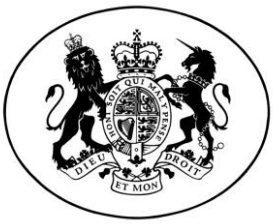

[2019] UKFTT 700 (TC)

TC07472

Appeal number: TC/2015/03601

EXCISE DUTY – Boxes containing about 950,000 cigarettes found in a storage unit owned by the Appellant which the Appellant was still using but which she was sharing with another person or persons - Appellant pleaded guilty on an agreed basis of plea in the Crown Court of being knowingly concerned in the fraudulent evasion of duty contrary to section 170 CEMA - Application to strike-out her Appeal on discretionary grounds - Rule 8(3)(c) - Key issue, was the Appellant 'holding' within the meaning of Regulation 10? - Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CHARLENE HUGHES (also known as CHARLENE COBURN)	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at Tribunal Hearing Centre, 2nd Floor, Chichester Street, Belfast BT1 3JF on 18 October 2019

Mr Michael Forde BL, of Counsel, instructed by Tiernans Solicitors, Newry, for the Appellant

Ms Joanna Vicary, of Counsel, instructed by the General Counsel to HMRC and Solicitors' Office for the Respondents

DECISION

1. This is my decision in relation to HMRC's application to strike-out this appeal, pursuant to Rule 8(3)(c) of the Tribunal's Rules, as being one where there is no reasonable prospect of the Appellant's case succeeding. This is a case-management decision.

2. I have decided to dismiss the Application, with the effect that the substantive appeal goes forward, albeit subject to the observations and directions which I make at the end of this decision.

Background

3. The appeal is made by way of a Notice of Appeal dated 9 June 2015, which challenges an assessment of excise duty in the sum of £213,332 made on 3 February 2015 and upheld at review on 5 May 2015.

4. That assessment was made against the following background.

5. On 20 April 2013, there was a police raid on what was described as a shed, owned by the Appellant, in Jonesborough, Co. Down. The description of a 'shed' does not do the building justice. As the photographs show, it is a double-height steel-framed industrial or commercial unit, composed of pre-fabricated panels, with a full-height metal overhead-roller door big enough to accommodate vehicles. The shed is approximately 20 metres in length, and 8 metres in depth.

6. It is agreed that inside the shed were found:

(1) 79 boxes each containing approximately 5,000 'Palace' King Size Filter cigarettes (which had no UK duty paid mark and bore a stamp from the Czech Republic);

(2) 18 boxes of cigarettes;

(3) 2000 'Silk Cut' cigarettes (which had no UK duty paid mark and bore a stamp from the Czech Republic);

(4) 57 boxes of cigarettes; and

(5) A 'Quantity of Cigarettes' (described as 'Approx 36 boxes').

7. The total number of cigarettes in the shed was 953,260. The assessment was made on the basis of 950,000 cigarettes. Although these were all described by HMRC as 'Palace' (when they were not) there is no dispute as to the manner in which the assessment is expressed, or its calculation.

8. Photographs taken at the time by the Photography Branch of the Police Service of Northern Ireland show many of the boxes to be plain, brown-cardboard, unmarked boxes, of a uniform size and shape, sealed with brown tape. The boxes were stacked inside the shed three deep, and at least some of them were stacked immediately behind the roller door. Others may have been on steel shelving units inside. The photographs give a good impression of the interior of the shed, which had a large quantity of other items in it, in some state of disorder.

9. In the light of the finds and seizures in the shed, an additional warrant was obtained for the Appellant's house (which has the same address as the shed). The house was searched later that same day. Amongst the items found were "Mixed contraband tobacco products." These were found inside a dishwasher and a bathroom bin. The cigarettes were 3 x cartons of Palace King Size (i.e., one of the same brands which was found in the shed, although there is no indication as to whether the Palace cigarettes found inside the house were duty paid, and, if so, where), 1 x carton of 'Jin Ling', 4 x loose packs of 20 Benson and Hedges, 11 x packs of MG Premium, and 1 x pack of Flandria loose tobacco. HMRC confirmed that the majority of those cigarettes are mixed brands not available in the UK.

