[2016] UKFTT 286 (TC)

TC05053

Appeal number: TC/2013/2893 and TC/2014/144

EXCISE DUTY –conditions imposed on WOWGR – first appellant in breach – whether UK legislation under which conditions imposed authorised by EU Directive – whether conditions in breach of TFEU – whether conditions proportionate - ex parte Lumsdon considered – question to be referred to CJEU – appeal dismissed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

EURO TRADE AND FINANCE LTD **Appellants**
-AND-
PIERHEAD DRINKS LTD

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale
Michael Sharp

Sitting in public at the Royal Courts of Justice, the Strand, London on 22-24, 27, 29-30 April and 1, 5-6 May 2015

with further submissions from the appellant (undated but received on 18 May 2015) with a response on 3 June from HMRC with a reply to the response from the appellant dated 9 June, and further submissions from HMRC on 15 September 2015 and a response from the appellant dated 2 October 2015; and further submissions from HMRC dated 15 January 2016 with a response from the appellant dated 1 February 2016

Mr J Shelley, CTA, for the Appellant

Mr B McGurk, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. The first appellant is Euro Trade Finance Ltd, which we refer to as Euro Trade in this decision. The second appellant is Pierhead Drinks Limited, which we refer to in this appeal as Drinks. As the two appellants had the same director, the two sets of appeals had overlapping witnesses and to some extent the same facts were relevant to both, such that hearing the appeals separately would have given rise to the risk of inconsistent findings of fact, the Tribunal had joined the appeals.

2. Euro Trade appealed against four decisions made by HMRC, in particular:

(1) HMRC's decision of 21 March 2013 to issue Commissioners' Directions to warehouses storing goods owned by Euro Trade;

(2) HMRC's decision of 2 May 2013 to refuse to restore those same goods which were seized on 11 April following the Commissioners' Directions.

(3) HMRC's decision of 2 May 2013 to refuse Euro Trade's application to amend the conditions on which its WOWGR was granted;

(4) HMRC's decision of 13 December 2013 revoking Euro Trade's WOWGR;

3. Drinks appealed against HMRC's decision of 13 December 2013 refusing its application for a WOWGR. By 'WOWGR' we refer to registration as a trader in duty suspended excise goods under the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 no 1278 which we refer to in detail at §§153-158 below.

Facts

Pierhead Purchasing Ltd

4. It is not, we find, possible to understand the facts in this case without starting with a company called Pierhead Purchasing Ltd. We will refer to this company as 'PPL' to distinguish it from Drinks.

5. Mr Richard Hercules was the director of PPL. PPL had traded since 1976 and held a WOWGR, without any conditions being attached to it, since 1999 when they were first required for trading in alcohol.

6. PPL was issued in the years 2007-2009 with three assessments totalling approximately £1.4million in relation to its trading in mobile phones. The grounds of these assessments were that PPL was not entitled to input tax which it had recovered from HMRC because (HMRC considered) it had engaged in transactions which it had known or should have known were connected with missing trader intercommunity fraud (normally referred to as MTIC fraud).

7. PPL appealed all three assessments but withdrew the appeals on the first day of the hearing in April 2012. It then applied in October 2012 to have the appeals

reinstated but this Tribunal refused the reinstatement on 7 March 2013 ([2013] UKFTT 172 (TC)). This decision was upheld on appeal to the Upper Tribunal in July 2014 ([2014] UKUT 321(TCC)). PPL then applied to the Court of Appeal for permission to appeal against the Upper Tribunal decision: this application had been refused on paper at the time of the hearing before us but renewed to an oral hearing. The oral hearing took place on 20 May 2015, after the hearing in this appeal. It was refused.

8. Following the withdrawal of its appeal, and before the application for reinstatement, HMRC withdrew PPL's WOWGR on the grounds that PPL and Richard Hercules were not, in HMRC's opinion, fit and proper persons to hold a WOWGR. This was because PPL had not discharged its very substantial debt to HMRC and Richard Hercules was its director. While HMRC retained some repayments owing to PPL to set off against this debt, when liability to interest is taken into account the debt owing to HMRC by PPL was and remains about £1.4 million.

9. PPL has appealed against the withdrawal of its WOWGR but that appeal was not a part of this hearing. That appeal was, we understand, stayed pending the outcome of its reinstatement application. The stay should now be lifted.

Euro Trade

10. Euro Trade was incorporated and started to trade in April 1991. Its original trade was in general merchandise and not in excise goods. Its shareholders were five family members each holding one fifth of the shares: Richard Hercules had one fifth, Ian Hercules (his son) another fifth and three other family members held one fifth each.

11. For the first twenty odd years until August 2012 Richard Hercules was the director of Euro Trade.

12. Euro Trade had no employees and owned no premises. Its need for staff was met by using the staff of PPL. To the extent it needed premises, this was met by occupying the same building as PPL, which was owned by Richard Hercules. Re-charges for the use of staff and premises by Euro Trade were made.

13. Euro Trade applied for a WOWGR sometime in 2011 and this was granted in January 2012. The WOWGR included conditions. While PPL's WOWGR had been granted without conditions, as we find was usual when it was granted back in 1999, by the time Euro Trade applied in 2011, it was, we find, policy for HMRC to impose conditions on new holders of WOWGRs. We discuss HMRC's policy in more detail below at §§110-123.

14. The conditions attached to Euro Trade's WOWGR only permitted Euro Trade to trade in duty suspended goods in the following circumstances:

(1) It was not re-exporting previously imported goods (we will refer to this as the 'condition prohibiting re-export');

(2) It could only store alcohol in three named excise warehouses;

(3) It was only permitted to purchase duty suspended alcohol from 5 named entities (we will refer to this as the 'supplier condition');

(4) It was only permitted to sell duty suspended alcohol to 5 named entities.

15. We find, as Mr Richard Hercules accepted, that these restrictions reflected Euro Trade's business plan provided to HMRC by the company as part of its application for a WOWGR. In other words, it permitted Euro Trade to trade with those companies it had indicated it wished to trade with in its business plan. Euro Trade did not ask for a review of, nor did it seek to appeal, the imposition of the conditions.

16. Euro Trade did apply on 24 April 2012 to amend the conditions by adding new trading partners. And an application for an unconditional WOWGR was made on 7 June 2012.

