[2016] UKUT 0124 (TCC)

Case Number: TCC – JR/02/2015

EXCISE – decision of HMRC to reject application for registration as owner of duty suspended goods held in an Excise Warehouse – appeal to Tribunal allowed and order made for application to be reviewed in accordance with Tribunal's direction – alleged failure of HMRC to comply with direction – purported decision on review rejecting application – judicial review of review decision – permission to bring judicial review refused

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE QUEEN ON THE APPLICATION OF
ACE DRINKS LIMITED

Claimant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Defendants**

Tribunal: Mr Justice Warren

Sitting in public in London on 17th February 2016

Mr Geraint Jones QC, instructed by Rainer Hughes Solicitors, for the Claimant

Mr Simon Charles, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Defendants

DECISION

Introduction

1. This hearing has been listed to deal with the application by the Claimant ("**ADL**") for permission to bring a judicial review claim against the Defendants ("**HMRC**") and, if permission is granted, to deal with the substantive application. The claim relates to HMRC's decision to reject ADL's application ("**the WOWGR Application**") for what has been referred to in these proceedings as registration as an owner of duty suspended goods held in an Excise Warehouse. More accurately, the application was for approval as a revenue trader and registration as registered excise dealers and shippers for the purposes of section 100G Customs and Excise Management Act 1979 ("**the Management Act**") in accordance with the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ("**WOWGR**").
2. Section 16 Finance Act 1994 ("**FA 1994**" and "**section 16**"), is headed "Appeals to a tribunal". Section 16(1B) provides for appeals against a "relevant decision" (with certain immaterial exceptions). The reference to "relevant decisions" is a reference to the decisions listed in section 13A FA 1994. These include the decisions listed in Schedule 5 (again with immaterial exceptions). Paragraph 2(p) of that Schedule includes within its ambit the decision appealed against in the present case. Accordingly, the First-tier Tribunal ("**the Tribunal**") had jurisdiction to deal with an appeal from that decision.

The facts

3. The relevant facts are not in dispute:
    a. On 9 July 2012, or perhaps 12 July 2012, ADL made the WOWGR Application.
    b. The appeal to the Tribunal was heard by Judge Poole and Mr Atkinson ("**the Tribunal**"). Their decision ("**the Tribunal Decision**") was released on 1 May

2014. Reference to paragraph numbers below in the form [x] are, unless the context requires otherwise, references to paragraphs of the Tribunal Decision. The Tribunal describes in [2] to [12] the history leading up to an initial decision by Mr Hibbs, the HMRC officer who had the conduct of ADL's application.

c. The Tribunal's finding was that on 1 February 2013, Mr Hibbs phoned Mr Parminder Singh Dhadwal ("**PSD**") who, as is recorded in [4], had introduced himself to Mr Hibbs as the sole director of ADL. In that conversation, Mr Hibbs informed PSD that the application was being rejected and summarised the reasons why. The Tribunal does not describe that summary and I do not know what Mr Hibbs actually said. Mr Hibbs told PSD that he would be referring the decision for internal review and a formal decision would be issued in due course. Once that letter had been issued, ADL could either request a formal statutory review or it could appeal direct to the Tribunal.

d. On 22 April 2013, HMRC sent a letter ("**the First Decision Letter**") to ADL rejecting the WOWGR Application. For further detail about this letter, see [4] below. I will refer to that rejection as "**the original decision**".

e. The appeal against the original decision was lodged by ADL although the date of it is not apparent.

f. Two important paragraphs of the F-tT Decision are [1] and [23] which it is helpful to set out in full at this stage:

> "1. The Tribunal decided that HMRC could not reasonably have arrived at its decision dated 22 April 2013 to refuse to approve the Appellant for registration as a registered excise dealer and shipper under section 110G Customs and Excise Management Act 1979. In accordance with section 16(4) Finance Act 1994, HMRC are directed to carry out a further review of their decision to refuse such approval on the basis set out at [23] below.
> ….
>
> 23. In the circumstances, we consider the most appropriate order to make is to require a wholly fresh review of the decision by an officer of HMRC

> unconnected with the previous decision, after giving an indication of all outstanding matters of concern on the application (including as to the suitability of the Appellant) and allowing the Appellant a reasonable opportunity to provide a detailed written response, supported by the fullest documentary evidence available, before HMRC issue a final, fully reasoned, decision. We therefore so order, and direct that HMRC shall provide a written indication of all their outstanding matters of concern to the Appellant within 56 days of the date of issue of this Decision, as the first step in that process."

As to [1], I interpose here to say that it is apparent from reading the whole of the decision that in saying that HMRC could not reasonably have arrived at the decision to refuse approval, the Tribunal were not saying that the only reasonable decision would have been to give approval and to register ADL accordingly. What they clearly were saying was that the process and reasoning by which the original decision was reached was not reasonable. As to [23], its meaning and effect are at the heart of the dispute between the parties to which I will come in due course.

g. On 11 July 2014, ADL issued an application in the Tribunal which, as I understand it, was treated as an application to transfer the matter to the Upper Tribunal under Rule 5(3)(k) of the Tax Chamber Rules. The thinking was that the Upper Tribunal would have effective enforcement powers lacking in the Tribunal in order to compel HMRC to conduct the review in accordance with the directions which had been given in [23].

h. The application was dealt with by Judge Poole at a hearing on 21 November 2014. The application was compromised. Judge Poole made a consent order with the order being released on 24 November 2014. Paragraph 1 of the consent order ordered that, unless HMRC provided to ADL by 12 December 2014 "written notification of each matter of concern upon which it requires information from the Appellant in order to conduct the Review ordered by this Tribunal", the

application was to be relisted. As Mr Jones observes, this order underscored what had been said in [23].

