[2020] UKUT 0141 (TCC)

Appeal number: UT/2019/0052

EXCISE DUTY – Border Force decision to refuse restoration of private car – FTT held Border Force decision unreasonable and directed further review taking into account FTT finding that goods not being carried for resale at a profit – effect of Jones and Jones – whether FTT erred in law – yes – appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE DIRECTOR OF BORDER REVENUE **Appellant**

- and -

KEITH DOCKETT **Respondent**

TRIBUNAL: MR JUSTICE NUGEE
JUDGE THOMAS SCOTT

Sitting in public at The Rolls Building, London EC4 on 12 March 2020

Michael Newbold, instructed by the Director of Border Revenue, for the Appellant

The Respondent appeared in person

DECISION

Introduction

1. The Director of Border Revenue ("Border Force") appeals against the decision of the First-tier Tribunal ("FTT") reported at [2018] UKFTT 748 (TC). Mr Dockett's car was seized by Border Force when he was stopped by their officers with goods liable to forfeiture in his car. Mr Dockett applied for restoration of his car and Border Force refused. Mr Dockett appealed against that refusal to the FTT. The FTT set aside Border Force's decision to refuse restoration, and directed that Border Force should conduct a further review of that decision, taking into account the FTT's finding of fact that Mr Dockett was not carrying the goods for resale at a profit.

The Facts

2. The relevant facts are not in dispute. In summary, they are as follows:

(1) On 23 April 2016 Mr Dockett and his son were stopped by Border Force officers at Coquelles in a car ("the vehicle") as they travelled back to the United Kingdom.

(2) When initially questioned, Mr Docket and his son said that they were each carrying 100 pouches of hand rolling tobacco.

(3) Officers searched the vehicle and found 392 pouches of tobacco, together with a quantity of cigarettes ("the goods").

(4) Border Force seized the goods and the vehicle.

(5) Mr Dockett did not challenge the legality of the seizure of the vehicle in the Magistrates' Court.

(6) Mr Docket sought restoration of the vehicle, and Border Force refused.

(7) Border Force upheld their decision on review.

(8) Mr Dockett appealed against the review decision to the FTT.

The Review Decision

3. The 12 page review decision ("the Review Decision") was contained in a letter of 6 July 2016 from Officer Perkins, a Review Officer in Border Force. It was reconsidered and maintained by Border Force following the provision by Mr Dockett of further evidence and documents.

4. After setting out the background at some length, the letter describes the Border Force policy, the relevant sections of which in this appeal are as follows:

> "**Summary of the Border Force Policy for the Restoration of Private Vehicles**

> The general policy is that private vehicles used for the improper importation or transportation of excise goods should not normally be restored. The policy is intended to be robust so as to protect legitimate UK trade and revenue and prevent illicit trade in excise goods. However vehicles may be restored at the discretion of Border Force subject to such conditions (if any) as they think proper (e.g. for a fee) in circumstances such as the following:
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> - If the excise goods were destined for supply on a "not for profit" basis, for example, for re-imbursement.
> - If the excise goods were destined for supply for profit, the quantity of excise goods is small, and it is a first occurrence…"

5. The letter states as follows:

> "**In considering <u>restoration</u> I have looked at all the circumstances surrounding the seizure but I have not considered the legality or the correctness of the seizure itself. If you are contesting the legality or correctness of the seizure—and that includes any claim that excise goods are for "Own use"—then you should have appealed to a Magistrates' Court within 1 month of the date of the seizure (or notice of seizure) as no one else has the jurisdiction to consider such a claim.**
>
> Having had an opportunity of raising the 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 as the tribunal does not have jurisdiction to consider it and the Review Officer should not normally do so—see Appendix C to this letter".