10. As far as I can tell from the papers, the cigarettes and tobacco found inside the house were not assessed by HMRC to duty, and were not the subject matter of any criminal charge.

11. On 20 April 2013, the Appellant gave a prepared statement to an officer of HMRC. She said (amongst other matters) that she definitely did not know the cigarettes were in the shed, had never seen cigarettes in the shed, and she did not know how they had gotten there. She said that after her father's death in 2006, a friend of her father's - one 'Jamsie' (or 'Jimmy') 'Hatz' - had asked to use the shed to keep furniture and she had let him. She had given him a key at some point so that he could let himself in. She said that the last time she went into the shed before 20 April 2013 was at Christmas 2012 so that she could get some vodka which she had stored there. She said that she did not see any cigarettes there at the time. She said that she would not have given Jamsie Hatz any keys had she known that he intended to store cigarettes, and she would not have let that happen.

12. She was not asked anything about the cigarettes in the dishwasher, or her house.

13. On that same day, she was interviewed under caution at Banbridge Police Station, in the presence of her solicitor. She made a prepared statement in materially identical terms to what she told HMRC. Otherwise (as was her right) she declined to comment in response to many of the questions. She was shown a brown cardboard box, which was opened in her presence, and contained sleeves of 200 Palace cigarettes (with Spanish health warnings).

14. The Appellant was charged (inter alia) with the following:

STATEMENT OF OFFENCE

"Knowingly concerned in, carrying, removing, keeping, concealing or dealing with goods with intent to defraud, contrary to section 170(1)(b) of the Customs and Excise Management Act 1979

PARTICULARS OF OFFENCE

"..on the 20th day of April 2013 ... were in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with such goods as are defined in Section 170(1)(a)(i-iii) of the Customs and Excise Management Act 1979, namely 953,260 cigarettes or

thereabouts, and that she did so with intent to defraud Her Majesty of any duty payable on the said goods or to evade any such prohibition or restriction with respect to the said goods"

15. The assessment was made on 3 February 2015 and upheld at review on 5 May 2015. The review was conducted following a representation from the Appellant's solicitors (and which neatly captures the heart of this dispute) that "We advise that there is no evidence that our client was holding any cigarettes or product upon which excise duty was payable."

16. The Appellant's position is expanded on in the Grounds of Appeal in June 2015, which say (in full):

"The officer has equated 'holding' to 'possession'. If the Regulations intended to use the well known concept of 'possession' to trigger liability for duty on excise goods, the word 'possession' would be used. We submit that holding denotes a much more intimate connection between the person and the goods. We don't argue that 'possession' cannot mean 'holding'. Clearly, the [word illegible] of holding would be caught by the concept of 'possession'. That does not apply in this case. We contend that 'holding' must denote a specific beneficial relationship to the goods. There is no such relationship in this case. Further the Appellant had no knowledge of the presence of the goods. Others had access to the premises. That HMRC have failed to identify that other person is not proper grounds to fix liability on the Appellant. HMRC have erred in using the concept of possession and taking any element of control of the premises to fix the Appellant with liability. If that were a proper application of the Regulations ever landlord would be in a perilous position. The Applicant was not holding any excisable goods, had no knowledge of said goods and there is no evidence that she ever held, possessed, controlled or owned the goods"

17. Meanwhile, the criminal proceedings continued. On 1 July 2016, the Appellant pleaded guilty to the above charge, without a trial, on an agreed basis of plea. That basis included the following:

"During police and HMRC interviews, [the Appellant] gave 2 prepared statements via her solicitor. In these she stated that ... only she and a man called Jamsie Hatz had access to the shed and she had no knowledge of the cigarettes. Jimmy Hatz was a friend of her late father and he was allowed to store items in the shed ... the last time she had been to the shed was at Christmas to get some vodka for a party...As there is no footage or cameras at the shed it cannot be confirmed whether [the Appellant] actually accessed the shed on any occasion ... it is accepted that another individual, if not more than one, was involved in accessing, storing and removing items from ... the shed [...]