i. On 3 July 2014, a different officer of HMRC, Ms Hanrahan of the Alcohol Strategy Team in Leicester, sent a letter ("**the 3 July 2014 Letter**") to ADL which included the following:

> "In the light of the recent Tribunal Decision to request an Independent Review of Ace Drinks Limited's Owner of Goods Application, to ensure an accurate, impartial and up to date review is conducted, can you please submit an updated WOWGR Application to HMRC's National Registration Unit.
> ……
> When submitting your new Application, can please [*sic*] ensure you include a full business plan, including financial projections, stock figures, details/contract/correspondence with potential customers/suppliers/hauliers/ Excise warehouses and anything else that will support a business need to become an Owner of Goods."

j. On 4 July 2014, another officer of HMRC, Miss Gibson of HMRC Local Compliance International Trade and Excise in Glasgow, sent a letter ("**the 4 July 2014 Letter**") to ADL which included the following:

> "Further to the Tribunal decision dated 1st May 2014, in order for HMRC to complete a wholly fresh review of the decision to refuse WOWGR registration as a registered excise dealer and shipper under section 100G Customs and Excise Management Act 1979 can you please provide an up-to-date business plan to include:"

There then followed a list of eleven bullet point, the last two of which referred to copies of bank/building society statements for the business bank account for the previous 6 months and any other relevant information to include wages for staff and drawings by directors.

k. Following those two letters, Ms Hanrahan wrote a letter to Mr Panesar (of Rainer Hughes, ADL's solicitors) dated 7 July 2014 ("**the 7 July 2014 Letter**") enclosing a copy of Miss Gibson's letter. That letter included the following:

> "To give further clarity and to reiterate Miss Gibson's correspondence, the requests have been made following the Tribunal decision on 1 May 2014 to enable HMRC to complete a wholly fresh review of the decision to refuse the

> WOWGR application. In order to do this and to allow Ace Drinks Limited a reasonable opportunity, can Mr Dhadwal please submit an up to date WOWGR Application and Business Plan, supported by the fullest documentary information he has available, before HMRC issue a final fully reasoned decision."

l. On 4 December 2014, Ms Hanrahan sent a further letter ("**the 4 December 2014 Letter**") to Mr Panesar which HMRC assert, but ADL denies, complied with the direction comprised in [1].

m. On 12 February 2015, Ms Hanrahan sent a letter ("**the Second Decision Letter**") to ADL again rejecting the WOWGR Application. This is the decision with which the present judicial review application is concerned.

4. The First Decision Letter was signed by Mr Hibbs. It was addressed to PSD. The letter states that the decision rejecting the application had been reached taking account of two matters, which were set out in two bullet points. Those matters were:

   a. A substantial seizure which had been made by HMRC from "Maini Wholesale Cash & Carry". At the time, PSD was a 25% partner/shareholder in that business. Duty payment could not be established in respect of some of the goods seized.

   b. PSD had advised Mr Hibbs that ADL would be buying "Double Dutch Beer" direct from Inbev Breweries in Belgium and that ADL would have distribution rights for the UK. Mr Hibbs' checks revealed that that brewery did not produce "Double Dutch" and had no knowledge of the product. Mr Hibbs stated that he had therefore come to the conclusion that the viability and credibility of the business was not demonstrated.

5. As to the 4 December 2014 Letter, the first paragraph reads as follows:

> "In line with the Tribunal Hearings of 14 March 2014 and 21 November 2014, I have provided a more detailed explanation (at points 1-4 below) as to why Ace Drinks Limited's WOWGR Application in July 2012 was not successful".

6. The four points were as follows:

a. Point 1: following the WOWGR Application, PSD called to advise that the business model had changed. It was intended to buy "Double Dutch" lager directly from Inbev Brewery in Belgium. HMRC officers responsible for that brewery had advised that the brewery had confirmed that it did not brew "Double Dutch" lager and had no knowledge of the product. "In the absence of any further evidence" Ms Hanrahan wrote "this business plan lacked credibility".

b. Point 2: there was no evidence of any due diligence having been conducted on "Global Sourcing Import and Export Ltd" as a *bona fide* supplier. The only information provided in relation to this supplier were self-sourced emails from PSD.

c. Point 3: PSD had not provided a contract from "Global Sourcing Import and Export Ltd" offering ADL the distribution rights to the brand name "Double Dutch".

d. Point 4: there were concerns that PSD had involvement with another business, where there had been substantial seizure. Additional information was sought, with supporting evidence, of the nature of his involvement with that business. In response, a letter was received from Charles & Co, solicitors, dated 12 October 2012, which stated "we are informed that Mr Dhadwal was a sleeping partner in the business (Maini Cash & Carry) and did not have any involvement in the day-to-day running of the business or the purchase of stock etc". This again was seen as a self-sourcing letter, which means that there was no independent evidence that PSD was only a sleeping partner in the business.

7. In the next part of the letter, Ms Hanrahan explained that she had been asked to carry out a review following the Tribunal Decision. In order to complete her review she stated that it was necessary for ADL to provide both historic and current data. In points 5 to 12, she

listed all the business information and documentation required to be submitted "for the purposes of the review". It is necessary for me to list them:

a. Point 5: confirmation of ADLs current VAT and Company House status.

b. Point 6: a current and fully comprehensive Business Plan including financial projections and stock figures.

c. Point 7: full details of suppliers of "Double Dutch" lager and customers and provision of contracts for that product and any other products ADL was involved with.

d. Point 8: full details of any changes to the business since the WOWGR Application was submitted.

e. Point 9: details of contracts and recent correspondence with potential customers, suppliers, hauliers and excise warehouses.

f. Point 10: copies of all due diligence conducted relevant to this process.

g. Point 11: a full account of PSD's involvement with Maini Wholesale Cash & Carry, including the full background to his directorship and details of any other current and historic directorships.

h. Point 12: any further information in support of a business need for ADL to become a Registered Owner of Goods and that would demonstrate that it is "Fit and Proper" Business.