6. The letter then considers in some detail the relevant facts, including the statements made by Mr Dockett and his son in interviews at the time of interception and subsequently. It notes that the goods were purchased with cash, rejects their explanation of this and asserts that the use of large cash sums is "a common feature of buying excise goods for commercial sale". It then states as follows:

> "I am satisfied that the excise goods, or a significant proportion of them, were for onward distribution and were to be sold for profit. In coming to this conclusion I placed particular importance on you and your son's dishonesty in failing to declare all of the excise goods being transported; the significant quantity; attempts to conceal previous trips; conflicting accounts and your frequency of travel.
>
> **My starting point is that the seizure of the vehicle was legal and the excise goods involved were commercial (not for own use).** In deciding whether the vehicle should be restored, and if so what fee should be charged, if any, I am guided by the Border Force policy as summarised above. I have examined the circumstances of this case so as to determine how to apply the policy as set out above.
>
> As you have not claimed that the excise goods were to be passed on to others on a "not for profit" reimbursement basis I have concluded that they were held for profit and the vehicle should therefore not normally

> be restored. Non-restoration is fair, reasonable and proportionate in these circumstances".

7. The Review Decision continues by stating that the Border Force policy of considering restoration for first offences involving small quantities of goods will not be applied because 19.6 kilos of tobacco does not qualify as a small quantity, and rejecting Mr Dockett's claim of exceptional hardship. It concludes that the vehicle should not be restored.

The relevant legislation

8. Before considering the FTT decision it is helpful to set out the relevant legislation.

9. Tobacco products being liable to excise duty, the duty point is established by Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593) ("the 2010 Regulations"). The 2010 Regulations apply to the United Kingdom control zone at Coquelles by virtue of the Channel Tunnel (Alcoholic Liquor and Tobacco Products) Order 2010. The relevant parts of Regulation 13 are as follows:

> "13 (1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person—
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> (a) making the delivery of the goods;
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> (b) holding the goods intended for delivery; or
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> (c) to whom the goods are delivered.
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> (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held—
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> (a) by a person other than a private individual; or
>
> (b) by a private individual ("P"), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P.
>
> …
>
> (5) For the purposes of the exception in paragraph (3)(b)—
>
> (a)…
>
> (b) "own use" includes use as a personal gift but does not include the transfer of the goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them)."

10. Where goods are imported without payment of the duty due they are liable to forfeiture: Regulation 88 of the 2010 Regulations and section 49(1) Customs and Excise Management Act 1979 ("CEMA").

11. Goods liable to forfeiture may be seized (section 139 CEMA) and any vehicle carrying those goods may also be seized (section 141 CEMA).

12. Schedule 3 of CEMA deals with challenges to seizure. Under paragraph 3 seizure must be challenged within one month by delivery of a notice to the Commissioners of HMRC, and the Commissioners must then take proceedings (usually in the Magistrates' Court) seeking condemnation of the seized goods: paragraph 6. Importantly, paragraph 5 provides as follows:

> "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."

13. A person may seek restoration of a seized item from Border Force, and, if dissatisfied with the resulting decision, may apply for a statutory review of that decision: sections 14 and 15 Finance Act 1994. The person who required that review may then appeal against it to the FTT. A decision to refuse restoration is what the legislation terms a decision as to an "ancillary matter", and, as such, the FTT's powers on such an appeal are limited by section 16(4) Finance Act 1994, as follows:

> "(4) 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—
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> (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…"

14. The effect of section 16(6) Finance Act 1994 is that the burden of proof is on the appellant to show that the grounds on which his appeal has been brought have been established.

The FTT Decision

15. The FTT made a number of findings of fact which were not supportive of the reasons for refusing restoration given by Officer Perkins in her review decision. These included the following:

(1) On the balance of probabilities, Mr Dockett had not previously imported significant quantities of dutiable goods on previous trips overseas: [12].

(2) "Mr Dockett confirmed under oath that he had no intention of selling the tobacco on a commercial basis. Again, on the balance of probabilities, we accept this as factually correct.": [13].

(3) The FTT accepted the version of events put forward by Mr Dockett which provided an innocent explanation for the goods being paid for in cash: [14].

