



**TC03100**

**Appeal number: TC/2011/04985**

*Customs duty – import of Chinese garlic, falsely declared as Cambodian in origin – late issue of post-clearance demand note for unpaid duty – whether the customs debt was the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings – yes – whether the amount of the debt could be communicated to the debtor more than three years after the debt was incurred – no express provisions in UK law for extension of three year period – whether three year time limit applies or not – Article 221 of Customs Code and section 167 Customs & Excise Management Act 1979 – held no valid provisions in UK law providing extension to three year period – three year period therefore applies – appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**FMX FOOD MERCHANTS LIMITED**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE KEVIN POOLE  
JOHN ROBINSON**

**Sitting in public in Bedford Square London on 13 and 14 June 2013**

**Eamon McNicholas of counsel for the Appellant**

**Keiron Beal QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

1. This appeal relates to the Appellant's liability for customs duties on imports of  
5 garlic made between August 2003 and January 2004.
2. It follows an earlier appeal, on very similar facts, which related to later  
imports of garlic made by the Appellant between February and October 2004.
3. That earlier appeal arose from a post-clearance demand note issued by HMRC  
within the "normal" three year time limit and the appeal was dismissed by the First-  
10 tier Tribunal in *FMX Food Merchants Import Export Co Limited v HMRC* [2011]  
UKFTT 20 (TC) ("*FMXI*").
4. The decision in *FMXI* was released on 21 December 2010. On or about 1  
April 2011 HMRC issued a further post-clearance demand note, pursuant to a  
15 decision notified to the Appellant by letter dated 30 March 2011, in respect of the  
earlier imports which had taken place between August 2003 and January 2004. The  
present appeal relates to this post-clearance demand note.
5. The main issue in this appeal is whether the demand note in question was  
issued out of time.

### The facts

#### 20 *Introduction*

6. We heard evidence on behalf of HMRC from Mr Guy Jennes of the EU's  
Anti-Fraud Office ("OLAF"). Mr Jennes also submitted a short witness statement  
(which was in fact a copy of the witness statement he had made in *FMXI*). As part of  
25 his evidence, he submitted a copy of an OLAF report he had prepared following a  
mission to Cambodia in January 2007. The report itself was nine pages long, but the  
annexures to it were extensive, running to three ring binders and a total of just under  
1200 pages. We also received a number of other documents in evidence, including  
the commercial documents relating to the imports under appeal and a copy of the  
Tribunal's decision in *FMXI*.
- 30 7. No witness evidence was offered on behalf of the Appellant.
8. We find the following facts.

#### *The imports and the post-clearance demand note*

9. Between August 2003 and January 2004, the Appellant imported the following  
consignments of garlic into the UK from Cambodia.

Date	Entry No.	Weight (kg)	Invoice value	£ equivalent <sup>1</sup>
12 August 2003	015824V	43,200	\$39,731.40	£24,725.49
2 September 2003	003337N	43,200	\$39,731.40	£24,950.64
3 September 2003	005941T	43,200	\$39,731.40	£24,950.64
1 October 2003	000230E	43,200	\$39,731.40	£24,776.37
25 November 2003	031935N	64,800	\$71,480.00	£42,313.38
4 December 2003	006135A	64,800	\$71,840.00	£42,276.23
12 December 2003	017819V	64,800	\$71,840.00	£42,276.23
24 December 2003	032094N	64,800	\$74,230.00	£43,682.69
2 January 2004	001374B	64,800	\$74,230.00	£42,133.04
20 January 2004	026426V	64,800	\$72,960.00	£41,412.19

10. In each case, on the face of the shipping documents presented to HMRC, the consignor was named as Duong Chiv Import Export & Transport Company of Phnom Penh, Cambodia (“Duong Chiv”) and the seller was shown as Arrow Quick Trading Limited of Taipei, Taiwan (“Arrow Quick”). The Appellant had originally been approached by Steve Wang of Arrow Quick (with whom it had a pre-existing trading relationship) with an offer to supply the garlic.