8. The Second Decision Letter provided as follows:

a. The first paragraph referred to a review of the application under WOWGR, that is to say the WOWGR Application. The second paragraph related that the original application was made on 12 July 2012 and was refused on 22 April 2013 and that the decision was appealed. Ms Hanrahan then explained that she had conducted the further review which had been directed by the Tribunal.

b. In the third paragraph, she explained that she had reviewed the original information supplied to Mr Hibbs and "the limited information that you have supplied on request following the Tribunal's decision". She concluded that the original decision to reject ADL's application on 22 April 2013 was upheld for the reasons which she then set out in five paragraphs numbered with roman numerals i. to v. I set out briefly the gist of those paragraphs:

   i. ADL had failed to submit an up-to-date business plan in line with Excise Notice 196. She mentioned earlier requests for an updated business plan (three in July 2014 and one in December 2014). Not having received any further information, "your application remains incomplete".

   ii. ADL had failed to comply with the requirements to submit business records or maintain adequate due diligence records in line with Excise Notice 196 adding that this "demonstrates your inability to meet the new Guidelines published in October 2014…".

   iii. One of the reasons the original WOWGR application was rejected was PSD's "involvement with Maini Cash & Carry Limited, a business in which HMRC has identified non-compliance. Although it was acknowledged that a letter had been received from Charles & Co Solicitors dated 12 October 2012 stating that PSD was only a sleeping partner in the Maini Cash & Carry business, this was "considered a self-sourcing letter, which means that there was no independent evidence that you were a sleeping partner" noting that no further confirmation of his status as a mere sleeping partner had been provided.

iv. The original WOWGR rejection decision was based on the intention to buy Double Dutch lager from Inbev Breweries and distribute in the UK. No evidence was received from Inbev to support this plan. Further the

> "contract you supplied with Global Sourcing Import and Export Limited is now in doubt as that company has been dissolved and removed from Companies House. Furthermore, the majority of Trading Partners you have identified are either missing, deregistered for VAT, ceased trading or have been subject to WOWGR Revocation."

v. Cross Tax checks had been conducted on PSD's personal self-assessment return and the corporation tax returns submitted on behalf of ADL and companies where PSD maintained directorships. The checks conducted showed that ADL posed a risk to the Revenue for three reasons:

- Failure to comply with Companies House requirements and threats for being struck off.
- Unexplained capital gains on PSD's personal self-assessment return and a failure to provide records to substantiate them.
- An underlying risk that corporation tax on PSD's trading companies was understated, based on basic checks conducted on those returns.

The Tribunal Decision

9. I have already set out the most important paragraphs of the Tribunal Decision at [3f] above. I have mentioned that the history leading up to Mr Hibbs' initial decision communicated to PSD in the phone call on 1 February 2013 as recorded in [2] to [12] of the Tribunal Decision. In making the decision to reject the WOWGR Application, it appears that Mr Hibbs relied only on the two matters referred to in the First Decision Letter. His concerns, however, went wider than those matters as is apparent from those

paragraphs of the Tribunal Decision; in particular, it can be seen from [5] that there was a general lack of clarity about precisely what information Mr Hibbs was acting on in refusing the application. The confusion identified by the Tribunal is added to by Ms Hanrahan's explanation, in the 4 December 2104 Letter, of the reasons for the original refusal of the WOWGR Application (see [5] and [6] above]). Although not mentioned as reasons for the refusal or specifically identified in the Tribunal Decision, it cannot be said that the matters identified by Ms Hanrahan were not matters of concern to Mr Hibbs: there is no finding to that effect although, equally, there is no express finding that they were matters of concern.

10. In [14], reference is made to the informal internal review which Mr Hibbs had told PSD would take place. As is apparent from [14] to [18], there were certain aspects arising out of that review about which Mr Hibbs was not satisfied. This led the Tribunal to say what they did in [21] and [22] which I now set out in full.

> "21. To our minds, the whole process of the application and its consideration in this appeal are characterised by a lack of attention to detail on the part of the Appellant and an apparent pre-disposition on the part of HMRC to draw negative conclusions from the material before them without offering any opportunity to the Appellant to provide further material or explanations to displace such conclusions. To a degree, the two shortcomings fed into each other. In the result, although we do not lay responsibility wholly at the door of HMRC, we consider the process overall to have been sufficiently unfair to the Appellant that it has led to a conclusion which could not reasonably have been arrived at.
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> 22. In the circumstances, however, there still remain legitimate unanswered concerns about the Appellant's suitability for approval, but equally we understand that matters have moved on, so that the Appellant is in fact importing comparatively large quantities of Double Dutch lager and paying the duty as it does so. Its business model should therefore be clearer and more credible as a result, but there seems to us still to be some outstanding questions to be resolved concerning the suitability of the Appellant for approval, bearing in mind the somewhat sketchy picture which still exists around some areas of HMRC's concern."

It is in the context of those paragraphs that [23] must be read.

Section 16(4): review

11. Where an appeal under section 16 relates to a decision as to an "ancillary matter" within the meaning of section 16(8), the powers of the Tribunal are limited to those set out in section 16(4). The decision in the present case falls within section 16(8). Accordingly, the powers of the Tribunal are restricted to those set out in section 16(4). The power which the Tribunal exercised is found in paragraph (b) pursuant to which they were able "to require [HMRC] to conduct, in accordance with the directions of the tribunal, a further review of the original decision".