The prosecution cannot gainsay that, whilst she allowed her shed to be used from (sic) the storing of contraband cigarettes, she in any way personally benefited from the same. She is entering a guilty plea to this count ... on the basis of 'harbouring' on behalf of another with no personal involvement in the purchase, sale, distribution or otherwise of the cigarettes'.

18. As far as I am aware, there was no *Newton* hearing.

19. On 31 December 2018, HMRC applied to strike out the appeal. Part of its application says as follows:

> "Given the outcome of the criminal prosecution, the Respondents respectfully contend that it would not be equitable, or in the interests of justice for the appeal to be allowed to proceed. There is clear evidence that the appellant knew that excise duty had not been paid on these goods as per the findings of the criminal court. This tax appeal cannot therefore reasonably succeed."

Observations on the Application generally

20. As the Application unfolded, it became increasingly clear to me that this is an an interlocutory application of the kind described by Judge Staker in *Jamie Garland v HMRC* [2016] UKFTT 573 (TC) where he remarked, at Paragraph [17]:

> "In a case of any complexity, hearing and determining a strike out application may involve less time and fewer resources than the hearing of the substantive appeal. In such a case, if no viable grounds of appeal are set out in the notice of appeal, it may therefore be proportionate and efficient initially to determine at a strike out hearing whether there is any justification for the appeal to proceed to a substantive hearing, and for a strike out application to be granted if no ground of appeal with a reasonable prospect of succeeding has been identified at the strike out hearing. **On the other hand, in a default paper case or a simple basic case, the time and resources required for a strike-out application may be the same or nearly the same as the time and resources required to hear the substantive appeal. In such a case, the making of a strike-out application may be disproportionate, unmeritorious though the appeal may appear to be. Given that there is always the possibility that the strike-out application may not be granted, the most efficient way of disposing of the case may be simply to proceed to hear the substantive appeal, giving the appellant his or her day in court.**" (emphasis added by me).

21. Although Judge Staker was referring to basic cases (which this one is not - it was allocated to the standard track) and to cases with an unrepresented Appellant (which this one is not - the Appellant has both solicitors and Counsel acting for her) his remarks nonetheless, in my respectful view, still hold good here.

22. The hearing of this strike-out application was set down for a day. Consistently with that, nothing else was listed to be heard in Belfast that day. Moreover, the making and pursuit of the strike-out application meant that nothing else was done to progress this appeal for the last 9 months. No directions have been given, and so there has not been any disclosure or witness statements.

23. The hearing took half a day. There was a bundle, and an authorities bundle. Both parties filed Skeleton Arguments in advance of the hearing, dealing only with the strike-out. But it seemed to me that the written and oral submissions, in very large measure, effectively foreshadowed what might be said at the conclusion of a substantive hearing, albeit without hearing oral evidence from the Appellant. In particular, there was an

intense semantic focus on the wording of the basis of plea, and what (if anything) could be derived from it. There may well be circumstances in which that approach is an appropriate one. But, in my view, and for the reasons set out further below, this case is not one - at least, not at this interlocutory stage.

'Holding'

24. Overall, the Appellant bears the burden (albeit only to the civil standard) of demonstrating that the assessment should be set aside. At a substantive hearing, the burden lies on her to show the Tribunal that she was not 'holding' the goods at the time.

25. But at an interlocutory stage, the exercise is different. This is HMRC's application, and so it bears the burden of demonstrating (albeit only on balance) that Rule 8(3)(c) is met, and that there is no reasonable prospect of the Appellant's case, or part of it, succeeding. HMRC needs to show (albeit only on balance) that there is no reasonable prospect of the Appellant successfully arguing that she was not holding, within the meaning and effect of the Regulations.

26. In *HMRC v Fairford Group plc* [2014] UKUT 329 the Upper Tribunal said (at Para [41]):

> "In our judgment an application to strike out in the FTT under r 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Pt 24). The tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of succeeding on the issue at a full hearing, see Swain v Hillman [2001] 1 All ER 91 and Three Rivers [2000] 3 All ER 1 at [95], [2003] 2 AC 1 per Lord Hope of Craighead. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see ED & F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472, [2003] 24 LS Gaz R 37. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in Three Rivers, the strike-out procedure is to deal with cases that are not fit for a full hearing at all."