11. On each of the above entries, the goods were declared to TARIC code 07108095 80, the code for frozen garlic. They were also declared to be of Cambodian origin, thus purportedly entitling them to exemption from all import duties under the “everything but arms” amendment to the EU’s generalised system of preferences made in favour of, amongst other countries, Cambodia in 2001. HMRC maintain, on the basis of the OLAF Report, that the garlic was in fact fresh and did not originate from Cambodia, but from China. The Appellant, whilst not formally admitting it, does not appear to dispute this assertion. We so find.

12. At the time of the imports listed at [9] above and the subsequent imports which were the subject of *FMXI*, fresh garlic was subject to a quota. Imports outside the quota were subject to *ad valorem* duty at the rate of 9.6% and an additional anti-dumping duty of €120/100kg.

13. In relation to the later similar imports by the Appellant after January 2004, HMRC issued a post-clearance demand note on 22 February 2007 for duty of £370,872.50, in respect of all importations that had taken place within the normal three year time limit prior to the issue of the note. The Appellant appealed against the issue of that note and ultimately the Tribunal determined the appeal by its decision issued on 21 December 2010 in *FMXI*. The Tribunal found that the imports under consideration in that case had been of fresh garlic, originating in China. It was also

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<sup>1</sup> These figures were calculated by HMRC using relevant exchange rates on the date of each entry, and are not challenged by the Appellant

not satisfied that the Appellant had acted in good faith for the purposes of Article 220 of the Community Customs Code.

14. HMRC have calculated the total liability for import duty on the above consignments as £503,577.63. The calculation is not disputed by the Appellant.

5 15. HMRC issued a post-clearance demand note (“the Demand”) for this amount on or about 1 April 2011, following the issuing of the Tribunal’s decision in *FMXI* on 21 December 2010. The Demand was therefore issued between six and seven years after the original imports and related declarations on which it was based.

#### *The fraud*

10 16. The OLAF mission to Cambodia established (and we accept as fact) that all the goods comprised in the above imports were of Chinese origin and were declared as fresh garlic of Chinese origin to the Cambodian customs authorities at the port of entry (Sihanoukville) on importation to Cambodia. When exported from Cambodia to the UK, however, the exporter (Duong Chiv) made declarations to the Cambodian  
15 authorities in Phnom Penh to the effect that the garlic originated in Cambodia, though in its export declarations to the local customs office in Sihanoukville it declared that the garlic originated in China.

17. On the basis of the false declarations made to them in Phnom Penh, the Cambodian authorities issued GSP Certificates of Origin (Forms A) for each  
20 consignment, which were presented to HMRC in support of the Appellant’s claims in its import declarations to the effect that the garlic should benefit from the relevant exemption from customs duty as being of Cambodian origin.

18. We find that the false declarations to the Cambodian authorities in Phnom  
25 Penh were made by Duong Tech of Duong Chiv on the instructions and/or with the knowledge of Steve Wang of Arrow Quick.

19. Upon completion of the OLAF mission, when they presented their findings to the Cambodian authorities in Phnom Penh, those authorities confirmed their acceptance that the garlic was all of Chinese origin and that the Forms A they had previously issued should be regarded as invalid.

30 20. No assertion was made by HMRC that the Appellant was a knowing participant in the fraud, so we do not consider that point further.

#### **The law**

##### *Community Customs Code*

35 21. As in force at the relevant time, Council Regulation (EEC) No. 2913/92 (the “Customs Code”) provided for an EU-wide system of rules governing *inter alia* customs duties on goods imported from outside the EU.

22. “Import duties” are defined in Article 4(1) of the Customs Code as including “customs duties and charges having an effect equivalent to customs duties payable on the importation of goods”.

23. Article 201 of the Customs Code provides *inter alia* that “[a] customs debt on importation shall be incurred through... the release for free circulation of goods liable to import duties” and that “[a] customs debt shall be incurred at the time of acceptance of the customs declaration in question”. The amount of the debt “shall be based on the Customs Tariff of the European Communities” (Article 20(1)).