12. The structure of regulation under section 100G of the Management Act and WOWGR is designed to ensure the proper collection of excise duty and to avoid, in particular, fraudulent evasion of such duty. The same can, I think be said in relation to any of the "ancillary matters" as defined in section 16(8). It is important that these, essentially regulatory, functions of HMRC are conducted on the basis of the fullest available information both for the protection of the taxpayer and of HMRC. In my view, this leads to a principled conclusion that the Tribunal is able to require HMRC to carry out a review in the light of all the circumstances as they stand at the time when the review is carried out. This allows both the taxpayer and HMRC to make a decision, on review, which best reflects the statutory, regulatory, functions involved in any "ancillary decision". In my judgment, the Tribunal is entitled not only to require a review to be carried out on the basis of material, or factors, not taken into account at the time of a decision (such as the original decision in the present case) even though the information could have been made available or been discovered at the time, but is also entitled to require a review to be carried out taking account of new material, or factors, which have only arisen in the intervening period. For instance, if a taxpayer had been caught, during that interim period, committing an excise offence, that is something which is at least capable of being taken into account. I say "at least capable" to leave open the argument that the Tribunal

could, by making directions within the meaning of section 16(4), preclude the admission, on the review, of new material or factors.

13. Mr Jones suggests that, as a matter of construction of section 16(4), the material, or factors, which might in principle be brought into account on a review do not go as wide as that. But where then, I ask, is the line to be drawn? It cannot, in my view, be correct that new material is to be altogether excluded and I do not understand Mr Jones to suggest that that is the case. It would have potential for great injustice to taxpayer and HMRC alike. However, unless as a matter of construction of section 16(4), HMRC are to be restricted, on a review, to precisely the same material as they had when making their original decision, I do not understand where any principled dividing line between what is and what is not potentially admissible is to be drawn. Clearly, further material must be admissible in order to clarify or enlarge on material which was taken into account when the original decision was made. But once that is accepted, it becomes impossible to see how to distinguish what is admissible from what is not.

14. Take, by way of example, a case where HMRC have doubts about the honesty of an applicant. They make a decision taking their perception of that dishonesty into account. The Tribunal then rules that their decision was flawed and directs a review under section 16(4). Clearly, in my view, when conducting the review, HMRC are entitled to take into account further detail of the alleged dishonesty, just as they would be bound to take into account new material from the taxpayer which demonstrated conclusively that he had not been dishonest. If that is correct, then I see no reason why HMRC should not also take into account any dishonest conduct which they are able to demonstrate, even if the dishonest conduct took place after the date of the original decision. That later conduct goes to the character of the taxpayer which had been a factor in the original decision.

15. Once that is accepted, there is no principled reason, in my view, why entirely unconnected matters should not be taken into account. Thus consider a case where HMRC make a decision against a taxpayer on the material before them at a time when they have no reason to doubt the honesty of the taxpayer. Suppose there is a successful appeal as a result of which the F-tT orders a review. Why should HMRC not, I ask, take account of any dishonesty on the part of the taxpayer which has come to light by the time of the review, whether or not that dishonesty pre-dated the original decision? My answer is that they can do so. And whilst section 15F FA 1994 probably cannot be relied on as an aid to the interpretation of section 16(4), since it was enacted after section 16(4) – and I do not rely on it for this purpose – it is interesting to note that a review of decisions under sections 15C or 15E by HMRC can take account of material not previously available.

16. This conclusion may need to be qualified, however, in the light of the F-tT's's power under section 16(4) to make directions. Mr Charles submits that this power is concerned with procedural matters; it did not entitle the Tribunal to direct that HMRC should not take into account material which would otherwise be relevant to their decision on review. Mr Jones submits to the contrary, arguing that the power to make directions is wide, enabling the F-tT to make directions which would preclude HMRC from relying on material or factors which are adequately identified in those directions. Thus, he says, it would be open to the F-tT in an appropriate case to direct HMRC to carry out a review on the basis of findings of fact made by the F-tT even if HMRC did not agree with those findings, a proposition which Mr Charles did not dispute. In similar vein, I imagine that Mr Jones would say that it would be open to the F-tT to direct HMRC to make their review decision ignoring a factor which it considered to be irrelevant even though HMRC considered it to be relevant.

17. In my judgment, it is open to the Tribunal not only to direct HMRC to carry out a review on the basis of findings of fact made by the Tribunal or on the basis that they should ignore certain factors which it considered to be irrelevant but also to limit the additional material which HMRC should be entitled to take into account. Nonetheless, the Tribunal ought, in my view, to have a good reason for restricting material which would otherwise be relevant, for instance to prevent a disproportionate exercise under which HMRC might otherwise require a taxpayer to produce a wealth of documentation which they had not asked for when making the original decision. And, in directing a review restricted in such a way, the Tribunal ought to explain in its decision why it is imposing the restriction.
18. This leaves open what is to happen, where a restricted review is directed, if important material comes to light which could have been made available when the original decision was made, or if important material, or factors, come into being after the date of the original decision (such as acts of dishonesty on the part of the taxpayer after that date). Depending on the precise directions made by the Tribunal, it may be possible for HMRC (or for that matter the taxpayer if the material is in his favour) to bring the matter back for the directions to be varied, failing which, HMRC might in a case such as the present decide that they would revoke any certification or registration as soon as it is made.
19. In the light of those considerations, I consider that the correct approach to any directions which are actually made is to read the language of those directions in a way which least constrains HMRC's powers on the review. The default position, absent any direction to the contrary, is that the review will have a wide ambit, allowing HMRC to take account of all material and factors relevant to the making of fully-informed review decision. That wide ambit should be cut down only by clear words.