16. The FTT heard evidence from Officer Perkins, and stated as follows:

> "21. It was clear that in coming to her conclusion not to restore the vehicle she had decided at the outset that the goods were being imported for a commercial purpose, ie a supply for profit. If this was not the case then, from the policy quoted above, we assume that, especially on a first offence, the vehicle would normally have been restored in accordance with item (1) above.
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> 22. Miss Perkins explained that she had come to the conclusion that the goods were being imported for commercial purposes for the following reasons:
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> (1) The quantity of goods was large.
>
> (2) On interception Mr Dockett did not tell the truth in a number of respects, which led her to question Mr Dockett's integrity. This general inconsistency of responses on a number of issues was regarded by Border Force as a sign of commercial activity.
>
> (3) They had carried out a number of day trips to France in recent months and therefore had the opportunity to import excise goods on a number of occasions.
>
> (4) The tobacco had been purchased entirely for cash. This was also regarded by Border Force as a tell-tale sign of commercial activity because it was normal for "customers" to pay in advance, in cash, for the tobacco they were intending to purchase."

17. Having set out its jurisdiction under section 16(4) Finance Act 1994, the FTT then considered whether the decision of Officer Perkins was flawed because it took into account irrelevant information, ignored relevant information, or reached a conclusion that no reasonable officer, properly directed, could have reached on the facts before them: [27].

18. In relation to its fact-finding jurisdiction, the FTT stated as follows:

> "29. In addition, it is well established that we can only consider the facts as they were at the time the decision was taken. We cannot take into account subsequent events. We can consider facts which existed at the time the decision was taken but which were ignored by the reviewing officer, either at the time of the decision or at the time of the subsequent review, but we cannot take into account new facts."

19. We set out in full the FTT's reasons for concluding that the Review Decision was flawed, as follows:

"31. As stated above, it is clear that the key factor which Miss Perkins took into account when deciding not to restore the car was that she believed Mr Dockett was carrying the goods with the intention of reselling them, at a profit, in the UK and that the goods were therefore held for commercial purposes.

32. The factors which led her to this conclusion were:

(1) the large quantity of goods, almost ten times the normal personal "allowance",

(2) the inconsistency of his answers when he was stopped,

(3) the frequency of trips to France, and

(4) the fact that the goods were paid for in cash.

33. However, Mr Dockett provided a very satisfactory explanation as to why the goods were paid for in cash, which was related to his nephew's purchase of a car the previous day. We do not therefore think that this should have been considered a relevant factor.

34. He had also provided an explanation for his frequent trips to France, which were essentially treats for his newly re-found family. He also stated that he had been stopped on two occasions on previous trips and on neither occasion had anything untoward been found by the Border Force officers who had stopped him. This pattern of frequent trips to France was not therefore in our view a relevant factor for Miss Perkins to take into account.

35. There is no doubt that the quantity of goods was large but again Mr Dockett was able to provide a very credible explanation as to why he was bringing in so much tobacco. This fact seems to have been ignored by Miss Perkins.

36. The only relevant factor remaining therefore which might have led Miss Perkins to have come to the conclusion that these goods were intended for resale was the inconsistency of replies to the officers who interviewed him at Coquelles.

37. Mr Dockett acknowledges that this was simply "a stupid mistake", but we do not think it unknown for individuals who have been stopped by Border Force officials to panic, and give false answers, especially if they know they are carrying too much tobacco. We certainly think it would be a very thin reason for anyone to come to the conclusion from these inconsistencies that the goods were intended for resale.

38. Lastly, of course, Miss Perkins has given no credence whatsoever to Mr Dockett's consistent statements that the goods were for himself and for gifts for his family. We understand that she may doubt Mr Dockett's truthfulness because of his inconsistent answers to the officers at Coquelles, but these inconsistencies disappeared once the more formal interviews at Coquelles were complete. Moreover it is in our view unlikely that Mr Dockett would have known that carrying the goods for resale at a profit was a key factor in the decision not to restore, such that he would have tailored his statements accordingly.

