into "so as to distance the Appellant from the smuggling";

(2) alternatively, the Appellant did not take reasonable steps to ensure that the Vehicle was not used for the purposes of smuggling;

(3) there was no evidence to suggest that the refusal to restore would cause the Appellant exceptional hardship; and

(4) in all the circumstances, the decision not to restore was not one that could not reasonably have been arrived at.

19. The allegation that the "contract of lending for use" was a sham arrangement entered into "so as to distance the Appellant from the smuggling" was not one that was expressly set out in the 20 September 2018 decision. However, in his evidence to the Tribunal, Mr Thomas confirmed that in his view the Appellant knew the Vehicle was going to be adapted (and used) for the purposes of smuggling and this was a factor taken into account in reaching his decision.

THE LAW

20. Section 88 CEMA 1979 provides:

> "Where
>
> …
>
> (c) a vehicle is or had been within the limits of any port…while constructed, adapted, altered or fitted in any manner for the purpose of concealing goods, that…vehicle shall be liable to forfeiture."

21. Pursuant to s139(1) CEMA 1979 any thing liable to forfeiture under the customs and excise Acts may be seized or detained by an appropriate officer.

22. Schedule 3 to CEMA 1979 provides in relevant part:

> "(3) Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice or seizure…give notice of his claim in writing to the Commissioners…
>
> …
>
> (5) If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners…the thing in question shall be deemed to have been duly condemned as forfeited."

23. Section 152 CEMA 1979 provides:

> The Commissioners may, as they see fit –
>
> …
>
> (b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under [the customs and excise Acts]

24. Section 14 FA 1994 permits a person affected by a decision not to restore a seized item to request a review of that decision. Where such a request is made in time, the review must be performed in accordance with s15 FA 1994. If the person that requested the review remains dissatisfied, that person can appeal to the Tribunal under s16 FA 1994.

25. Pursuant to s16(8) FA 1994 and paragraph 2(1)(r) of Schedule 5 of the FA 1994, a decision pursuant to s152(b) CEMA 1979 is a decision as to an "ancillary matter".

26. Section 16(4) FA 1994 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."

27. However, as was underscored in the recent Upper Tribunal case of *Grzegorz Sczcepaniak t/a Phu Greg-Car v The Director of Border Revenue*, the limitation imposed on the Tribunal's power by s16(4) FA 1994 is subject to an important qualification, namely that when deciding whether the Director's (or HMRC's) decision was one that could not reasonably have been arrived at, the Tribunal is not bound by the factual determinations made by the decision maker. Nor is the Tribunal limited to a consideration of evidence that was before the decision maker. Therefore, it is open to an appellant to produce evidence that was not before the decision maker and invite the Tribunal to reach factual conclusions different to those reached by the decision maker and to submit that, in light of those different factual conclusions, the decision under appeal was unreasonable. This important qualification was first acknowledged at appellate level in *Gora v Customs and Excise Commissioners* [2003] EWCA Civ 525. A number of Court of Appeal (and Upper Tribunal decisions) have subsequently cited *Gora* with approval (see for example *HMRC v Jones and Anor* [2011] EWCA Civ 824; and *HMRC v Behzad Fuels (UK) Ltd* [2019] EWCA Civ 319).

28. Unfortunately, despite the importance of the *Gora* qualification, it was not referred to in the Director's Statement of Case or Skeleton Argument (although counsel for the Director did

acknowledge, when asked by the Tribunal, that the *Gora* approach was appropriate in this appeal). The Tribunal very much hopes that such an omission will not be repeated.

29. A decision will not be one reasonably arrived at if it takes into account irrelevant factors or fails to take into account relevant factors (*Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd [1981] AC 22*, 60 per Lord Lane).

30. Further, as held by the Court of Appeal in *Lindsay v Customs and Excise Commissioners* [2002] EWCA Civ 267:

> "if the commissioners are to arrive reasonably at a decision, their decision must comply with the Convention for the Protection of Human Rights and Fundamental Freedoms , as scheduled to the Human Rights Act 1998."