The present case – the meaning of [23]

20. In the present case, it follows that, apart from the direction contained in [23]. HMRC were not constrained, in conducting the review, from relying on all relevant material. They would have been entitled to request ADL to supply additional information of precisely the scope and type which they would have been entitled to request on an original application.

21. Mr Jones' submission is that [23] contains a direction which limits what HMRC are entitled to pursue by way of further information. They are restricted to obtaining material which relates to the outstanding concerns referred to in [23]. In effect, the words "after giving an indication of all outstanding matters of concern on the application (including as to the suitability of the Appellant" are words of limitation: unless the additional material and factors on which HMRC wish to rely (or about which they wish to obtain further information) fall within those words, the material or factors are to be excluded from consideration.

22. Mr Charles submits to the contrary, saying that the quoted words are not words of limitation but are merely an example of the lines of enquiry which HMRC are entitled to pursue. The words are making explicit what is in any even implicit, namely that HMRC are entitled to have their concerns addressed, but doing so by requiring HMRC to give an indication of those concerns and allowing ADL the opportunity to provide a written response. The concerns are not restricted to those subsisting at an earlier time, but encompass all the concerns subsisting at the time of the review.

23. As to the relevant time as at which outstanding concerns are to be identified on Mr Jones' interpretation of [23], he has proceeded on the basis that it is the date of the Tribunal Decision.

24. Mr Charles says that it cannot be right to pick that date. It would be an entirely arbitrary result depending on how long the Tribunal took to deliver the Decision after the hearing

with HMRC being able to rely on material or factors it had identified as concerns between the date of the hearing and the date of the Decision. It would be more logical to adopt the date of the hearing, as the date on which HMRC had identified to the Tribunal their then existing concerns. I would add that, although more logical, perhaps, it would be unprincipled. While it might be argued that, on a review, HMRC should be restricted to the material on which they relied at the time of the original decision together with additional material relating to the concerns which they had at that time, there is no more reason to pick the date of the hearing as a cut-off date than any other date before the review itself is carried out.

25. Mr Jones' submission about the meaning of [23] (ignoring that last point) has some attraction as a matter of language if one reads [23] in isolation. At the very least, it can be argued that the Tribunal contemplated all matters of concern being identified within 56 days of the Decision since a written indication of concerns had to be provided within that period. But against that, it can be noted that the provision of this written indication was only "the first step in the process".

26. However, [23] is not to be read in isolation. It must be read in the context of the Decision as a whole and in particular bearing in mind the contents of [21] and [22] which explain why the Tribunal considered that there was the need for a review in the first place. It is, in any event, impossible sensibly to interpret what the Tribunal meant in using the words "outstanding matters of concern" in [23] without reference to [21] and [22].

27. [21] is important since it describes in very general terms what went wrong with the process leading to the original decision, a decision made, of course, on the material then available to HMRC (and according to [21], with HMRC having an apparent pre-disposition to draw negative conclusions without giving ADL the opportunity to displace those conclusions).

28. The Tribunal might, I suppose, then have stopped there and considered that the right thing to do was to direct a review, giving ADL the opportunity to displace the negative conclusions on which HMRC had relied in the First Decision Letter. But that is not what they did. Instead, they went on to make the remarks which they did in [22], an equally important paragraph.

29. In [23], the Tribunal observed that "there still remain legitimate unanswered concerns about the Applicant's suitability for approval". That statement lends support to the view that the Tribunal was interested in, and only interested in, the unanswered questions which had been raised. The Tribunal went on, however to note that "matters have moved on" noting the change of circumstance (as I read it, since the date of the First Decision Letter) with ADL then importing large quantities of Double Dutch lager and paying excise duty as it did so. As the Tribunal observed ADL's "business model should therefore be clearer and more credible as a result". It is necessarily implicit in that observation that the Tribunal contemplated a revised business model as being relevant to HRMC's review decision. Further, the Tribunal's perception was that there remained "some outstanding questions to be resolved concerning the suitability of the Appellant for approval, bearing in mind the somewhat sketchy picture which still exists around some areas of HMRC's concerns". I see that as a very weak basis on which to assert that [23] has the very restricted meaning for which Mr Jones contends.

30. There is this point to be borne in mind also. Although the First Decision Letter relied on only two reasons for the original decision, that does not mean that those reasons were the only concerns which HMRC had at the time of that decision, let alone at the times of the hearing or the F-tT Decision. The material before the Tribunal indicated that there were wider concerns: see for instance [3c] and [4c] above.

31. In my judgment, and reading [23] in its context, in particular in the context of [21] and [22], the reference in [23] to outstanding concerns is a reference to concerns outstanding at the time when the written indication was to be given, which should have occurred within 56 days of the Tribunal Decision. HMRC could not, of course, have indicated concerns which they had not yet formulated at the time of writing. They would have been able, however, to indicate all the concerns which they held at the time of compliance with the direction (had they in fact complied); I consider that all of the concerns which they then held are properly to be seen as outstanding concerns within the meaning of [23].

32. Further, in my judgment, the fact that HMRC should have indicated all of the concerns which they then held when complying with the direction in [23], does not mean that they are precluded from relying on any further concerns identified during the course of the review. They would, as a matter of good and fair administration, have to identify any further concerns and give ADL the opportunity to respond. I reject, however, the submission that they could not rely on any new concerns at all.

33. It must be remembered, however, that section 16(4) enables the Tribunal to direct a review of the original decision. The original decision, in the present case, relates to the WOWGR Application; and what ADL is entitled to receive, on the review, is a further decision in relation to that application. HMRC could not require ADL to submit a fresh application and deal with the review as though it were a wholly new application. I do not pause to consider whether the Tribunal would have been able to direct ADL to make a fresh application: they did not do so. However, I see no reason why HMRC should not be able to require ADL to provide such further information on the review as they would have been entitled to require were they still considering the original application for the first time. I will consider later, so far as necessary, what they are entitled to require on that approach.