> 39. In summary, it appears to us that a, if not the, key factor in Miss Perkin's decision that the vehicle should not be restored was that she believed the goods were being carried to the UK for resale at a profit. She had no solid evidence for this other than a pattern of behaviour and other factors which she regarded as determinative. We, on the other hand, have found as a matter of fact that Mr Dockett had no intention of selling the tobacco on a commercial basis.
>
> 40. As we have explained above, Mr Dockett had sound explanations for most of the factors which concerned Miss Perkins, and these had nothing to do with the resale of the goods for profit. Indeed, there was no evidence that the goods were even being sold on a "not for profit" basis, eg for simple reimbursement, as envisaged in item (1) of Border Force's policy on restoration set out at para [19] above.
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> …
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> 43. In summary therefore, we consider that when making her decision not to restore the vehicle Miss Perkins based her conclusions on her belief that Mr Dockett was intending to resell the goods in the UK on a commercial basis and that she had no evidence to support that belief other than four indicative factors, three of which had satisfactory explanations."

20. The FTT then directed that the Review Decision should be set aside, and an additional review undertaken. The FTT directed that the additional review "should take into account our finding of fact that Mr Dockett was not carrying the excise goods for resale at a profit in the UK": [46].

Border Force's Appeal

21. The FTT refused Border Force permission to appeal. Permission was granted by Judge Scott of this tribunal, on the following two grounds:

> (1) The FTT erred in law in finding that Mr Dockett had a credible explanation for the quantity of tobacco because that was not a finding which could be made by virtue of the deemed forfeiture. As a result of the deemed forfeiture, it had to be assumed by the FTT that the tobacco was not held for own use, which by virtue of Regulation 13(5)(b) of the 2010 Regulations includes use as a personal gift. The FTT also erred at [38] in criticising the review officer for not giving credence to Mr Dockett's statements "that the goods were for himself and for gifts for his family". Again, those assertions were precluded by the deemed forfeiture.
>
> (2) The FTT erred in law in its effective conclusion as to the status of the goods held. Logically, the goods could only have been held (1) for personal use, including use as a gift, (2) for resale at a profit, or (3) for resale not at a profit. Option (1) is precluded by the deemed forfeiture. Having found that the evidence to support a conclusion that option (2) applied was inadequate, and directed that the review be carried out again on this basis, the FTT was effectively determining that option (3) applied. But that was a finding not open

to the FTT, because there was no evidence to support that finding, and indeed the decision says as much at [40].

Discussion

22. The legal regime applying to seizure and restoration is unusual, and in some respects draconian in its effect. Additionally, more could be done in practical terms to increase awareness of the relevant legal procedures, from Border Force's right to seize vehicles through to the effect of failure to challenge seizure in the Magistrates' Court.

23. Notwithstanding these factors, the legal position in a case such as this appeal is clear. Where a vehicle has been properly seized and no proceedings have been brought within the relevant time limit in the Magistrates' Court, the tribunal must approach its review of a Border Force decision to refuse restoration with two matters in mind. The first is the FTT's fact-finding role. The second is the effect of paragraph 5 of Schedule 3 of CEMA.

24. In relation to the FTT's fact-finding role, the limited nature of the jurisdiction conferred by section 16 must be understood in the light of *Gora v Customs and Excise Commissioners* [2003] EWCA Civ 525. The FTT is not bound by the facts as found by Border Force, and its determination is not limited to the evidence before Border Force at the time of the decision under appeal. The position was explained by the Court of Appeal in *HMRC v Behzad Fuels (UK) Ltd* [2019] EWCA Civ 319 as follows, at paragraph 7 of the decision:

> "7. It is common ground that a decision made by HMRC under section 152(b) of CEMA 1979 is an "ancillary matter" for the purposes of section 16, from which it follows that the powers conferred on the FTT on an appeal from the relevant review decision are confined to those set out in subsection (4), and are also dependent upon the FTT being satisfied that the decision is one which HMRC "could not reasonably have arrived at". The apparent strictness of this approach has, however, been significantly alleviated by the decision of this court in Gora v Customs and Excise Commissioners [2003] EWCA Civ 525, [2004] QB 93, where Pill LJ accepted the submission of counsel for HMRC (Mr Kenneth Parker QC, as he then was) that the provisions of section 16 do not oust the power of the FTT to conduct a fact-finding exercise, with the consequence that it is open to the FTT on an appeal from a review decision to decide the primary facts and then determine whether, in the light of the facts it has found, the decision was one which could not reasonably have been reached: see the judgment of Pill LJ at [38] to [39]. The correctness of this approach has not been challenged before us, and in Jones Mummery LJ said at [71](6) that he "completely agree[d] with the analysis of the domestic law jurisdiction position by Pill LJ in *Gora's* case".

25. However, it is not open to the FTT in the exercise of its fact-finding role when considering whether the Border Force decision could reasonably have been reached to make certain findings of fact. That is the consequence of the deeming effect of paragraph 5 of Schedule 3 of CEMA. That effect was explained by the Court of

Appeal in *Revenue and Customs Commissioners v Jones and Jones* [2011] EWCA Civ 824, at paragraph 71, as follows:

> "71. I am in broad agreement with the main submissions of HMRC. For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.
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> (1) The respondents' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UTT are statutory appellate bodies that have not been given any such original jurisdiction.
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> …
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> (4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned *and* to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.
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> (5) The deeming process limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.
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> …
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> (7) I completely agree with the analysis of the domestic law jurisdiction position by Pill LJ in *Gora* and as approved by the Court of Appeal in *Gascoyne*. The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to "reality"; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion."

26. The Court of Appeal helpfully clarified conclusion (7) in this passage in *European Brand Trading Ltd v HMRC* [2016] EWCA Civ 90 in the following terms:

> "33. The "reality" in this legal world is the reality created by the statute. It is not possible for the decision to restore or not to restore to be conducted in a different legal world. In one subsequent case in the FTT (*Pioneer Traders (UK) Ltd v HMRC* [2014] UKFTT 552 (TC)) it was suggested that in *HMRC v Jones* the court had extended the scope of the deeming provision. This was a reference to Mummery LJ's statement at the end of [71] (7) that:
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> "Deeming something to be the case carries with it any fact that forms part of the conclusion."
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> 34. As Mr Pickup accepted this criticism is misplaced. Mummery LJ was doing no more than giving effect to the deeming provision in accordance with well-established principles. To take one well-known example, in *East End Dwellings Co Ltd v Finsbury BC* [1952] AC 109, 132 Lord Asquith said:
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> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.""

27. We turn now to the FTT decision.

28. Paragraph [29] states as follows:

> "29…it is well established that we can only consider the facts as they were at the time the decision was taken. We cannot take into account subsequent events. We can consider facts which existed at the time the decision was taken but which were ignored by the reviewing officer, either at the time of the decision or at the time of the subsequent review, but we cannot take into account new facts.

29. It is apparent from this that the FTT misunderstood its fact-finding role. Mr Newbold told us that nothing turned on that in relation to Border Force's appeal, but we trust that future FTTs will adopt the approach we have summarised above.

30. In relation to the appeal, the critical issue is the explanation given to Border Force and the FTT by Mr Dockett for carrying the goods, and the consequences of that explanation in view of paragraph 5 of Schedule 3.

31. Mr Dockett's evidence in this respect was and remains clear and consistent. When he was stopped at Coquelles, he told Border Force when interviewed that the goods were "all for me and my family". This was repeated in the written document which Mr Dockett and his son signed three days later. In a document dated 14 June 2016 addressed to the review officer, Mr Dockett stated that "the tobacco and cigarettes were for my own use and for gifts for my family members. It was never my intention to sell any of these items as suggested by the officer…I proved that I could pay for the goods and told the officer interviewing me that it was for me and my

partner, plus gifts for my family". In the hearing before us, Mr Dockett stated that he had always maintained that the goods were for his own use and gifts for his family.