31. The Court of Appeal went on to state at [52]:

> "The commissioner's policy involves the deprivation of people's possessions. Under article 1 of the First Protocol to the Convention such deprivation will only be justified if it is in the public interest. More specifically, the deprivation can be justified if it is "to secure the payment of taxes or other contributions or penalties". The action taken must, however, strike a fair balance between the rights of the individual and the public interest. There must be a reasonable relationship of proportionality between the means employed and the aim pursued: *Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35* , 50–51, para 61 and *Air Canada v United Kingdom 20 EHRR 150* , as cited above. I would accept Mr Baker's submission that one must consider the individual case to ensure that the penalty imposed is fair. However strong the public interest, it cannot justify subjecting an individual to an interference with his fundamental rights that is unconscionable."

32. In determining whether the decision not to restore was one that could not reasonably have been arrived at the Tribunal is *not* permitted to revisit the issue of whether the seizure of the relevant goods/vehicle was lawful or to make findings of fact inconsistent with the forfeiture of the goods. That is so whether the forfeiture results from an order made following condemnation proceedings pursuant to schedule 3 CEMA 1979 or by operation of the deeming provisions in paragraph 5 of Schedule 3 CEMA 1979 (see *HMRC v Jones and Anor* [2011] EWCA Civ 824).

33. In *John Dee v Customs and Excise Commissioners* [1995] S.T.C. 941, the Court of Appeal stated:

> "It was conceded by Mr. Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a Tribunal can dismiss an appeal. In the present case, however, though in the final summary the Tribunal's decision was more emphatic, the crucial words in the Decision were:
>
> > 'I find that it is most likely that, if the Commissioners had had regard to paragraph (iii) of the conclusion to Mr. Ross' report, their concern for the protection of the revenue would probably have been fortified.'
>
> I cannot equate a finding "that it is most likely" with a finding of inevitability."

THE CONSEQUENCE OF THE DEEMING PROVISIONS IN SCHEDULE 3 OF CEMA 1979

34. The Vehicle was seized on the basis that it had been "adapted…for the purpose of concealing goods" (and was therefore liable to seizure pursuant to s88 CEMA 1979). There

was no challenge, by way of the procedure set out in Schedule 3 CEMA 1979, to the legality of that seizure. Accordingly, pursuant to paragraph 5 of Schedule 3 CEMA 1979, the Vehicle was duly condemned as forfeit. In light of the Court of Appeal decision in *Jones*, we accept the Director's submission that, in determining the reasonableness of the decision not to restore, we cannot make a finding that the Vehicle was not adapted for the purpose of concealing goods (although we should record that on the photographs we were shown it was not immediately apparent to us exactly how the Vehicle had been adapted for the purpose of concealing goods).

EVIDENCE AND FINDINGS OF FACT

35. The Director's only witness was Officer Thomas. He confirmed the accuracy of his witness statement (in which he exhibited relevant documents and confirmed that he stood by the 20 September 2018 decision letter) and further told us:

(1) the Director has a number of restoration policies including one relating to adapted vehicles and one relating to "innocent parties". These are "hefty" documents consisting of multiple pages containing stages/steps that need to be "worked through";

(2) in conducting his review, he had applied the Director's policy that if a vehicle is adapted for the purposes of concealment, it will only be restored in exceptional circumstances;

(3) he was of the view that the Appellant knew the Vehicle was going to be adapted and used for the purposes of concealment;

(4) had he reached the view that the Appellant did not know that the Vehicle was going to be adapted and used for the purposes of concealment, he would have considered the "innocent parties" policy which would have involved considering whether in all the circumstances reasonable checks had been put in place to guard against adaptation/use for the purposes of concealment/smuggling;

(5) he maintained that in all the circumstances the Appellant had not put in place reasonable checks to guard against adaptation/use for the purposes of concealment/smuggling within the meaning of the innocent party policy (albeit that at the time of making the decision he had not applied the innocent party policy because he was of the view that the Appellant knew the Vehicle was going to be adapted and used for the purposes of concealment);

(6) a lot of new information had been presented by the Appellant during the hearing but he remained of the view that his decision was reasonable on the basis of what was known to him; and

(7) the Director's restoration policies are not in the public domain.