24. Article 201(4) of the Customs Code provides that “[t]he debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor.”

25. By virtue of Articles 218, 220 and 221(1) of the Customs Code, customs authorities are required to enter the amounts of customs debts arising promptly into the accounts, and communicate them to the debtor. Where it is discovered that the amount was insufficient, the shortfall must be entered and communicated promptly when it comes to light. The debtor’s obligation to pay is linked to such communication. We mention these provisions only briefly because, although they are important to an overall understanding of the position, no dispute arose on them in this appeal.

26. It is not in dispute that the amounts comprised in the Demand are in respect of import duties within the Customs Code, or that the Appellant is liable for them as a debtor (subject to the issues mentioned below).

27. The key dispute in this appeal is whether the Demand was issued out of time. In general, there is a three year time limit for issue of post-clearance demands. This time limit, and the associated exception to it, is (and was at all relevant times in 2003-04) contained in Articles 221(3) & (4) of the Customs Code, which provide as follows:

“(3) Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. This period shall be suspended from the time an appeal within the meaning of Article 243 is lodged, for the duration of the legal proceedings.

“(4) Where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period referred to in paragraph 3.”

28. Under Article 4(23) of the Customs Code:

“‘Provisions in force’ means Community or national provisions.”

29. Article 221(3) and (4) of the Customs Code, in this form, was only brought into force on 19 December 2000, by virtue of Regulation (EC) No 2700/2000 of 16 November 2000. Prior to that date, the relevant wording was contained in just one paragraph, as follows:

5                                   “(3) Communication to the debtor shall not take place after the expiry of  
a period of three years from the date on which the customs debt was  
incurred. However, where it is as a result of an act that could give rise  
to criminal court proceedings that the customs authorities were unable  
10                                   to determine the exact amount legally due, such communication may, in  
so far as the provisions in force so allow, be made after the expiry of  
such three-year period.”

30. We mention the earlier form of the provisions because some of the authorities to which we were referred by Counsel were based on the earlier provisions.

*The Implementing Regulation*

15 31. Various provisions of Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of the Customs Code were cited to us, but as no dispute arose between the parties on their effect, and they are not crucial to an understanding of the disputed issues in the appeal, we see no need to recite them at length in this decision.

20 *UK Legislation*

32. Section 167 of the Customs & Excise Management Act 1979 (“CEMA”) provided, so far as relevant, as follows at all relevant times:

                                  “(1) If any person either knowingly or recklessly –  
  
                                  (a) makes or signs, or causes to be made or signed, or delivers or causes  
25                                   to be delivered to the Commissioners or an officer, any declaration,  
notice, certificate or other document whatsoever; or  
  
                                  (b) makes any statement in answer to any question put to him by an  
officer which he is required by or under any enactment to answer,  
  
                                  being a document or statement produced or made for any purpose of  
30                                   any assigned matter, which is untrue in any material particular, he shall  
be guilty of an offence under this subsection and may be arrested.....

...

                                  (3) If any person –  
  
                                  (a) makes or signs, or causes to be made or signed, or delivers or causes  
35                                   to be delivered to the Commissioners or an officer, any declaration,  
notice, certificate or other document whatsoever; or

(b) makes any statement in answer to any question put to him by an officer which he is required by or under any enactment to answer,

5 being a document or statement produced or made for any purpose of any assigned matter, which is untrue in any material particular, then, without prejudice to subsection (4) below, he shall be liable on summary conviction to a penalty of level 4 on the standard scale.

10 (4) Where by reason of any such document or statement as is mentioned in subsection (1) or (3) above the full amount of any duty payable is not paid or any overpayment is made in respect of any drawback, allowance, rebate or repayment of duty, the amount of the duty unpaid or of the overpayment shall be recoverable as a debt due to the Crown or may be summarily recovered as a civil debt.”

15 33. Section 37(2)(a) of the Limitation Act 1980 provided at all relevant times that that Act does not apply to “any proceedings by the Crown for the recovery of any tax or duty or interest on any tax or duty”.