32. The Review Decision, as we set out at [4] to [7] above, was reached on a basis which did not accept Mr Dockett's explanation for carrying the goods. The Border Force general policy on restoration which it described draws a clear distinction between a situation when the goods are destined for supply at a profit and one when they are "destined for supply on a "not for profit" basis, for example, reimbursement". The review officer reaches the conclusion that the goods were intended for onward distribution and resale at a profit, and then decides to refuse restoration "as you have not claimed that the excise goods were to be passed on to others on a "not for profit" reimbursement basis".

33. In determining, as it was required to do, whether the Review Decision was one which the officer could reasonably have reached, the FTT should have begun with a consideration of the effect of paragraph 5 of Schedule 3. That would have enabled the tribunal to establish at the outset which findings of fact were not open to it as a result of the statutory deeming in this case.

34. Unfortunately, that did not happen. The decision makes no reference to paragraph 5. Nor does it refer to Regulation 13 of the 2010 Regulations and the critical definitions of "commercial purpose" and "own use". The decision does acknowledge that, as a result of *Jones and Jones*, the FTT cannot "reopen the question of whether or not the goods were legally seized": [24]. However, it is clear in our view that the FTT did not take into account the conclusions set out by the Court of Appeal in *Jones* as to the limiting effect of paragraph 5. As the Court put it, "the deeming process limited the scope of the issues which [Mr Dockett was] entitled to ventilate" in his appeal, and "deeming something to be the case carries with it any fact that forms part of the conclusion".

35. At numerous points in its decision the FTT refers to the question of whether the goods were being imported "for commercial purposes", and determines that they were not. That choice of wording is unfortunate and apt to confuse, because the application of Regulation 13 turns on whether or not the goods are held "for a commercial purpose". It appears from paragraph [21] that the FTT was using the term "for commercial purposes" to mean a supply for profit. We have reached our decision on the basis that that is what the FTT intended, though we do see that choice of wording as consistent with a failure to focus on Regulation 13 and paragraph 5.

36. The deeming effect of paragraph 5 in this case meant that it was not open to the FTT to make findings of fact which were inconsistent with the goods being held for a commercial purpose as defined by Regulation 13. By virtue of sub-paragraphs 3(b) and (5) of Regulation 13, that meant that the FTT was bound to accept in reviewing the Border Force restoration decision that the goods were *not* held for Mr Dockett's own use, including use as a personal gift.

37. Regulation 13(5) excludes from the definition of own use "the transfer of the goods to another person for money or money's worth (including any reimbursement

of expenses incurred in connection with obtaining them)". This meant that it *was* open to the FTT as a matter of principle to find as a fact that the goods were held by Mr Dockett for (paraphrasing) resale (1) at a profit, or (2) on a "not for profit" basis.

38. In the Review Decision, Officer Perkins reached the conclusion on the facts that the goods were held for resale at a profit. In reaching that conclusion, the Officer stated that she was not able to form a conclusion that the goods were held for own use or for personal gifts, as a result of the statutory deeming in paragraph 5 read with Regulation 13. It was also made clear that the Officer had acknowledged the possibility that the goods were held for resale on a not for profit basis (which was not precluded by paragraph 5) but had rejected that conclusion because Mr Dockett had never claimed that that was the case.

39. The FTT criticised Officer Perkins for coming to this conclusion "at the outset" ([21]) and for "[giving] no credence whatsoever to Mr Dockett's consistent statements that the goods were for himself and for gifts for his family" ([38]). That was a fundamental error, because Officer Perkins was bound to reject these consistent statements, as was made clear in *Jones*.