36. The Tribunal asked whether a copy of the relevant policies could be provided to the Tribunal. Mr Coleman said that this was not possible and if disclosure was sought it would likely be resisted on public interest immunity and/or "sensitivity" grounds.

37. The Appellant gave evidence (with the assistance of a Polish interpreter). He confirmed the accuracy of his witness statement. He further told us:

(1) he is a Polish national who, as at 2003, operated a farm and eco-holiday site in Poland;

(2) in 2003 or 2004 he met Bjorn Leuckx in Belgium. Mr Leuckx sold static caravans which the Appellant was interested in purchasing for use at his eco-holiday site;

(3) Mr Leuckx subsequently supplied the Appellant with caravans and holidayed at the Appellant's site. The Appellant and Mr Leuckx became friends;

(4) the farm and eco-holiday site were not very profitable;

(5) in 2015, the Appellant and Mr Leuckx agreed that the Appellant would join Mr Leuckx's business in Belgium. The Appellant's role would be to collect and deliver the static caravans that were bought and sold by the business. The Appellant's "buy in" to the business was that he had to purchase a vehicle suitable for said collection/deliveries. In return for this buy in and for collecting and delivering the caravans the Appellant was to receive 30% of the profits;

(6) the Appellant purchased the Vehicle and had various modifications made to it to make it suitable for the transport of caravans and to ensure it could be lawfully driven in the UK (where many used static caravans are available for purchase). The Appellant funded the purchase and modifications with loans from family members;

(7) the Appellant needed to obtain an HGV licence. The plan was that once he had obtained this licence he would move from Poland to Belgium and join the business;

(8) the Appellant and Mr Leuckx agreed that while the Appellant remained in Poland so as to obtain his HGV licence, Mr Leuckx could have use of the Vehicle as the Appellant has no use for it (and could not drive it without an HGV licence);

(9) the Appellant asked Mr Leuckx to enter into the 'contract of lending for use' because he wanted proof that the vehicle remained his even though Mr Leuckx was in possession of it. This was entered into on 20 August 2016;

(10) the Appellant insisted that the contract be notarised because without notarisation "it's just a piece of paper". However, the contract was not notarised until 26 September 2016 because the Appellant did not get around to it before then;

(11) a week or two after 21 September 2016 (the date of the seizure), Mr Leuckx contacted the Appellant and said that the Vehicle had been seized because one of his drivers had driven the Vehicle to the UK and had been carrying immigrants. Mr Leuckx told the Appellant he needed to contact Border Force;

(12) the Appellant attempted, through a translator, to contact Border Force on the telephone but the phone either rang out or he was told that the officer dealing with the matter was not available. The Appellant also said that his emails to Border Force went unanswered;

(13) when the Appellant handed the Vehicle over to Mr Leuckx it did not have any sort of adaptation for the purposes of concealing goods or people; and

(14) the Appellant did not know that the vehicle was going to be adapted and did not know that the Vehicle would be used for smuggling.

38. The Director challenged the Appellant's evidence, specifically putting to the Appellant:

(1) that it was odd that the Appellant had bought the Vehicle prior to obtaining his HGV licence (to which the Appellant said he had thought the process for obtaining an HGV licence would be quicker than it ultimately was);

(2) the Appellant's witness statement made no mention of the Appellant's business arrangements with Mr Leuckx and simply said that Mr Leuckx was a "former friend"

who had a static caravan business (to which the Appellant said the account he had given in evidence was accurate and true);

(3) the Appellant had had plenty of opportunity to explain the business arrangement with Mr Leuckx but had failed to do so prior to giving oral evidence which supported that the account given in evidence was a fabrication (to which the Appellant again said the account he had given in evidence was accurate and true);