27. In *The First De Sales Limited Partnership and others v HMRC* [2018] UKUT 396 (TCC) the Upper Tribunal (Henry Carr J and Judge Sinfield) remarked (at Para [33]):

> "Although the summary in Fairford Group Plc is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, as he then was, in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in *AC Ward & Sons v Caitlin Five Limited* [2009] EWCA Civ 1098. The parties to this appeal did not suggest that any of these principles were inapplicable to strike out applications.
>
> "i) The court must consider whether the claimant has a 'realistic' as opposed to a "fanciful' prospect of success: Swain v Hillman [2001] 1 All ER 91

ii) A ‘realistic’ claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a ‘mini-trial’: Swain v Hillman

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant’s case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

Discussion

28. HMRC places heavy reliance on the fact of the conviction, and the basis of plea.

29. The Appellant was convicted of the offence of being "knowingly concerned in, carrying, removing, keeping, concealing or dealing with goods with intent to defraud, contrary to section 170(1)(b) of the Customs and Excise Management Act 1979."

30. The conviction is admissible in evidence for the purpose of proving (where to do so is relevant to any issue in the proceedings) that a person committed the offence, whether that person was so convicted on a plea of guilty or otherwise: *Civil Evidence Act 1968* section 11(1). Ms Hughes is taken to have committed the offence unless the contrary is proved, and the charge sheet and basis of plea are admissible in evidence for that purpose: section 11(2)

31. Beyond that, the status of the basis of her plea is less clear. The prosecution must have ensured that the basis was factually accurate, and was such as to enable the sentencing judge to impose a sentence appropriate to reflect the justice of the case. The Court must have been satisfied that the basis represented a clear acknowledgment of guilt to the offence charged.

32. I agree with Ms Vicary that Ms Hughes' failure to challenge the seizure of the cigarettes in the Magistrates Court pursuant to section 139 and Schedule 3 of the *Customs and Excise Management Act 1979* means that the cigarettes are deemed to have been condemned and were duly condemned as illegally imported goods: see *HMRC v Jones* [2011] STC 2206 (Court of Appeal) per Mummery LJ at Para [71], as applied to assessments to excise duty in *Race v HMRC* [2014] UKUT 0331 (TCC) (Warren J, sitting as President of the Tax and Chancery Chamber of the Upper Tribunal).

33. But the Appellant is not seeking to challenge a finding of commerciality. Her case is that the cigarettes were not hers, and were not being held by her.

34. In *Dawson's (Wales) Ltd v HMRC* [2019] UKUT 296 (TCC), handed down on 4 October 2019, the Upper Tribunal (Falk J and Judge Herrington) undertook a careful and comprehensive review of the authorities on holding. The Upper Tribunal noted that the Court of Appeal in *Revenue and Customs Commissioners v Perfect* [2019] EWCA Civ 465, in March 2019, made a reference to the CJEU for a preliminary ruling (with the questions for that ruling being agreed by the parties). I accept that, on the face of it, the question referred to the CJEU is materially different to that here, because *Perfect* concerns a person transporting excise goods, for a fee, from one Member State to another and there is no element of Miss Hughes transporting anything in this case.

35. However, at Para 131 of its decision, the Upper Tribunal in *Dawson's* said:

> "The CJEU's answers to these questions will therefore most likely give helpful guidance as to the extent to which physical possession alone of excise goods in respect of which duty has not been paid is sufficient to constitute a person a "holder" of the goods for the purposes of the Regulations. Those answers may also be of assistance in determining the extent to which the distinction drawn in the domestic cases between constructive possession and physical possession, based on the domestic law concept of bailment as well as, where relevant, the Convention, is of relevance in determining the EU law meaning of "holding".

Pending the CJEU delivering its judgment on these questions, we proceed on the basis of the following principles, as derived from the cases reviewed above:

(1) A person who is able to exercise legal or de facto control of excise goods in respect of which duty remains unpaid, and intends to assert that control against others, whether temporarily or permanently, is to be regarded as "holding" those goods for the purposes of the 2008 Directive and the Regulations.