40. The FTT also rejected several of the reasons given by Officer Perkins, in her Review Decision and in evidence, for concluding that the goods were held for resale at a profit. In relation to the undoubtedly large quantity of goods, the FTT found ([35]) that the Officer acted unreasonably in taking this into account because she had ignored Mr Dockett's "very credible explanation" as to why he was bringing in so much tobacco, namely that he was a heavy smoker and intended part of the tobacco to be gifts for his family. It also concluded ([38]) that the Officer had acted unreasonably in questioning Mr Dockett's integrity on the basis of his inconsistent and incorrect statements when intercepted, because Mr Dockett had stated consistently that the goods were for himself and for gifts. Both of these reasons for the FTT decision were errors of law, because it was not open to the Officer or the FTT to have accepted these explanations and statements; they were plainly inconsistent with the facts necessarily required for the deemed forfeiture in this case.

41. We therefore accept Border Force's first ground of appeal.

42. Having found the Review Decision to be unreasonable, the FTT set it aside, and directed Border Force to carry out a further review, in which "they should take into account our finding of fact that Mr Dockett was not carrying the excise goods for resale at a profit in the UK": [46].

43. Border Force's second ground of appeal is that this direction would have the effect of requiring them to carry out a review on a basis which was not only unsupported by the evidence, but in fact in contradiction to the evidence. This followed because, by virtue of Regulation 13 and paragraph 5, in combination with the FTT's finding of fact, the only remaining basis on which Mr Dockett could have been carrying the goods was for resale on a not for profit basis.

44. We agree with Border Force. As we explain above, the decision in *Jones* does not *in principle* preclude a finding of fact that the goods were held for resale on a not for profit basis. That distinction is clearly recognised in the general Border Force policy on restoration which we set out above. However, such a finding, like any finding of fact, must be based on the evidence.

45. In this case, Mr Dockett had never offered at any stage the explanation, to either Border Force or the FTT, that he was carrying the goods for resale on a not for profit basis. Moreover, there was simply no evidence to that effect. As the Decision records, at [40]:

> "40. As we have explained above, Mr Dockett had sound explanations for most of the factors which concerned Miss Perkins, and these had nothing to do with the resale of the goods for profit. Indeed, there was no evidence that the goods were even being sold on a "not for profit" basis, eg for simple reimbursement, as envisaged in item (1) of Border Force's policy on restoration set out at para [19] above."

46. The FTT's direction was therefore wrong in law in an *Edwards v Bairstow* sense, because it was a decision which no reasonable tribunal could have reached on the evidence. In refusing permission to appeal, the FTT maintained that it had made no finding of fact in relation to whether or not Mr Dockett was carrying the goods for resale on a not for profit basis. However, it did reach such a finding, by necessary implication, by directing a further review on the basis which it did. That was a finding, and a basis for a further review, which was wholly unsupported by the evidence.

Disposition

47. We have concluded that the Decision contained errors of law. Section 12 of the Tribunals, Courts and Enforcement Act 2007 provides that in that event we may (but need not) set aside the decision, and that, if we do so, we may either remit it to the FTT or remake the decision. We cannot be confident that the FTT would have reached the same decision absent the errors, so we set the Decision aside.

48. We consider that we have sufficient facts available to remake the decision. Applying the law correctly, Border Force was correct in its decision to refuse restoration to reject Mr Dockett's explanation that the goods were for own use and for personal gifts. For the reasons we have given, Border Force was not acting unreasonably in reaching its conclusion that the goods were held for resale at a profit to take into account the quantity of the goods and the inconsistencies in Mr Dockett's statements. The burden is on Mr Dockett to show that in these circumstances the decision reached by Officer Perkins was one which no reasonable officer could have reached. That burden has not been met.

49. We therefore remake the decision, allow the appeal by Border Force, and reject Mr Dockett's appeal against the Review Decision.

MR JUSTICE NUGEE
JUDGE THOMAS SCOTT

RELEASE DATE: 29 April 2020