(4) that the alleged arrangement made no sense including because Mr Leuckx could have bought a vehicle and the Appellant could simply have driven it when he obtained his HGV licence (to which the Appellant said buying the Vehicle was his "buy-in" as he wanted to be more than just an employee);

(5) there was no written proof of the business arrangement (to which the Appellant said this was because he and Mr Leuckx were friends and so a formal document was not necessary);

(6) the "contract of lending" was uncommercial (which suggested it was a sham) including because it made no provision for any fee to be charged for the use of the Vehicle (to which the Appellant said such contracts were common in Poland and he had not charged a fee for use because he was about to go into business with Mr Leuckx, and understood that only Mr Leuckx would drive the Vehicle and that he would only drive it in Belgium);

(7) the "contract of lending" said the Vehicle could only be driven in "the State" which must mean Poland (where the contract was entered into) and yet the Appellant knew that the Vehicle was to be used in Belgium (to which the Appellant said that, looking at it now, he accepted the contract was unclear);

(8) the "contract of lending" was not notarised until 26 September 2016 by which point the Appellant knew the Vehicle had been seized (to which the Appellant said that it was only on 26 September 2016 that he had opportunity to get the contract notarised and, as at that date, he was unaware that the Vehicle had been seized);

(9) the photographs of the Vehicle on the day of seizure show that it has a blue livery with "Amigo" written on it and "Amigo" is the name of the Mr Leuckx's company (the Appellant accepted this);

(10) at the point of purchase by the Appellant the Vehicle had the blue Amigo livery on it (the Appellant denied this);

(11) the Appellant had not produced any documents to show that his family had loaned him money to purchase and modify the Vehicle (to which the Appellant said that he did not realise that such documents were relevant);

(12) the "contract of lending" was with Mr Leuckx's English company which, in March 2016, had been issued with a note of compulsory strike off (to which the Appellant said that the business he was joining was in Belgium not the UK, and that he had not checked Companies House so was unaware of the note of compulsory strike off); and

(13) the contract of lending did not impose any restrictions on how the Vehicle could be used (to which the Appellant said that it did say that the Civil Code had to be complied with which he understood to mean that the Vehicle could not be used for any criminal purpose).

39. Mr Coleman confirmed that the Director accepted:

(1) at the date of the seizure, the Appellant was the registered owner of the Vehicle; and

(2) on the basis of documents shown by the Appellant to the Director's legal team, the Appellant obtained his HGV licence in June 2017.

40. We found the Appellant's evidence relating to the proposed business arrangement with Mr Leuckx, the Vehicle "buy in", and the reason for the Appellant permitting Mr Leuckx to use the Vehicle to be credible. The Appellant was able to give a coherent account of how his relationship with Mr Leuckx developed and reached a stage where they agreed to go into business together. Further, given that the Appellant had previously purchased static caravans from Mr Leuckx, the pair had become friends (which friendship had existed for some years), and t the Appellant's business in Poland was not performing well, the account of the decision to go into business with Mr Leuckx made logical sense and has the ring of truth about it, and is further supported by the fact that the Appellant did eventually obtain his HGV licence.

41. We note the Director's concern that the business arrangement between the Appellant and Mr Leuckx was not foreshadowed in the correspondence or the Appellant's witness statement (despite this witness statement not being filed until 9 September 2019). In some cases the failure to foreshadow important matters prior to oral evidence may lead to the conclusion that the oral evidence given is a recent fabrication. However, in this case the Appellant is not an English speaker and was represented by a Belgian lawyer who, whilst he did a commendable job on behalf of his client, is unfamiliar with the English legal system and who also has English language limitations. Having observed the Appellant and Mr Debruyne during the course of the hearing and having read correspondence authored by Mr Debruyne, we can understand how it has come about that the business arrangement between the Appellant and Mr Leuckx was not set out prior to the Appellant giving oral evidence.