Compliance with [23]

34. Mr Jones submits that, whatever the scope of the direction contained in the Tribunal Decision, HMRC have not complied with it. This is a complaint about the substance of the non-compliance, not about procedure. He contends that HMRC have never provided a written indication of all of the matters of concern to HMRC as required by [23] of that decision. ADL has never had the opportunity to respond. Given that failure, of substance, on the part of HMRC, he submits that the refusal in the Second Decision Letter cannot stand. And he submits that the appropriate way to challenge the rejection of the WOWGR Application is by an application for judicial review to quash the decision.

35. Mr Charles submits, to the contrary, that the correspondence which I have described above does comply with the direction. He further submits, if that is wrong, that if ADL has any remedy at all, it should be achieved by an appeal against the rejection of the WOWGR Application in the Second Decision Letter and not by way of judicial review. Further, he submits that the rejection of the WOWGR Application in the Second Decision Letter was not unreasonable in the sense that would justify a judicial review by the quashing of the decision. This is the case not only on the basis of the entirety of the material and factors established by the time of that decision, but also on the basis of the more restricted material and factors known to HMRC when the original decision was made.

36. HMRC contend that they complied with the requirements (a) to give, within 56 days, an indication of all outstanding matters and (b) to provide ADL with a reasonable opportunity to provide a detailed written response. They did so by sending the 4 December 2014 Letter mentioned at [5] above. I have already set out the relevant detail of that letter in [5] to [8] above. Of course, the 4 December 2014 Letter was more than 56 days after the release of the Tribunal Decision. The consent order of 21 November

2014, however, extended the period to 12 December 2014, and it was within that extended period that HMRC wrote.

37. Before I consider the impact of that letter, I should say something about the correspondence taking place in the period between the release of the Tribunal Decision and 4 December 2014, as to which see [3i-k] above. The 3 July 2014 Letter was not in compliance with the direction in [23]. That is not to say that it should not have been written: it was, in my view, perfectly in order for HMRC to seek the information which it did. However, I do not think that HMRC could properly have required the making of a new WOWGR application since their duty was to review the existing application. There are, however, two points to make:

    a. The first is that what was required was an updated application not a new application. HMRC were effectively simply asking for the material on which to make a fully informed decision on the review (which, for the reasons I have already given, I consider that they were entitled to request).

    b. The second is that the consent order gave further time for compliance with the direction in [23]. The 4 December 2014 Letter superseded the 3 July 2014 Letter. Even if ADL had been entitled to ignore the earlier letter, that did not entitle it to ignore the later letter.

38. As to the 4 July 2014 Letter, HMRC were, in my view, entitled to request a further business plan in order to alleviate the concerns which they had about the plan before them on the original application. That, at least, was a concern which was outstanding at the time of the Tribunal Decision and clearly within [23]. Further, as with the 3 July 2014 Letter, this letter was superseded by the 4 December 2014 Letter.

39. As to the 7 July 2014 Letter, I make the same points as made in relation to the 3 July 2014 Letter.

40. I make the following observations on the 4 December 2014 Letter.

41. The opening paragraph (see [5] above) refers to the Tribunal Hearings, not to the Tribunal Decision. It is, of course, the case that the Tribunal had a considerable amount of material before it. It may be, – and here I speculate – that during the course of the hearing, the Tribunal suggested that it would be helpful for HMRC to give a fuller account of their reasons for refusing the WOWGR Application; whether they did so or not, HMRC considered it appropriate to give that fuller account.

42. It is clear that the fuller account goes beyond the reasons actually contained in the First Decision Letter. The fact that limited reasons were given for the decision in the First Decision Letter does not mean, however, that HMRC did not have other concerns. They must have considered that the reasons they gave were sufficient and that they did not need to rely on other material.

43. The Tribunal, however, considered that the decision could not be relied on and ordered a review. On any view, I consider, HMRC were entitled to take into account any concern which they had expressed to the Tribunal during the course of the hearing. It seems to me that each of the matters raised in points 1 to 4 of the 4 December 2104 Letter was either a matter before the Tribunal or arose out of matters which were before the Tribunal. They were or gave rise to "unanswered concerns" within [22]. In particular, they constituted unanswered concerns about the business model. They were also "outstanding matters" and "outstanding questions" questions concerning ADL's suitability for approval within [23].

44. In the next part of the letter, Ms Hanrahan moved on from her explanation ("in line with the Tribunal Hearings") of the reasons for the original refusal of the WOWGR Application to consider what she needed to receive, by way of further information, to deal with the review "[f]ollowing the decision of the Tribunal in this matter". She asked for a

considerable amount of material as indicated in points 5 to 12 (see [7] above. It is clear to me that all of the material which she asked for was material which, had she been dealing with an original application rather than a review, she would have been able to require to be provided.

45. Further, it is material which, in my view, was all relevant to addressing HMRC's concerns (about the WOWGR Application) existing when she wrote, on 4 December 2014. If I am right in my views concerning the jurisdiction under section 16(4)(b) and the lack of impact of the Tribunal's direction on the scope of the review, then HMRC were entitled to take into account all of that material in carrying out the review: and so, being entitled to take it into account, they were entitled to request and receive it (subject, perhaps, to any issue of the proportionality of the request as to which none has been raised).