(2) Depending on the circumstances, a person having physical possession of such goods, and sharing legal possession of them with the person mentioned in (1) above, may be regarded as holding them for those purposes.

(3) An innocent agent of a person mentioned in (1) or (2) above having physical possession of such goods is not to be regarded as holding those goods for those purposes.

(4) Actual or constructive knowledge of physical possession of such goods might be sufficient to constitute "holding" for those purposes and take such a person outside the status of "innocent agent".

36. Even taking the evidence as it stands, and at its highest - derived from the photographs, the unchallenged presence of some cigarettes of the same brand in the dishwasher, the prepared statements given to HMRC and PSNI, and the basis of plea - it is still not presently clear to me how, either as a matter of fact, or a matter of law, those facts engage with 'holding' in the light of the above observations.

37. I regard the following as relevant:

(1) The Appellant owned a big shed. Her position is that she gave someone else a key and that they both used the shed. That other person (on the Appellant's case, without her knowledge) put things in the shed;

(2) Was she - as the owner of the shed - able to exercise legal or de facto control of those things? What does legal control mean in these circumstances? What does de facto control mean in these circumstances?

(3) Is this a case of actual possession or constructive possession? Is it a case of deposit or bailment?

(4) Did the Appellant know what was there? Someone (on the Appellant's version, as it stands, without her knowledge or awareness) at some point before 20 April 2013 stored (it seems, in a prominent position, right by the doors) a considerable number of plain brown cardboard boxes. It is not clear whether any of those boxes were open, so that the contents could be seen. Did she need to know that anything was there? Does it matter that she thought that the shed was being used to store furniture? Does it matter that boxes are not furniture?

(5) What (if anything) is to be made of the cigarettes in the dishwasher and the bathroom bin. Nothing was said about these in the interviews, and they are not the subject of the charge, nor therefore mentioned in the basis of plea.

38. I do have regard to the recent decision in *HMRC v Saqib Munir* [2019] UKUT 0280 (TCC) where the Upper Tribunal (Judge Cannan and Judge Greenbank) remarked (at Paras 30-31):

> "30. [Counsel for HMRC] submitted that having pleaded guilty to being knowingly concerned in the fraudulent evasion of excise duty, there was a presumption that Mr Munir knew that the van contained goods on which excise duty had not been paid. We accept that submission. The question which then arises is whether it must follow, if the presumption is not rebutted, that Mr Munir was holding the goods.
>
> 31. Mr Munir was the driver of the van and, if the presumption is not rebutted, he must be taken to have known that goods on which duty had not been paid were in the van. The only possible distinction between this case and *McKeown* is that, in the present case, Mr Munir's evidence was that the goods were locked in the back of the van and he did not have the keys. We do not need to decide whether this would mean that Mr Munir did or did not have de facto control of the goods so as to be holding the goods for the purposes of Regulation 10(1). If he was "knowingly concerned" in the evasion of duty, he was plainly "involved" in holding the goods for the purposes of Regulation 10(2). Even if he could access the goods he knew they were inside the van and on the undisputed facts he was transporting them for the person who had control of the goods."

39. Even if there is a presumption, of the kind identified by the Upper Tribunal in *Munir*, it is nonetheless open to rebuttal. The question as to whether Ms Hughes was holding the cigarettes in the shed, notwithstanding the fact of her conviction and the basis of plea, does not presently strike me as so clear cut as to preclude any realistic prospect of rebuttal.

40. In my view, the true position cannot be established without giving the Appellant the opportunity of giving evidence, and giving HMRC the opportunity to test that evidence by way of cross-examination.

41. I should record that Mr Forde was not able to tell me whether his client intended to give evidence, but he did tell me that his advice to her would be that the prospects of her appeal succeeding could be affected if she did not. Despite that reticence, it would not be fair or just for me, at this point, to guess whether or not Miss Hughes will give evidence. Although she gave HMRC and PSNI a prepared statement and she did not give evidence in Crown Court, the past is not always a reliable indicator of the future.