42. We did not, however, find the Appellant's evidence in relation to the contract for lending to be truthful. The Appellant's case was that the contract was signed on 20 August 2016 but was not notarised until 26 September 2016. This was apparently despite the Appellant being of the view that, without notarisation, the contract was "just a piece of paper". In such circumstances, the delay in having the contract notarised (until, even on the Appellant's case, after he had handed possession of the Vehicle over to Mr Leuckx) makes no logical sense. Further, the entering into a contract of this sort (and proceeding to have it notarised) is not consistent with the way in which the Appellant and Mr Leuckx dealt with the business arrangement between them i.e. they were friends and so no written documentation was needed. On the balance of probabilities we conclude that the written contract for lending was not in existence as at 21 September 2016. Rather, after the Vehicle was seized, the contract document was created (and notarised) likely in the hope that it would assist the Appellant in securing the return of the Vehicle.

43. We have considered whether the fact (as we have found) that the contract document was created after the event leads to the conclusion that the Appellant knew the Vehicle was going to be adapted and/or used for smuggling. We find that it does not. We find that the contract was created to give an air of formality to an arrangement (use of the vehicle by Mr Leuckx) which had been entered into on an informal basis, likely in the belief that putting the arrangement on a formal, written basis would assist the Appellant in securing the return of the Vehicle. However, that does not mean that, prior to being informed of the seizure, the Appellant knew the Vehicle was going to be adapted and/or used for concealment/smuggling The Appellant denies that he had any such knowledge and, on balance, we accept that given, as set

out above, we find the Appellant's account (other than in relation to the contract for leading) to be coherent, logical and credible.

44. Accordingly, we make the following findings of fact:

(1) in 2015/16, the Appellant agreed with Mr Leuckx (who the Appellant had known both as a supplier of caravans and as a friend for over 10 years), that the Appellant would join Mr Leuckx's business in Belgium where the Appellant's role would be to collect and deliver static caravans. The Appellant's "buy in" to the business was the purchase of the Vehicle;

(2) the Appellant purchased the Vehicle and became the registered owner;

(3) the Appellant did not, if this is what the Director sought to suggest, purchase the Vehicle from Mr Leuckx (or any company controlled by him). There is simply no evidence of that, and the Appellant denied it (and said he had purchased it from a third party);

(4) pending the Appellant obtaining his HGV licence he allowed Mr Leuckx to use the Vehicle;

(5) the Appellant did not know or have reason to suspect that Mr Leuckx (or anyone else) would adapt the vehicle for the purpose of concealing goods or use the vehicle for smuggling purposes;

(6) the contract for lending said to have been signed on 20 August 2016 was not signed on that date. Rather this document was prepared after the date of seizure. Prior to the seizure there was no formal agreement in place. Rather, the Appellant simply allowed his friend and future business associate to use the Vehicle from on or about 20 August 2016;

(7) the Appellant did not place any express restrictions on how the vehicle could be used by Mr Leuckx but expected it to be used for the purpose of Mr Leuckx's business (the purchase and sale of static caravans);

(8) The Vehicle had been in Mr Leuckx's possession a relatively short time (approximately one month) before it was seized (this is relevant to Mr Thomas's suggestion that the Appellant ought to have conducted "periodic checks" on the Vehicle); and

(9) there is no evidence that non-restoration of the Vehicle will cause the Appellant exceptional hardship (i.e. hardship above and beyond that which is suffered whenever a person is deprived of a vehicle). The Appellant did not adduce any evidence of his financial position or of any other special circumstance that might mean that the decision to restore would give rise to exceptional hardship.

DISCUSSION AND DECISION

45. In upholding the decision not to restore the Vehicle, Mr Thomas gave three principle reasons for his decision being:

(1) There was no exceptional hardship;

(2) The contract for lending made little commercial sense (which in his evidence Mr Thomas confirmed, consistent with the Mr Coleman's opening, was to be read as an allegation that the document was a "sham" put in place because the Appellant knew that the Vehicle was going to be adapted (and used) for smuggling); and

(3) The Appellant did not put in place adequate safeguards to ensure that the Vehicle was not adapted and used for smuggling.