17. On 29 August 2012, and before either of the above applications had been refused or allowed, and shortly after the withdrawal of PPL's MTIC appeal, Euro Trade's WOWGR was revoked on the grounds that the director of Euro Trade, Richard Hercules, was no longer regarded by HMRC as a fit and proper person to be a director of a company with WOWGR. This was on the grounds that he was the director of PPL when it had incurred and failed to pay the debt of £1.4 million mentioned above.

18. That decision is not under appeal; Euro Trade's WOWGR was reinstated by a review decision dated 15th October 2012 but with effect from 29 August 2012, the day on which it was revoked. The ground on which it was reinstated was that Richard Hercules had resigned as a director of Euro Trade on 31 August 2012. Ian Hercules, his son, had become a director in January 2012 and remained as the sole director when Richard resigned. The conditions on which the WOWGR was reinstated were the same conditions on which it was originally granted with the exception that the fourth condition set out above (restricting sales to 5 named entities) was no longer imposed.

19. In November 2012, Ian Hercules applied to HMRC for a longer list of authorised suppliers to be added to Euro Trade's WOWGR. Ian made a further application, to add some 44 authorised suppliers, to Euro Trade's WOWGR in January 2013.

20. We find these applications triggered a visit by HMRC to Euro Trade to assess whether the applications should be allowed. The visit took place on 1 March 2013.

21. At and after the meeting, the HMRC officers requested a list of Euro Trade's stock and the names of the suppliers who supplied it. This was provided on 19 March 2013 and from this list it was apparent that all of Euro Trade's duty suspended stock had been purchased from suppliers other than those with whom its conditions on its WOWGR authorised it to trade.

22. It was accepted by Euro Trade that it did trade in breach of its WOWGR conditions. We find that the list that Euro Trade had supplied on 19 March 2013 of its stock showed that all of its duty suspended stock was from non-authorised suppliers and that some of it had been obtained from suppliers before Euro Trade had even applied to HMRC to add that particular supplier to its approved list, and in one case obtained from a supplier not even on the list that Euro Trade had provided to HMRC to be added as approved suppliers.

23. On 21 March 2013, in response to this, HMRC imposed Commissioners Directions on the two warehouses in which this stock was held. This prevented the stock being sold without HMRC's prior consent.

24. On 11 April 2013, Euro Trade was served with a notice of seizure. All their duty suspended stock, as it was all purchased from non-authorised suppliers, was seized. The appellants estimated its value at about £58,000. Euro Trade did not challenge the seizure but it did request restoration of the goods.

25. On 2 May 2013, the applications to amend the WOWGR conditions were rejected on the basis of Euro Trade's failure to comply with its existing WOWGR conditions. On the same day, restoration of the goods was refused on the grounds that there were no exceptional circumstances justifying a departure from HMRC's normal policy that seized goods would not be restored.

26. On 13 December 2013, Euro Trade was notified that its WOWGR was revoked. As we have said, the imposition of the Commissioners Directions, the refusal to amend the WOWGR conditions, the refusal to restore the goods and this second revocation of the WOWGR are all the subject of this appeal.

Drinks

27. Drinks started trading in 2012, although in fact traded for only one month. It traded in wine which it was accepted did not require a WOWGR. Ian Hercules was its director from its inception in April 2012. He owned 80% of the shares; his partner, Ms Amanda Nokes, owned the other 20%.

28. Drinks applied for a WOWGR on 31 July 2013. It had a pre-credibility visit from HMRC on 23 September 2013. On 13 December 2013 it was notified its application for a WOWGR was refused.

29. HMRC's case was that Drinks was a 'phoenix'. While the appellants did not like that term, they accepted (and had always made plain to HMRC) that Drinks was intended to take over PPL's business. We find Euro Trade applied for an unrestricted WOWGR, and Drinks was incorporated very shortly after, the withdrawal of PPL's MTIC appeal. While it seems Richard Hercules had not anticipated the loss of PPL's WOWGR following on from the withdrawal of that appeal, he had anticipated that PPL was unlikely to be able to pay the debt and might therefore cease trading. He intended to preserve PPL's business, built up since 1976, by transferring it to Euro Trade and/or to Drinks. To do so, those companies needed WOWGRs. Drinks was

incorporated as 'Pierhead Drinks Ltd' in order to preserve the goodwill in the Pierhead name.

30. We find as a fact that Drinks was intended to take on the whole or part of the trade in duty suspended alcohol formally carried on by PPL. In practice, it never did so as it was never given a WOWGR.

The 1 March 2013 visit – Euro Trade

31. There was a dispute between the parties over when HMRC were first aware that Euro Trade had breached its WOWGR conditions. Euro Trade's witnesses maintained that they had brought this to HMRC's attention in the 1 March 2013 pre-credibility visit following Euro Trade's January application to add 44 more approved suppliers; the officers who attended that meeting maintained that they did not know of the breaches until they received the list on 19 March.

32. There was also dispute over the extent to which Richard Hercules represented Euro Trade in that meeting.

33. It was agreed that present at the meeting were:

(a) Surinder Singh (HMRC officer)

(b) Caroline Ames (HMRC officer)

(c) Richard Hercules

(d) Ian Hercules.

34. The Tribunal had in front of it Mr Singh's and Miss Ames' contemporaneous notes of this meeting. Neither note records that HMRC were notified of any actual breach of the WOWGR; the notes record that Richard Hercules agreed to provide a stock list stating from whom the goods were purchased. The notes also recorded that he had advised them that Euro Trade had purchased goods from a supplier not on the list with the intention to import the goods into duty suspension but that the goods had not yet arrived in Felixstowe. This notified HMRC of a potential, but not actual, breach.

35. Both Ian and Richard Hercules maintained in cross examination that full disclosure had been given at this meeting. It was put to Richard Hercules that he had not been so forthcoming. He denied this but we are unable to accept the denial. Both contemporaneous notes clearly record that Richard Hercules declared that a single batch of goods were about to be imported outside the terms of the WOWGR. We consider it extremely unlikely that the notes would have failed to record the much more significant admission of an actual breach applying to all of the trader's stock. We also accept the officers' evidence that, had an actual breach been notified, they had a procedure their rules obliged them to follow, which included issuing paperwork to the trader. They did not follow this procedure at the meeting because they were not notified of an actual breach. Moreover, HMRC's reaction to knowledge of the actual

breach was to impose a Commissioner's Direction: had they known of it on 1 March it was likely the Direction would have been imposed in the next day or so. It was not.