46. But even if I am wrong, important parts of that material were potentially relevant to addressing concerns which HMRC had at the time of the original decision. Those concerns related to certain particular aspects of the matter:

    a. One of those was a concern about the business plan. HMRC were justified in seeking a new business plan to meet those concerns. Clearly, if a new plan was to be provided, it should be one which was current and fully comprehensive as required by point 6.

    b. Another concern related to the proposed sales of "Double Dutch" Lager. HMRC were justified in seeking full details surrounding that product in accordance with point 7. It makes no difference, in my view, that ADL was by now importing the lager and paying duty as it went along.

    c. Due diligence had been a concern in the past. HMRC were justified in seeking details of due diligence relevant to the WOWGR Application in accordance with

point 10. Clearly, if detail of due diligence was to be supplied at all, it ought to address the position at the time of the review, and not simply at the time of the original decision.

d. PSD's involvement with Maini Wholesale Cash & Carry had clearly been a concern of HMRC. They were entitled, in accordance with point 11, to full details of his involvement in order to meet those concerns.

47. Points 5, 8, 9 and 12 can be seen as relating to matters which do not go to particular concerns. However, they do all go to the question whether ADL was suitable for approval. That was, and always has been, a concern of HMRC, something which was recognised in [22]. However, even if (contrary to my view) these requests went beyond what HMRC could properly request, the material which they were entitled to request and receive has not, in fact, been provided. Some, at least, of HMRC's concerns as subsisting at the time of the original decision, have not been met.

48. In my judgment, the 4 December 2014 is, as Mr Charles submits, properly to be read as a written indication of HMRC's outstanding matters of concern within [23]. It is clear that the letter was written in response to what had been said at the hearing and in response to the Tribunal Decision. It is also clear that points 1 to 4 raised matters of concern to HMRC which were capable in principle of being met by satisfactory information supplied in accordance with the requests in points 5 to 12. It demonstrates, in points 1 to 4, the concerns which HMRC had when the original decision was made.

49. But as well as doing that, it demonstrates HMRC's general concern about the suitability of ADL for approval. This is manifest from the final paragraph of the 4 December 2014 Letter:

> "In the interest of dealing with this long delayed matter quickly, may we request that you provide us with all the information requested, no later than 15 January 2015. Should Ace Drinks Ltd fail to provide the requested information by 15 January 2015,

I will be unable to review the original application and the original decision will stand."

50. Ms Hanrahan could only have asked for that information if, without it, she would have had concerns about ADL's suitability for approval. Accordingly, if I am right about the extent of the jurisdiction under section 16(4)(b) and the scope of the direction under [23], then the 4 December 2014 Letter was effective to communicate that general concern to ADL. It may well be that Ms Hanrahan was wrong to say that the review could not be proceeded with in the absence of that information since the Tribunal's direction was to carry out a review. It would have been better if she had said that the review would be carried out on the basis of the information which she had and taking account of the failure to reply. This point is, in any case, academic, because a review was in fact carried out.

51. I have addressed the contents of the Second Decision Letter at [8] above where I set out the gist of the five reasons which she gave for rejecting the application, as well as noting her reference to the limited information supplied.

52. The first reason related to the failure to submit an up-to-date business plan "in line with Excise Notice 196". On any view, concerns about the business plan were extant at the time of the Tribunal hearing: HMRC were entitled to raise their concerns about the business and, reasonably in my view, requested an up-to-date plan in accordance with the current requirements to be satisfied that ADL was a suitable person. The business plan had been asked for; it was not supplied. HMRC were entitled to take that into account.

53. The second reason was that ADL had failed to comply with the requirements to submit business records or maintain adequate due diligence records in line with Excise Notice 196 adding that this "demonstrates your inability to meet the new Guidelines published in October 2014…". Due diligence had, again, been a concern even at the time of the Tribunal hearing and it was a concern of which ADL was aware. HMRC were entitled to raise their concerns about due diligence and, reasonably in my view, requested due

diligence records again in line with the current requirements to be satisfied that ADL was a suitable person. No adequate response was received. It is beside the point, in my view, that reference is made to the new guidelines

54. The third reason was that one of the reasons for the rejection of the original WOWGR application was PSD's involvement with Maini Cash & Carry Limited, reference being made to the letter from Charles & Co. This was clearly a matter of concern to HMRC at the time of the Tribunal hearing and was a matter which had been raised in the 4 December 2014 Letter. HMRC had received no further confirmation of PSD's status as a mere sleeping partner. HMRC were entitled to take account of this in reaching their decision.

55. The fourth reason was that the original WOWGR rejection decision was based on the intention to buy Double Dutch lager from Inbev Breweries and distribute in the UK. No evidence was received from Inbev to support this plan.

56. The concerns about Double Dutch lager were clearly articulated at all stages both before and after the Tribunal hearing. HMRC were clearly entitled to rely on this in the absence of any proper explanation from ADL (which it had had plenty of opportunity to provide) about PSD's involvement with this product.

57. In addition, the fourth reasons referred to the contract with Global Sourcing Import and Export Ltd supplied by PSD being in doubt as that company had been dissolved and removed from Companies House. Furthermore, "the majority of Trading Partners you have identified are either missing, deregistered for VAT, ceased trading or have been subject to WOWGR Revocation." Global Sourcing Import and Export Ltd was clearly a matter of concern to HMRC, a concern which had been raised in the 4 December 2014 Letter but not addressed by ADL. HMRC were entitled to take this into account in reaching the review decision.

58. The fifth reason was that cross tax checks had been conducted on PSD's personal self-assessment return and the corporation tax returns submitted on behalf of ADL and companies where PSD maintained directorships. The checks conducted showed that ADL posed a risk to the Revenue for three reasons for the three reasons set out. Mr Jones submits that, even if this concern existed, it was never put to ADL which consequently had no opportunity to deal with it. It is worth noting, in that context, that the Second Decision Letter contained a paragraph inviting PSD, if he did not agree with the decision, to send any further information which he would wish Ms Hanrahan to consider. It is wrong, therefore, to say that ADL had no opportunity to deal with it. PSD did not take advantage of that opportunity to explain why the fifth reason was not a good reason but that was his decision. Nor has any attempt at an explanation been made in the course of the judicial review application whether in evidence or submissions. This was clearly, in my view, material which was relevant to the decision which HMRC had to make on the review. The only issue, it seems to me, is the impact on the validity of the decision of the failure to provide ADL with an opportunity to deal with the concern prior to the decision being made, a matter I will come to when considering the appropriate way for ADL to challenge any decision.