### **Submissions**

#### *The Respondents*

34. Mr Beal submitted, in summary, as follows.

20 35. The evidence clearly established the existence of a fraud. The essence of the fraud was the obtaining of false certificates of Cambodian origin for the garlic from the Cambodian authorities, and the provision of those certificates in the knowledge that they would be presented to the EU customs authorities in order to obtain exemption from customs duty when the garlic was imported into the EU.

25 36. That fraud fell within section 167(1) CEMA, on the basis that one or more of Duong Tech, Steve Wang, Duong Chiv, Arrow Quick and various other companies had obtained and caused to be delivered to HMRC the relevant false Forms A. He also submitted that the presentation of the false Forms A to HMRC on import by or on behalf of the Appellant, even if not done knowingly or recklessly, amounted to a criminal act on the part of the Appellant within section 167(3) CEMA.

30 37. It was clear from the ECJ case of *Meico-Fell v Hauptzollamt Darmstadt* [1991] C-273/90 that the phrase “an act that could give rise to criminal court proceedings” contained in the earlier version of Article 221(4) referred only to acts which, under the domestic law of the relevant member state, were classified as criminal offences. In that case, the question was whether an “administrative irregularity” was sufficient to disapply the three year time limit, and the ECJ held that  
35 it was not. In the present case, the relevant acts were clearly criminal offences under UK law, so *Meico-Fell* did not assist the Appellant.

40 38. It was also clear from the ECJ case of *Fazenda Publica v ZF Zefeser* [2007] C-62/06 that there was no need for an actual criminal prosecution to take place before the three year time limit would be disappled; and it was within the competence of

HMRC (and, by extension, the Tribunal) to determine whether the customs debt was the result of an act which, at the time it was committed, was liable to give rise to criminal proceedings – i.e. no pronouncement as to the criminal nature of the underlying act was required from any criminal court. *Zefeser* also confirmed that it was irrelevant whether criminal proceedings for the relevant act might be time-barred.

39. The ECJ case of *Snauwaert and others v Belgische Staat* [2009] C-124/08 and C-125/08 made it clear that the predecessor provision to Article 221(4) permitted the extension of the three year deadline even when it was not the person responsible for the customs duty that had committed the relevant criminal act. So far as that point was concerned, the wording of the new Article 221(4) led to the same conclusion. In passing, he also observed that *Snauwaert* confirmed the customs debt had to be entered in the accounts by the customs authorities before it could be validly communicated to the debtor under Article 221(4), and it had been confirmed that this had been done in the present case.

40. In *Agra Srl v Agenzia Dogane* [2010] C-75/09, the ECJ made it clear that “it is for each Member State to determine the rules governing the extinction, through the passage of time, of customs debts which it has not been possible to assess because of an act which could give rise to criminal court proceedings”; it accordingly found that a provision in domestic Italian law which linked the limitation period to “the date on which the order or judgment in the criminal proceedings becomes final” did not offend EU law. As a general matter, the Court said that “Article 221(4) of the Customs Code defers to national law as regards the rules governing the extinction of the customs debt through the passage of time, where that debt arises as a result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings.”

41. The customs debt due to HMRC arose as a result of the relevant acts of Duong Tech and/or Steve Wang and/or their respective companies Duong Chiv and Arrow Quick, acts which at the time they were committed were liable to give rise to criminal proceedings under section 167(1) CEMA. In reply to the Tribunal’s questions about the territorial limits on the criminal jurisdiction of the UK, he submitted that the offence was only completed when the Forms A were actually presented in the UK and therefore there was sufficient connection to the UK to found criminal jurisdiction here.

42. In addition, it could be said that the customs debt arose as a result of the Appellant causing to be delivered to HMRC the untrue Forms A, an act which at the time it was committed was liable to give rise to criminal proceedings under section 167(3) CEMA.

43. The conditions contained in Article 221(4) of the Customs Code for the normal three year time limit to be overridden were therefore satisfied.

44. Article 221(4) therefore permitted recovery of the customs debt outside the three year time limit, subject to any conditions contained in UK law.