36. We take into account that Mr Singh's witness statement appeared slightly ambiguous in its wording as to whether he found out about the breaches at the meeting or afterwards; but we accept his explanation of why he worded his statement, written sometime after the event, in this manner. We find no notification of actual breaches of the conditions was made at this meeting but was discovered by HMRC officers when they received the annotated stock list on 19 March.

37. We also take into account that elsewhere we could not accept Mr Richard Hercules' evidence as entirely reliable. His view of matters was shown on a number of occasions not to be entirely realistic. For instance, in September 2012 he told Ms Ames that PPL's VAT was up to date but HMRC were refusing to honour its input tax claims: he omitted to mention that PPL owed a debt to HMRC of £1.4million outstanding at the time; in the same letter he said that PPL and Euro Trade were only connected by his directorship, overlooking the many other relevant connections; he told HMRC officers in the second meeting that he had nothing to do with Drinks while even his son described him as an adviser to it; in the hearing he played matters down, such as his earlier evasion and his decision to ignore the conditions on Euro Trade's WOWGR. There were other concerns such as those mentioned at §§80-90.

38. Having said that, we reject one particular criticism of Mr Richard Hercules. Mr McGurk suggested that the email dated 19 March 2013 from Richard Hercules to HMRC enclosing the requested stock list was intended to mislead HMRC. Mr Hercules had said in this: *'Most of these beers are duty paid and transferred for distribution throughout the UK….'* In fact, most beers held were held in duty suspense. Not only was this alleged deception not put to Richard Hercules, we consider on a proper reading there was no deliberate deception here: we consider that taking the context of the email as a whole, it was a figure of speech, with the writer using present tense when future tense was intended. He was describing his intended business model. It enclosed the stock list so it was obvious these beers were still held in the warehouse: clearly "transferred for" must have been used in the sense of "will be transferred for" so it seems to us that "are duty paid" was intended to be read as "will be duty paid".

39. Nevertheless, overall, we were wary about accepting Richard Hercules' evidence as entirely reliable for the reasons given in the above paragraphs.

40. We also take into account that elsewhere we could not accept Mr Ian Hercules' evidence as entirely reliable either. There was a tendency for his evidence on a point to move during the hearing; for instance, his original position was that he knew enough about excise matters to run an excise business before accepting that he did not (§101). He said his father's role in Euro Trade reduced after his resignation but that was not consistent with Ian's acceptance that all the purchases were undertaken by Richard Hercules, that the purchasing was the heart and soul of the business and that Richard Hercules was using his business knowledge in driving the purchases.

41. For all these reasons, we reject Ian and Richard Hercules' evidence that HMRC was informed of actual breaches of the WOWGR at this meeting.

42. Both officers' notes also record that Richard Hercules answered most of the questions the officers asked about Euro Trade. The appellants challenged this. Mr Richard Hercules position was that he largely answered historical questions about the company. We have considered the notes and accept the HMRC officers' evidence on this: Richard Hercules had the lion's share of Euro Trade's side of the conversation and it was not limited to historical answers about the company.

Meeting of 23 September 2013- Drinks

43. The meeting on 23 September 2013 was the pre-credibility check for Drinks' application for a WOWGR. It took place, as did the 1 March meeting, at PPL's premises, as these were not only used in addition by Euro Trade but by Drinks also.

44. Present at the meeting were:

(1) Richard Hercules;

(2) Ian Hercules;

(3) Andrew Cousins (HMRC officer) and

(4) Surrinder Singh (HMRC officer).

All bar Mr Cousins had of course been present at the 1 March 2013 meeting concerning Euro Trade.

45. Mr Singh's evidence was that Richard Hercules answered what Mr Singh considered to be the 'difficult' questions at this meeting. The appellant does not accept this: Richard Hercules position was that he was present to answer the historic questions about the business or to help out Ian where he lacked experience.

46. We have considered the evidence and Mr Singh's and Mr Cousins' contemporaneous notes. The questions were largely directed at Mr Ian Hercules, which is not surprising as he was the company's director. He answered the lion's share of the questions. But we accept Mr Singh's evidence that the more difficult questions, particularly regarding excise matters, were answered by Richard Hercules. The impression we got was that Richard Hercules, and not Ian, had the knowledge of how Drinks' duty suspended business was intended to be operated.

47. We also consider that the notes of both meetings show that Richard Hercules identified himself strongly with both companies. For instance, he constantly referred to the companies as "we".

Euro Trade's business

48. Euro Trade's original application for a WOWGR was made before the withdrawal of PPL's appeal and the resultant loss of its WOWGR. Richard Hercules'

explanation, given to HMRC at the time, was that he intended to split the business of PPL into two, passing a discrete section of the business to Euro Trade.

49. He accepted at the hearing, as we have said, that after the loss of PPL's WOWGR, Euro Trade and Drinks became a part of the contingency plan to preserve the business of PPL, moving PPL's duty suspended trade from PPL to another company with a WOWGR.

50. He said that he was preserving the business of PPL in Euro Trade and Drinks so that it could be handed over to his son, as he himself was in his late sixties and intending to retire. One of the main questions at the hearing was the extent to which Richard Hercules remained in control of Euro Trade and the extent to which he had control (if any) over Drinks. We reach our conclusions on this below.

Richard Hercules' relationship with Euro Trade

51. So what was Richard Hercules' relationship with Euro Trade? As we have said, Richard Hercules owned the premises Euro Trade occupied; he was also the owner and director of PPL which employed the staff which acted on behalf of Euro Trade, Euro Trade having no staff of its own. Mr Richard Hercules' own evidence, which we accept, was that Euro Trade only paid rent to him when it made money and he implied in re-examination that any profits would have been extracted in the form of a management charge.

52. Mr Ian Hercules' evidence was that the management charge would depend on the extent to which Euro Trade used the services of PPL's staff: as this is not entirely consistent with what his father says, and as Ian was accepting that the charge was only quantified after the event, we find that there was a lot of flexibility in how much would be paid.