Summary of conclusions concerning review

59. HMRC were entitled to take into account on the review all of the material and factors which they would have been entitled to take into account had they been making an original decision; and they were entitled to request material and information correspondingly.
60. Even if that is wrong, the matters of concern (even taking a restrictive approach to the meaning of the direction in [23]) to HMRC at the date of the release of the Tribunal

Decision (indeed at any time from and including the hearing) included the matters referred to in points 1 to 4 of the 4 December 2014 Letter; HMRC were not restricted in their concerns to those relating to the two reasons given in the First Decision Letter.

61. The 4 December 2014 Letter complied with the direction in [23] substituting the date of 12 December 2014 provided for in the consent order for the date appearing in [23].

62. Even if, contrary to my view, the request for information in the 4 December 2014 Letter went beyond that which HMRC were entitled to request, points 6, 7, 10 and 11 sought information which they were entitled to request, requests which were not satisfactorily addressed by ADL prior to the Second Decision Letter.

63. The reasons given in the Second Decision Letter were based on factors on which HMRC were entitled to rely and constituted a decision on the review which had been directed by the Tribunal. However, ADL was not given an opportunity prior to the making of the original decision to comment on the tax cross-checks concerns.

Appeal or judicial review

64. In the light of my conclusions concerning the review, the issue of jurisdiction would, apart from the tax cross-checks issue which I put aside for the moment, be straightforward. HMRC made a decision in accordance with the Tribunal's directions. If ADL wished to challenge that decision, the appropriate route was for it to make a further appeal under section 16(4), which it has not done. The decision was reached (subject to the tax cross-checks issue) in a procedurally correct way and there is no aspect of such a challenge over which the Tribunal would not have jurisdiction. There was and is no scope, therefore, for judicial review since an alternative and effective remedy was available to ADL. Whether or not an appeal would, if made, have succeeded or might, if

permission to appeal out of time were obtained, succeed is not a matter on which I need to express an opinion.

65. What, then, is the impact of the tax cross-checks issue? In my view, the answer is none at all. The failure to draw attention to the concerns arising out of ADL's and PSD's tax affairs prior to the promulgation of the review decision may be open to criticism. However, I reject the proposition that that criticism justifies any intervention by way of judicial review. The point here is that the decision was, in a real sense, provisional. It was clear from the Second Decision Letter that Ms Hanrahan was prepared to consider further information which ADL might wish to submit; and it is obviously implicit in her expressed willingness to do so that she would reconsider the decision if the information warranted it. It would have been the simplest thing in the world for ADL and PSD to give an explanation, if one existed, to allay the concerns listed in the three bullet points within the fifth reasons. They did not do so. HMRC should, in my view, be in no worse a position than they would have been if they had expressed this concern to ADL and PSD prior to any decision being made but had received no information or representations within a reasonable time to indicate why this fifth reason should not be relied on in making their decision.

66. The application before me is for permission to bring judicial review. The listing of the application is such that, if granted, I should proceed to deal with the application. The case has been fully argued. It is apparent from what I have said that an application for judicial review should not succeed. However, having heard the argument which I have, I should give permission and then dismiss the substantive application; rather it is one where I should refuse permission.

67. That is enough to dispose of the case before me. But I wish to say a little, in deference to the arguments raised, if, contrary to my view, the 4 December 2014 Letter is not properly

to be seen as complying with the direction in [23]. In that case, Mr Jones' argument is that either (i) the appeal route is not available at all or (ii) if it is, then it is not an adequate remedy so that ADL should be entitled to challenge HMRC's purported decision by judicial review.

68. As to (i), the argument is that the purported decision is not a decision at all. The failure to comply with the direction in [23] (as modified by the consent order) is a matter of substance and not merely procedure, not simply because the outstanding concerns have not been indicated but also because, not having been indicated, ADL has not had a proper opportunity to respond to any concerns which HMRC might have had.

69. As to (ii), which is closely related to (i), the argument is that ADL should not be restricted to obtaining a review of the review decision (in accordance with new directions under [23]) but should be entitled to have that decision quashed and for the review already ordered to take place properly. Further, a successful appeal would require the Tribunal to be satisfied that the decision made by HMRC on the review was not one which they could reasonably have arrived at. It is said that there is no certainty about how the Tribunal would approach the issue of reasonableness and it cannot be said for sure that, simply because there had been a process defect in reaching the review decision which would justify a quashing order, the Tribunal would be satisfied about unreasonableness.

70. Mr Charles does not accept either of those arguments as justifying judicial review rather than appeal. But if he is wrong in that, he submits that, in any event, the concerns outstanding at the time of the original decision remain outstanding and are serious enough to justify rejection of the WOWGR Application. That may or may not be so. HMRC have not, however, actually made a decision on that material alone. The review decision was based on wider material and factors. And although one might speculate that it is likely that, given the opportunity, HMRC would make the same decision based on the

limited material, this is not a case where I can say with confidence that they would clearly do so.

71. On this aspect of the case, I would prefer Mr Jones' arguments if they arose for decision. They do not arise, and I make no actual decision.

Disposition

72. ADL's application for permission to bring judicial review is refused.

Mr Justice Warren

Release Date: 14 March 2016