42. Taking all the above into account, it does seem to me, and without the need to decide the point definitively at this interlocutory stage, that it is at least arguable that there is a material difference for these purposes between a vehicle (as in *Munir*) and an industrial unit of the kind here. A van moves around; a shed does not. A van can only be driven by one person at a time, using one set of keys. As a matter of simple common sense, there must be a strong presumption that someone driving a vehicle, knowing that there are goods in the back, and transporting them for the person who had control of the goods, is knowingly concerned in the evasion of duty, and is plainly involved in holding the goods.

43. But it is not clear to me that the same can be said in relation to an industrial unit which may have several sets of keys. Moreover, that unit may be large or small. It may contain only the goods which are the subject matter of the dispute, in plain sight, or it may contain other things as well.

44. Ultimately, I have firmly in mind what the Upper Tribunal said in *First De Sales* at Para. 33[vi]. This case may turn out at trial not to be really complicated. It may turn out at trial to be very simple. Nonetheless, it does not follow that the case should be decided without the fuller investigation into the facts which a trial will allow, but which is neither possible nor permissible at this interlocutory stage.

45. In my view - and even treating *Munir* as on point, and as establishing a rebuttable presumption in this case - there is nonetheless, just about, enough here to lead me to believe that a fuller investigation into the facts at trial could add to or alter the evidence available, and so as to affect the outcome of the case.

46. In and of itself, that is sufficient to dismiss the Respondents' application, and to allow this appeal to go forward to a full hearing.

'Incorrect factual basis'

47. The second point made by Mr Forde is that the strike-out application "is based on an incorrect factual basis". Given my above conclusion, it is not necessary for me to deal with this, but, to do deference to the parties and their submissions, I wish to do so.

48. This refers to the fact that the Application Notice, both in its original form dated 31 December 2018 and its amended form (noting that neither the original Notice nor the amended Notice were settled by Ms Vicary) asserted, as a matter of fact, that "the Appellant was found to have had *"an organisational role in the conspiracy - a professional smuggling organisation"*. Ms Vicary was not able to take me to anything in the papers before me to show where the words (which are in inverted commas in the Notice, and hence are held out as accurately representing something either said or written) came from.

49. Mr Forde makes the following points: (i) there was no criminal trial in the conventional sense; (ii) there is no evidence that the words quoted were said or written about his client (and his position on her behalf is that they were not); and (iii) there was no conspiracy because none of the counts related to conspiracy.

50. In my view, (ii) and (iii) are fair points. But, in and of itself, this apparent inaccuracy emanating from and maintained by HMRC, would not have been determinative of the application. I say 'apparent', because I am leaving open the possibility that something may subsequently emerge which in fact shows that what was said is in fact accurate. This is simply indicative that, as matters presently stand, the remainder of what is advanced in the Application to strike-out the Appeal should be approached with a degree of caution.

51. The point now falls away given that the appeal is going forward to a full hearing.

Proportionality

52. The third basis upon which the application is resisted is that "to view the Appellant as 'holding' the cigarettes is disproportionate".

53. I have no hesitation in rejecting this ground. The simple answer is that I agree with the remarks of the Tribunal (Judge John Brooks) in *Marcin Staniszewski v HMRC* [2016] UKFTT 128 (TC) at Paragraphs 42-52. They are very well-known, and it would be otiose to set them out in full.

Conclusion

54. Accordingly, I dismiss the Respondents' application to strike-out the Appeal.

Further directions

55. This appeal must now go forward. The parties will, within 21 days of the date release of this decision, file directions with the Tribunal which are agreed, if possible. In my view, this should be heard in Belfast, with an estimated length of hearing of one day, before a Judge and a member.

56. I am not giving the parties an entirely free rein on directions. This is a standard track appeal, and there will have to be a witness statement, supported by a Statement of Truth, from the Appellant, which deals in sufficient detail with the matters which are the subject matter of her appeal.

57. 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.

Dr CHRISTOPHER MCNALL
TRIBUNAL JUDGE

RELEASE DATE: 19 NOVEMBER 2019