53. This situation existed at all times, both before and after Richard Hercules resigned as director. The appellants' case was that management charges and rental charges were normal in a commercial world: staff and premises must be paid for. However, the significance of the arrangements is that they were not on commercial terms. We find on the basis of the evidence that the charges were not fixed in advance but paid at Richard Hercules' discretion. He was acting as an investor in a company would act and not someone dealing at arm's length. He was effectively investing his property and his company's employees' time in Euro Trade in the hope of getting a return.

54. This was perfectly rational behaviour, but the rational behaviour of someone who was invested in the company and looking for profit. It also meant that he controlled the company's ability to trade by controlling its premises and access to staff.

55. Richard Hercules described his resignation as director of Euro Trade as a part of the process of handing over the business to his son. When writing to Ms Ames after

his resignation to inform her of it, he described his letter as his 'last involvement' with the company. In the meeting of 1 March he described himself as an unpaid adviser.

56. Ian Hercules also said his father was handing over the business to him and that his role was reduced after his resignation.

57. We are unable to accept as reliable Richard Hercules' own assessment of his involvement with Euro Trade after his resignation. It morphed during the hearing. Early on, he accepted he was 'not backing off totally'. Three times in cross examination he used the excuse that he had written on behalf of the company because Ian Hercules might have been ill that day but even he appeared to accept that that excuse wore thin. Later he admitted that he did have to 'help out a lot'. We also reject Ian's similar assessment.

58. We find Richard Hercules' own actions at the time indicated a large degree of involvement in and control of the company after his resignation. For instance, Richard Hercules had authorised all the purchases by Euro Trade in duty suspense. Indeed, he referred to this as a 'big mistake' made by himself because he had held the mistaken belief (he said) that HMRC would rubber stamp the application to add more permitted suppliers to Euro Trade's WOWGR conditions. In other words, he was accepting that the decision to purchase all of Euro Trade's stock, and to do so in breach of its WOWGR, was his decision. We also find he attended the 1 March meeting (with Ian) on behalf of Euro Trade and answered the greater part of the questions on behalf of the company (§42). We also find he strongly identified with the company throughout the meeting by saying "we" had done this and so on (§47). It is also clear from the files that Richard Hercules was the author of many emails sent by Euro Trade to HMRC (although Ian Hercules also wrote some). Richard's emails read as if he was wrapped up in Euro Trade's business and personally frustrated by the restrictions on Euro Trade's WOWGR. We also take into account that Ian did not have the excise experience to run Euro Trade. It was put to Richard Hercules that he was at the heart of Euro Trade's business and we think that the evidence shows that he was.

Drinks' relationship with Mr R Hercules

59. Richard Hercules was not a director of Drinks; the director was and always had been Ian Hercules. As we have said (§27), neither was Richard Hercules a shareholder.

60. Richard Hercules' evidence was that he had nothing to do with Drinks, which was his son's company, and he himself was about to retire. In re-examination he repeated that he had nothing to do with the company.

61. However, as with his evidence over the degree of his involvement with Euro Trade, we are unable to accept this evidence as reliable.

62. As with Euro Trade, Drinks had traded using PPL's staff and Richard Hercules' premises. Although charges were intended to be paid, they were not agreed in

advance and appeared to us to depend on whether or not Drinks made a profit. The same comments on this arrangement apply as at §§53-54 above in respect of Euro Trade. Moreover, Richard Hercules had agreed to loan Ian Hercules £50,000 as start up capital. Again this was described as an ordinary commercial transaction but we find it was not. Although interest was specified to be payable, it was only payable at the end of the five year loan and the rate was not specified. Ian Hercules' evidence was that the rate would depend on Drinks' profitability. Again, in respect to this loan, we consider Richard Hercules acted like an investor with a hope of profit, rather than someone at arm's length. As he could extract profit in the form of management charges, rental and interest, it seems irrelevant that he was not a shareholder: he was in reality the only major investor in the company.

63. It was accepted that Richard Hercules was a signatory on Drinks' bank account: the appellants presented this as an ordinary commercial step to ensure that there was a back up signatory in case the primary signatory was unavailable. We find that the company already had two signatories, Ian Hercules and his partner Amanda Nokes. As they were a couple they might go away together, so a third signatory might well be sensible in such a case, but the fact the choice of signatory was Richard Hercules does suggest a greater degree of involvement by him than was admitted.

64. We accept Ian Hercules' evidence that Drinks only traded for one month, and that its trade was in wine for which it did not need a WOWGR. The Tribunal has no evidence over who actually conducted that one months' trading. However, in view of the above evidence and taking into account Richard Hercules' continued involvement with Euro Trade, and the openly acknowledged intention to transfer PPL's trade to Drinks and/or Euro Trade, we think Richard Hercules would have been as much involved with Drinks as he was with Euro Trade after his resignation, if Drinks' application for a WOWGR had been successful.

Was Richard Hercules a fit and proper person to be a director of a company with a WOWGR?

65. PPL's WOWGR was withdrawn on the grounds that both PPL and Richard Hercules were not fit and proper persons to hold a WOWGR. Obviously Richard Hercules did not hold the WOWGR, but he was the director of a company which did and we accept that it would be entirely reasonable for HMRC to refuse to issue a WOWGR to a company the director of which was the director of another company which, because of events while he was a director of it, was not a fit and proper person to hold a WOWGR.

66. PPL's appeal was not in front of this Tribunal. HMRC's position was that in those circumstances we had to assume that Richard Hercules was not a fit and proper person.

67. We do not agree. PPL's appeal against the revocation of the WOWGR was in a very different position to PPL's appeal against the MTIC assessments. The former appeal was live and unresolved; the latter appeal had been withdrawn and was resolved against PPL. (We would say PPL's appeal had been resolved against it even

if there was a live application to reinstate the appeal, but in practice we do not have to rule on this because by the time of writing, the reinstatement application was no longer live).

68. We think that it is unavoidable that we must rule on whether we find Richard Hercules was a fit and proper person to hold a WOWGR because at least a part of HMRC's decision on Drinks' application revolved around its connection to PPL and Richard Hercules. If Richard Hercules and PPL were fit and proper persons to hold a WOWGR, that would undermine a significant part of HMRC's decision on Drinks.

69. We accept that in effect we are pre-empting the decision in PPL's stayed appeal. However, what findings of fact we make in these appeals, will not bind the Tribunal when hearing PPL's appeal.