45. UK law contained no relevant conditions which restricted recovery outside the three year time limit.

46. There is therefore no limitation period applicable to the recovery of the unpaid duty in this case, and the Demand was therefore issued in time and was validly enforceable.

47. This should not be regarded as a surprising result. Whilst limitation periods of various lengths are normal, they are not universal (see, for example, the claims back to 1973 approved by the ECJ in *Marks & Spencer plc v HMRC* [2002] ECR I-6325). And the reasoning of the ECJ in *Agra SRL v Agenzia Dogane – Ufficio delle Dogane di Alessandria* [2010] C-75/09 made it clear that there was nothing offensive in EU law about a limitation period that ran from the date of a criminal judgment in the underlying criminal offence – which was effectively therefore an indefinite limitation period. The Tribunal would have a general power to control the determination of “stale” claims, under Article 47 of the Charter of Fundamental Rights.

48. In response to a question asked by the Tribunal in relation to the general UK law of limitation, he submitted that law was not relevant to the issues the Tribunal was competent to decide (partly for the reasons set out at [49] below and partly because the Tribunal was not adjudicating on the enforcement of a civil debt or debt due to the Crown, it was adjudicating on the validity of the Demand); and even if the general six year limitation period in the Limitation Act 1980 (“LA”) could apply, the six year period would only run from the time of discovery of the fraud (in this case, February 2007) and therefore the 2011 Demand was in time in any event.

49. As a wider observation on the question of limitation, he submitted the Tribunal had no jurisdiction to consider the question of equivalence (i.e. the general principle that procedural rules, such as those relating to limitation, governing actions for safeguarding EU law rights should not be less favourable than such rules for protection of equivalent domestic law rights), but in any event he argued that as payment of customs duties was essentially an EU law matter, equivalence was irrelevant.

### 30 *The Appellant*

50. Whilst not formally admitting that the presentation of the false Forms A amounted to “an act liable to give rise to criminal court proceedings”, Mr McNicholas did not actively deny it.

51. His main argument was based on the lack of any express provisions in UK law specifically dealing with the extended time limit contemplated in Article 221(4) of the Customs Code. He submitted that if HMRC were to be empowered to override the normal three year time limit, they must identify the specific provisions of UK law conferring that power. He observed that the ECJ jurisprudence was all concerned with the application of specific extended time limits contained in the domestic laws of the various countries concerned. As such, it did not provide authority for the proposition that an absence of any express time limit implied an indefinite extension

to the three year period set out in Article 221(4). This would offend against the principle of legal certainty, which required that a trader such as FMX should not be left in an indefinite legal limbo.

52. In support of this argument, he referred to *Kingdom of the Netherlands v EC Commission* [2003] C-156/00. In that case, the European Commission had refused to consider an application for remission of unpaid duties insofar as the imports in question took place more than three years before the demand for payment was made to the trader, on the basis that Article 221(3) of the Customs Code applied. The ECJ held that it should not have done so, as the matter of extending the three year time limit was entirely a matter for Member States and the Commission had no power to take the point itself by refusing to consider the relevant part of the remission claim. In the course of its judgment, it had made it clear that if Member States wished to implement an extended time limit under Article 221(4), the burden lay on them to do so.

53. The nearest that HMRC had come to identifying a “provision in force” in UK law was their reference to section 167(4) CEMA. But in his submission, that subsection merely established that any duty which was payable was recoverable “as a debt due to the Crown”. This did not necessarily imply any particular time limits – he referred us to the provisions of paragraph 5, Schedule 11 Value Added Tax Act 1994, where VAT was conferred with “debt to the Crown” status, but provisions imposing time limits for assessments, etc, were specifically set out elsewhere.

54. His secondary argument (if the “criminal act” relied on by HMRC was the Appellant’s act in presenting the false Forms A under section 167(3) CEMA) was that section 146A(3) CEMA imposed a time limit of three years for criminal proceedings in relation to such an offence. That time limit was long past before the Demand was issued and therefore the Demand must be invalid.