46. As to there being no exceptional hardship: we agree (see paragraph 44(9) above).

47. As to the lending contract being a sham put in place because the Appellant knew that the Vehicle was going to be adapted (and used) for the purpose of concealment/smuggling: we have found that the lending contract was created after the date of the seizure. However, we have also found that prior to the seizure the Appellant did not know or have reason to suspect that the Vehicle was going to be adapted (and used) for this purpose. Accordingly, by taking into account that the Appellant knew that the Vehicle was going to be adapted (and used) for smuggling, Mr Thomas took into account an irrelevant consideration (because the Appellant had no such knowledge). This error also led to Mr Thomas failing to apply the "innocent party" policy, which he accepted he would have gone on to apply had he not reached the view that the Appellant knew about the adaptation (see paragraph 35(4) above).

48. As to whether the Appellant put in place adequate safeguards: at the time that he made his decision, Mr Thomas did not know the circumstances that had led to the Appellant allowing Mr Leuckx to use the Vehicle (see findings of fact at paragraph 43 above). It seems to us that these circumstances are relevant to the extent to which the Appellant could reasonably be expected to put in place "safeguards". Accordingly, Mr Thomas failed to take into account relevant factors.

49. Given that Mr Thomas took into account an irrelevant factor and failed to take into account relevant factors, the decision is one that could not reasonably have been arrived at. We have considered whether, even if the relevant factors had been taken into account and the irrelevant factor excluded, it would be inevitable that the same conclusion (i.e not to restore) would be reached. We are not satisfied that is inevitable given that:

(1) we do not know what the Director's restoration policies (specifically the adapted vehicle policy and the innocent party policy) say. This is because copies of the policies were not provided to us. We therefore do not know whether or not, on the findings of fact set out above, the applicable policies would indicate restoration was the appropriate course. We note that a more detailed summary of some of the Director's restoration policies appears to have been given in *Grzegorz Sczcepaniak*. However, we have no way of knowing whether the policies summarised therein would apply to the present appeal and, in any event, we do not think it appropriate for us to try to surmise what the policies might say by reference to other reported appeals; and

(2) in any event, regardless of what the applicable polices might say, it seems to us that depriving a person of property in circumstances as found in the present case would be disproportionate to the aim pursued and would thereby give rise to a breach of Article 1 to the First Protocol of the European Convention on Human Rights, particularly given that (1) the Appellant did not know or have reason to suspect that the Vehicle would be adapted or used for the purpose of concealment/smuggling and (2) the Appellant handed possession of the Vehicle to his long-standing friend and soon to be business partner pursuant to an informal agreement for use (at no charge) on the understanding that the Vehicle would be used for the purposes of an existing lawful business.

50. It follows, therefore, that appeal is allowed and we direct as follows:

(1) The Director is to conduct a review of the decision not to restore the Vehicle and notify the Appellant of the conclusion of the same within 30 days of the release of this decision; and

(2) In conducting the further review, the Director is to take into account all relevant circumstances including the findings of fact set out in this decision.

51. As a post-script in relation to the Director's decision not to provide us with a copy (or at least a detailed summary) of the applicable policies: we were able to dispose of the present appeal on the basis that the decision maker took into account an irrelevant factor and failed to take account of relevant factors. However, in other appeals the position may be different. Even if the facts of a given appeal do not disclose that irrelevant factors have been taken into account or relevant factors excluded (and no proportionality issues arise), it seems to us that a decision might well nonetheless be unreasonable if it purported to apply the relevant restoration policy/policies but in fact had not done so (for example because the decision maker had misinterpreted or misapplied the provisions of the applicable policy or had applied the wrong policy). However, the Appellant and the Tribunal have no way of knowing whether the applicable policies have been correctly applied in circumstances where the content of the policies is not disclosed in any meaningful detail.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

52. 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.

DAVID BEDENHAM
TRIBUNAL JUDGE

RELEASE DATE: 29 OCTOBER 2019