70. The reason PPL was not considered a fit and proper person was, we find, because of the unpaid debt to HMRC of £1.4 million. This has not been paid and the appellants did not suggest that it would be paid.

71. That is not the only reason why Richard Hercules might not be considered a fit and proper person. There were three other issues which we consider HMRC would reasonably have to consider in reaching a decision on this, in particular:

(a) Richard Hercules' personal tax compliance record and PPL's tax compliance record;

(b) The tax compliance history of Euro Cellars Ltd ("Cellars"), a company of which he had at the relevant time (2002-2008) been a director;

(c) Richard Hercules' decision that Euro Trade should trade outside its WOWGR.

We consider these four matters in turn.

The unpaid debt of £1.4 million

72. The appellants did not accept that this debt should be held against PPL. It was their case that the appeal had been withdrawn on the (allegedly) bad advice of counsel newly appointed to replace PPL's original counsel who had become ill. PPL had later sought to have the appeal reinstated out of time and had appealed the refusals of the FTT and Upper Tribunal to so reinstate it. It ought, in their view, to have been reinstated so PPL could prove that it neither knew nor should have known of any fraud in their supply chains.

73. We did not permit the appellants in the hearing to lead evidence on the question of knowledge or means of knowledge of fraud in PPL's mobile phone supply chains. This was not a hearing of the PPL's MTIC appeal, this Tribunal should not undermine the decision on reinstatement of that appeal, and in any event HMRC was not prepared to contest the MTIC appeal in this WOWGR appeal. So we do not make

any finding of fact on whether PPL acting by its director had knowledge or means of knowledge of any MTIC fraud.

74. Nevertheless, the withdrawal of its appeal meant that PPL accepted its liability to pay the MTIC assessments. It no longer contested it: therefore it accepted it. Whatever Richard Hercules says now, or thought at the time, a person who does not appeal (or withdraws its appeal) against an assessment accepts its liability to pay it. PPL is liable to pay the assessment.

75. That is not just the effect of the ordinary rules of common law and the need for finality in litigation: in this case it is also provided for by statute. S 85(4) Value Added Tax Act 1994 provides that a person who has given notice of appeal and then withdraws shall be treated as if they had reached an agreement with HMRC that the decision under appeal should be upheld without variation. So PPL is liable to pay the assessment.

76. It has not paid it and it was not suggested that it intended to pay it. Unless and until it is paid, the debt is outstanding and is very substantial. Taxpayers should always ensure that they can pay their tax liabilities, yet PPL failed to meet its obligations, while under Richard Hercules' directorship, to the tune of £1.4million. The director of a company which has incurred such a very large and unpaid debt to HMRC seems, obviously to us, not to be a fit and proper person to be trusted with a WOWGR.

77. That conclusion is enough to find Richard Hercules was not a fit and proper person, but there is more. It seems to us, whether or not the debt is ever paid, by withdrawing its MTIC appeal, PPL accepted its liability which means it also accepted that at least it should have known its transactions were connected with fraud (as liability would have depended on this being proved). PPL effectively admitted, at the very least, to very serious carelessness or lack of sensible business precautions. It also seems obvious to us that the director of a company which accepted that it should have known of the fraud in its supply chain is not a fit and proper person to be trusted by HMRC with a WOWGR.

78. PPL's application for reinstatement makes no difference: it wishes to resile on its acceptance of liability to the assessment. But unless and until it is given permission to renew the appeal, it seems only right and in accordance with the need for finality in litigation, that the appellant is seen as having accepted its liability. In the event the reinstatement application has been unsuccessful, but we do not see that as making any difference to the fundamental point which is that by withdrawing its appeal the appellant accepted its liability to the assessment.

79. The appellants' case was that PPL's appeal was only withdrawn due to poor advice from its new (and, by implication, insufficiently familiar with the case) barrister: we have no evidence on which to judge the validity of the appellants' complaint and it makes no difference to the position even if the advice to withdraw was bad. It accepted liability whether or not it was ill-advised to do so.

Richard Hercules' and PPL's tax compliance history

80. HMRC sought permission to rely on the witness statement of a Mr White, an HMRC officer, which was served in the MTIC appeal, but did not intend to call Mr White as a witness in this hearing.

81. The witness statement recorded that there were enquiries in 2008 into possible fraud in Richard Hercules' personal tax affairs and those of PPL and Cellars in early 2008. Richard Hercules had chosen to cooperate with the enquiries and met (with his accountant) with Mr White at HMRC's offices and signed a statement admitting to a failure to declare certain tax liabilities.

82. As we have set out more fully in a footnote §§282-288 the appellant objected to the use in these proceedings of witness statements served, but never used, in earlier proceedings. We overruled that objection for reasons given in that footnote. Nevertheless, as Mr White was not called, we ruled that HMRC could only rely on the statement as evidence of the fact it had been served in the MTIC appeal and not as evidence of the truth contained in it.

83. Mr McGurk put to Richard Hercules that Mr White's statement was true. Largely Richard Hercules accepted that; he accepted that he made the admissions which Mr White's statement recorded. He went on to say that he had only signed the admission on the advice of his accountant and that he had made a qualification to the admissions with respect to VAT, which was unrecorded in the witness statement; he also said the statement was 'out of proportion' to what had really happened.

84. He accepted, in particular, that he had personally received £250,000 'off the books' when selling a property in his personal capacity, thus evading capital gains tax on some of the sale price. He also accepted that he had deliberately understated PPL's profits by failing to declare the receipt of retrospective quantity discounts from a supplier. He put these undeclared profits into a foreign bank account and used them in part to fund the purchase of his home, and failed to declare this as personal income.

85. So far as VAT was concerned, he agreed that he had accepted in the interview that PPL's VAT returns were not complete. He said that he had qualified this at the time to explain (he said) that only turnover was understated due to hiding the receipt of the above mentioned discounts; as the sales were zero rated, he said, no VAT liability was understated.

86. He accepted that he had reached a settlement of his liabilities with HMRC which led to PPL paying additional corporation tax of £111,000, while he paid additional income tax of £146,000 and additional CGT of £42,000, plus interest on all amounts and a penalty at 45% of £135,000.