### **Discussion and decision**

55. We have found that the Forms A presented to HMRC on importation were false. We have found they were fraudulently obtained and provided by one or more of Duong Tech, Duong Chiv, Steve Wang and Arrow Quick. The fraudster(s) were well aware that the false documents would be presented to HMRC for the purposes of the UK import declaration. The Appellant, even if it was not aware of the fact that the Forms A were false, caused them to be delivered to HMRC for the purposes of its import declarations (to support the claims for exemption from duty).

56. The fraudster(s) in our view clearly committed an act that was liable to give rise to criminal court proceedings in the UK under section 167(1) CEMA (the last, and crucial, stage of the fraud involving the presentation of the false documents to HMRC in the UK).

57. The Appellant also, in presenting the false Forms A to HMRC on importation, was committing an act that was liable to give rise to criminal court proceedings in the

UK under section 167(3) CEMA, irrespective of whether it knew or was reckless as to the falseness of the Forms.

58. The fact that any criminal proceedings against the Appellant under section 167(3) CEMA became time-barred under section 146A(3) CEMA well before the Demand was issued is irrelevant and cannot protect the Appellant from liability based on a section 167(3) CEMA criminal act – see *Zefezer*.

59. Article 221(4) of the Customs Code clearly permits recovery after the three year period set out in Article 221(3) in such circumstances, but only “under the conditions set out in the provisions in force”. For these purposes, “the provisions in force” means “Community or national provisions”, but there are no applicable Community provisions.

60. The central point is therefore that the three year time limit in Article 221(3) of the Customs Code applies unless there are UK “provisions” in which “conditions” are set out, under which communication of the debt outside that time limit is permitted.

61. The UK legislation contains no specific reference to an extended time limit for the purposes of Article 221(4) of the Customs Code, still less any “conditions” applicable to such an extended time limit.

62. Section 167(4) CEMA provides that any duty underpaid by reason of matters falling within sections 167(1) or (3) CEMA is to be recoverable either as a debt due to the Crown or summarily as a civil debt. It does not however go on to address the matter of time limits for communicating or recovering the debt.

63. In relation to causes of action generally, applicable time limits are laid down by the Limitation Act 1980. Section 37(2)(a) of that Act however disapplies the Act in relation to claims for payment of (inter alia) “duty”, which we take to include the duty the subject of this appeal.

64. There is accordingly no express time limit laid down in the UK legislation for the recovery of customs debts resulting from criminal acts.

65. The question therefore is whether the absence of such an express provision means:

(1) that there is nothing to override the three year time limit in Article 221(3) of the Customs Code (as Mr McNicholas argued); or

(2) that the applicability of general principles of law should be recognised, thereby providing “provisions in force” which would include the “conditions” under which the three year time limit should be extended (as Mr Beal argued).

66. The authorities cited to us do not assist in any material way with answering this question.

67. Mr Beal’s argument is essentially based on the proposition that Article 221(4) of the Customs Code is an enabling provision, under which the UK is entitled to introduce whatever limitation provisions it chooses. The EU leaves that entire area to the UK under the “division of competences” concept and if (as the UK has supposedly chosen to do here) it decides to implement no limitation period, that is a choice which has been left open to it, which must be respected under EU law.

68. We disagree. We accept that Article 221(4) of the Customs Code is an enabling provision, and a wide margin of appreciation is left to Member States as to how they choose to implement it. We take the view however that it is clear from the wording of Article 221(4) that it contemplates some particular “provision” which contains “conditions”.

69. We do not consider that a failure to address the matter of limitation at all can be regarded as the valid adoption of an unconditional “no limitation” provision, which is effectively what Mr Beal argues for. Instead, we consider that the failure to enact appropriate specific provisions, setting out the conditions for an extended time limit or limits, means that there are no “provisions in force” in the UK which disapply the default three year time limit set out in Article 221(3) of the Customs Code.

70. In the absence of any such provision, it follows that we find the three year time limit in Article 221(3) applies in this case and accordingly the Demand was issued out of time.

71. The appeal must therefore be allowed.

72. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**KEVIN POOLE  
TRIBUNAL JUDGE**

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**RELEASE DATE: 29 November 2013**