87. Mr White's statement does not record any particulars about the VAT irregularities or if there was any settlement. It does not record Richard Hercules' qualification set out above. HMRC did not accept that Richard Hercules had made this qualification, and appeared to be suggesting that there was evaded VAT in addition to the admitted evasion of direct taxes. However, taking into account HMRC

did not call any witness on this, and that Mr White's own statement did not record any details about the VAT admission nor claim that there had been a settlement of VAT liabilities, we were left with Mr Richard Hercules' evidence, which was plausible and we accept it. So we do not accept that Richard Hercules admitted to VAT evasion in this interview.

88. There was also a dispute between the parties over a separate matter, which we will refer to as the 'false invoice matter', and in particular whether this involved dishonesty by Mr Richard Hercules. Ms Yeoman's evidence was that in November 2001, Mr Richard Hercules had admitted to conduct involving dishonesty for purpose of evading VAT of about £60,000 by creating a false invoice representing a sale of phones to a Spanish company, zero rated for VAT, when in fact PPL had made a standard rated sale of the phones to a UK company. The documentary evidence of this was introduced during the hearing in the form of a letter from HMRC dated 9 May 2002 which recorded that a civil dishonesty penalty was imposed at £11,821 for suppressing a sale. The penalty was set at the lowest possible percentage of 20% taking into account the early admission, full disclosure and full cooperation from PPL.

89. Although Mr Richard Hercules did not deny making the admission and receiving the penalty, he claimed in the hearing that the error with the invoice was accidental and the penalty imposed by HMRC had been withdrawn and not paid. Neither side had any documentary evidence of either any payment or alleged withdrawal of the penalty. Miss Yeomans said HMRC's records of payment did not go back to 2001 so she was unable to verify whether or not the penalty had been paid; it was also her hearsay evidence that she had spoken to the HMRC officer who had imposed the penalty who had no recollection of it being withdrawn. We do not rely on this evidence.

90. There was introduced into evidence a record of Richard Hercules' admissions on 8 November 2001. In this document he clearly admitted that he knew that at the time of their submission that PPL's VAT returns were incorrect or incomplete. That admission is not consistent with the mistake being accidental nor with the withdrawal of the penalty. On balance, we find Mr Richard Hercules' evidence on this unreliable: he would not have admitted fraud if the mistake was accidental. So we reject his evidence that the penalty was withdrawn. In any event, we find Richard Hercules clearly admitted in 2001 to dishonest conduct in respect of VAT.

Euro Cellars' WOWGR compliance history

91. As we have said, Cellars was a company of which Richard Hercules was a managing director. It held a warehousekeeper's WOWGR licence. It went into liquidation in 2008 following insolvency brought about by stock theft by staff.

92. The extent to which, if any, this company had failed to comply with its obligations to HMRC was in dispute.

93. In the letter of 13 December 2013 refusing Drinks' application for WOWGR registration HMRC listed some 14 instances of non-compliance by Cellars. The accuracy of this list was hotly disputed in the hearing. Our findings are as follows:

(1) By far the most significant alleged non-compliance was the incurring and non-payment of an excise and VAT debt arising out of alleged irregular exports amounting to approximately £700,000. Excise duty and VAT were assessed in January 2007 but the excise duty assessment was then withdrawn on the basis that it was made out of time. The VAT assessment was withdrawn in January 2010 because (as the letter said) Cellars was in liquidation and could not pay the assessment, so HMRC did not consider it worth pursuing.

At the time the VAT assessment was withdrawn, it was under appeal. Euro Cellars had never accepted its liability to either the VAT or excise duty assessments.

HMRC pointed out that HMRC had slightly reduced the VAT debt by setting it off against a VAT reclaim made by Cellars: Mr Shelley disputed the accuracy of this in closing but had failed to put this to any witness. We think it is a non-point: whether or not HMRC exercised a set off does not alter the fact that the assessment was under appeal. The appellant had never accepted that any part of the assessment was owing or that HMRC were entitled to set it off; and before the dispute was resolved, HMRC had withdrawn the assessment.

In these circumstances, no non-compliance by Cellars was proved in connection with this particular alleged irregularity in excise goods movement. It was wrong in law for HMRC to have taken this matter into account as demonstrating Richard and/or Ian Hercules were not fit to be directors of a company with a WOWGR. We return to this point at §277.

(2) There was another assessment on a smaller but still significant scale: in March 2007 Cellars was assessed to £18,241 VAT with regards to a discrepancy on an AAD. Richard Hercules' evidence was that he thought it was withdrawn as he would have known about it due to its size and he couldn't remember it.

The only paperwork in front of the Tribunal in respect of this matter was the assessment. That is prima facie evidence of the assessment; we are unable to accept Richard Hercules' evidence that it was withdrawn as it was vague, unsupported and as discussed below at (3) his evidence that assessments had been withdrawn was not always reliable.

(3) The rest of the non-compliance alleged was to do with failures to adhere to the rules and regulations in the years 2003-2008. Many of the alleged non-compliances were to do with stock marking and stock storage. Sometimes warning letters were issued; on other occasions standard penalties of £250 were imposed. In 2007, a series of standard penalties imposed on one occasion amounted to £3,750; some 21 failures in August 2008 led to the imposition of a combined penalty of £5,250.

In so far as warning letters only were issued, we discounted this as not proving anything. The question is not whether an HMRC officer thought that there was non–compliance but whether there actually was non-compliance; if a warning

letter is issued it only proves the former and not the latter. And there seems no reason why a recipient would necessarily dispute a warning letter which did not carry a penalty. So without more evidence we can't find these alleged instances of non-compliance proved.

On the other hand, those non compliances which led to a penalty being imposed we did consider proved non compliance if Cellars had paid the penalty. This was on the assumption that if Cellars disputed the alleged non-compliance it would not have paid the penalty but appealed.

HMRC have proved the penalties were imposed. The appellants' case was that the penalties (a) were largely unpaid and withdrawn (b) over minor matters in any event. We reject the appellants' case on this for the following reasons.

The appellants relied on a SAGE print out for Cellars which it appears was printed out not later than 2008. Ian Hercules' evidence was that the print out was of items coded as being unusual payments to HMRC, such as the payment of penalties. He accepted, however, as was apparent on its face, that the print out related only to the year of 2006 and the parameters of the search used to produce it were not known. It showed a number of payments, some of which appeared to relate to PAYE. It did show, we find, that penalties of £500 and £5,608 were paid in this period to HMRC in respect of excise matters.

We are unable to accept that this print out proves anything, least of all that the bulk of the penalties were withdrawn and not paid. If anything it shows that a significant number of penalties were paid in 2006.

The appellants also relied on a letter dated 23 February 2007 from HMRC in which HMRC refused Cellars' application to join the excise payment security system on the grounds that there had been 'two or more debt management actions in last three years' and cited two instances of penalties being imposed both within 2 weeks of each other in November 2006 (one of which appears to be the £5,250 alcohol penalty mentioned above). The appellants said this showed that Cellars had only ever had two penalties assessed: we do not agree it shows anything of the sort. To us the letter clearly implies that the two listed penalties were the most recent penalties; it does not state they were the only ones. In any event, the Sage printout referred to a penalty paid in February 2006 clearly showing those in the letter were not Cellars' only ever penalties. We also accept Mr Singh's evidence that these sorts of letter would only list the two most recent penalties as the test was no more than one penalty in the last three years. Listing more than two would be superfluous.

We are unable to accept as reliable either Richard or Ian Hercules' evidence that very few of the penalties imposed were actually paid, with the rest being withdrawn. Their evidence was vague and inconsistent with what documentary evidence that there was.

Our view is that HMRC were able to show the penalties were imposed and it was for the appellant to show they had been successfully challenged. The appellant failed to show this. It was not for this Tribunal, so long after the events and without the benefit of any facts, to make a decision as if this was an

appeal against the penalties imposed. The appellants had had the opportunity to appeal at the time and had not done so; by not appealing they had accepted liability to the penalties.

The appellants' position on the penalties was also that to the extent that Cellars had been in breach of its obligations as a warehousekeeper, its breaches were purely administrative, to an extent unavoidable due to the nature of its business in storing fine wines, and (said the appellant) not excessive in number for a business of its size.

We do not accept this, even to the extent it was factual rather than opinion evidence, in any event. We did not find Richard and Ian Hercules' evidence to be entirely reliable in other areas. We note in particular that Richard Hercules played down the seriousness of the fraud admitted to and referred to at §§80-90 and we would not accept as reliable his evidence that the penalties were for insignificant matters or no more in number that a business could reasonable expect to receive. We take into account Mr Singh's evidence that in his experience he had never seen a warehouse with such a high amount of damaged stock.

The appellants put the case that some of the penalty notices should not have been relied on; in particular one which showed stock in the wrong location. Mr Shelley's point was that it was (he said) clearly an error as that quantity of stock could not in fact have fitted into that location. We accept that either way the error was Cellars'; either the stock was where it should not have been or Cellars' computer erroneously recorded the stock as being where it should not have been.

Our view is that HMRC were able to show that the penalties were imposed and the appellant was not able to show they had been successfully challenged. It was also for them to show that they were for insignificant breaches and they have failed to do so. We do not accept the appellant's case on this.

The breach of Euro Trade's WOWGR

94. Mr Richard Hercules accepted that he knew at the time that Euro Trade's purchases went outside the terms of its WOWGR and indeed was responsible for this situation. Indeed, as we have said, he described it as his big mistake.

95. As we have said, his explanation was that he considered that having additional authorised suppliers added to Euro Trade's WOWGR would be a 'rubber stamping' exercise. We don't accept this as reliable. It would be illogical to think HMRC imposed conditions with no intention of them being taken seriously and it is not consistent with the fact that in practice Euro Trade kept chasing HMRC for a reply to its various applications and was therefore clearly concerned about the limitations.

96. So we had no real explanation for why Euro Trade breached its WOWGR conditions with its purchases made over (at least) a three month period.

Conclusion

97. We do not consider Richard Hercules to be a fit and proper person to be a director, key employee or otherwise a significant influence on a company holding a WOWGR. The outstanding debt to HMRC of PPL, a company of which he is director, of £1.4 million is by itself sufficient to disqualify him as someone HMRC ought to trust with a revenue privilege. In addition we find he has a history of tax evasion: see §§80-90 above. Either and certainly both these matters would disqualify him as someone whom HMRC ought to trust with a revenue privilege. Taking into account that he was a director of Euro Cellars which had a long history of poor compliance with its excise duty obligations, this view is only reinforced.

98. We reach that conclusion without considering his responsibility for the breach of conditions by Euro Trade. It goes without saying that this would only strengthen the conclusion reached in the previous paragraph, but that conclusion would stand even if we were to find that the conditions were unlawfully imposed and that therefore a breach of them is immaterial to the question of whether Mr Hercules was fit and proper to hold a WOWGR.

Was Ian Hercules a fit and proper person to be a director of a company with a WOWGR?

99. Ian Hercules was bookkeeper for Cellars from 2002 to 2008 and, from 2008, for PPL. He become a director of PPL in 2011.

100. Richard and Ian Hercules agreed that Ian was only a bookkeeper at Cellars and had no operational responsibilities and in particular did not deal with excise matters and was not responsible for any failures at Cellars. We accept that; it was not really challenged by HMRC and in any event it was consistent with other evidence in particular that Richard Hercules dealt with excise matters for Euro Trade, led in the two meetings with HMRC on excise matters and that Ian Hercules' knowledge of excise matters was weak (discussed below).

101. We do find that Ian Hercules' knowledge of excise compliance matters was weak. He appeared to accept this. Although originally in cross examination he started from the position that his knowledge of excise matters was sufficient by March 2013, he soon pointed out that he was able to rely on employees to help him with such matters. (These employees would of course be PPL employees as neither Euro Trade nor Drinks had any). He ultimately accepted in cross examination that his level of excise knowledge was insufficient to enable him to run an excise registered business, but considered that with the help of knowledgeable employees he was able to do so. It was also clear from questions directed to him that he was not familiar with a number of matters to do with excise control that the Tribunal would have expected him to understand.

102. Ian did not place the orders that were in breach of Euro Trade's WOWGR. Indeed, he implied he did not even authorise the purchases. But he accepted he knew at least when he paid for them that they were purchased duty suspense. So we consider he ought to have known they were in breach of Euro Trade's WOWGR as he

was clearly aware of the conditions on the WOWGR, and he knew from whom the goods were purchased and that they were in duty suspense. Indeed, he accepted that he did know this. In cross examination he accepted that he misled Ms C Ames in January 2013 by giving her a list of 'intended suppliers' while knowing (from having paid the bills) that Euro Trade had over at least the preceding three months already taken supplies from these suppliers.

103. In conclusion, we do not consider that HMRC could reasonably have considered Ian Hercules to be a fit and proper person to hold a WOWGR. There are two significant concerns with him:

(1) While we accept he had no responsibility for Cellars' non-compliance, that was because he was just a bookkeeper at Cellars and did not acquire the knowledge necessary to run an excise business. Nor had he acquired this knowledge by the time of the hearing.

(2) While he was sole director of a WOWGR company, the company flouted the conditions on its WOWGR.

104. We consider that either of these matters individually would mean that HMRC could not consider him as a fit and proper person to hold a WOWGR. Even if we were to decide that the conditions on the WOWGR were unlawful, we would still consider on the evidence in front of us that because of item (1) Mr Ian Hercules was not a fit and proper person to hold a WOWGR.

105. In so far as Ian's lack of experience was concerned, while, as Mr Singh indicated, HMRC might nevertheless grant a WOWGR to a company with a director who did not have the requisite experience, that would only be where they were satisfied that compliance would be the responsibility of another person, a director or key employee, with appropriate experience and otherwise a fit and proper person to hold a WOWGR. We consider that there was no such person for Euro Trade or Drinks. Amanda Nokes, we were told, would be that person for Drinks. But we heard no evidence from her. We were therefore unable to be satisfied as to her level of knowledge. Moreover, while she had no responsibility for Euro Trade's breaches, her claim to excise experience rested at least in part on her duties at Cellars, a company with a history of non-compliance. In any event, at the time of the application she was on leave and clearly not at the time a key employee of Drinks. While we consider Richard Hercules was at the least a key worker, and more likely than not a shadow director, of Euro Trade, he was not a fit and proper person, so again his involvement with Drinks could not have justified the grant of a WOWGR to it.

Risk of excise diversion fraud

Risks associated with traders in duty suspended goods

106. Mr Singh and Mr Charlton gave evidence on what HMRC perceived the risk to revenue associated with traders in duty suspended goods. Although they were questioned about the type of excise duty frauds which existed, there did not appear to

be any dispute between the parties about how the two frauds below operate and we find as follows.

107. There were two kinds of excise fraud involving complicity of owners of duty suspended goods: 'inwards' and 'outwards' diversion, with inwards diversion being the biggest risk to revenue. Inward diversion relies on a WOWGR holder using the identical authorisations to bring in multiple identical loads into the UK during the period for which (3 to 5 days) the ARC number for the authorised movement of duty suspended goods is valid. The loads would be diverted for sale within the UK without payment of excise duty. Only the last load would reach the warehouse and lead to payment of excise duty: the last load would either be any load which has actually been stopped and its ARC number checked on the border or, if that does not happen, the last load would be the last load to be brought over within the time permitted by the ARC number.

108. Outward diversion relies on a WOWGR holder apparently despatching excise goods to an authorised warehouse elsewhere in Europe, but in practice diverting the load for consumption in the UK. The destination warehouse may need to be complicit as they may need to provide confirmation the load arrived, when it did not.

109. Both these frauds are lucrative because excise duty in the UK is much higher than elsewhere in Europe.

HMRC policy on WOWGR

110. The evidence on policy was largely given by Mr Charlton, who has some responsibility for HMRC's excise duty policies and more relevantly has responsibility for the Alcohol Approvals systems. While the reasonableness of the policies was challenged, there was no suggestion that Mr Charlton's evidence on them was unreliable and we accept it.

111. Historically, while HMRC would vet WOWGR applicants and not all applicants would be granted WOWGR status, WOWGRs if granted would not have conditions attached. In 2010, HMRC reviewed its excise policies in order to try and address the perceived an estimated £1.5 billion per annum evasion of excise duty.

112. One of the ways in which HMRC decided to tackle excise duty evasion was to 'robustly' challenge WOWGR applications. HMRC policy unit perceived that there was an issue with businesses successfully applying for a WOWGR on the basis of a business model (eg importing niche alcohol products), but then, having obtained approval, switching to a different, and much more (from HMRC's perception) excise revenue risky business model (such as selling lager to France where there was no demand for it). This led to a decision by HMRC to ensure that the new WOWGRs granted reflected the business plan put forward as part of the approval application. This meant WOWGRS were granted subject to conditions, restricting the applicant to trade in accordance with its business plan. The conditions would be reviewed at the end of the first year of operation and in any event the taxpayer could apply for amendment at any time.

113. It was explained that conditions were originally only imposed on new WOWGR applicants, the view initially being that businesses with an established track record with WOWGR status did not need to be monitored in the same way as 'clean skins'.

114. Application of the policy led to much greater numbers of applications for WOWGRs being rejected. Mr Singh's evidence, which we accept as consistent with other evidence in the case, was that before approving a supplier as being one with which the WOWGR could trade, HMRC would effectively conduct its own due diligence on that supplier, looking at its director's background and other registrations and so on. It was a considered process, and not, as Mr Shelley suggested, merely an exercise in paperwork. Nevertheless, as the evidence in the case clearly showed, it was a time consuming process with delays of months occurring between the application for a WOWGR or amendment to it, and the grant or refusal of it.

115. Mr Shelley's case was that other methods of control would have been at least as effective as restricting the suppliers with whom a WOWGR holder could trade.

116. Mr Shelley suggested that a pre-notification system would be enough. The witnesses did not accept that and we agree. If HMRC merely knew in advance that a trade would take place, that would be far less effective at preventing excise duty fraud than actually limiting WOWGRS to trading with reputable suppliers unlikely to be involved in fraud. A pre-notification system, while not at all restrictive on trade, would involve HMRC in the burden of carrying out due diligence on all trades, and give them no control over traders undertaking risky trades (unless HMRC could actually prove fraud had taken place). Clearly the supplier condition was more effective than a mere pre-notification system at preventing risky trades.

117. Mr Shelley also suggested a pre-approvals system would also be enough but the witnesses did not accept this and we agree. It would hamper trade to a significant extent if every trade had to be approved by HMRC advance. Clearly the supplier condition was less restrictive of trade than this.

118. It was put to Mr Singh that requiring the WOWGR holder to carry out due diligence on its suppliers would have been a better means of regulating the trade than the supplier condition and Mr Singh appeared to agree, although deferring to Mr Charlton. Mr Charlton's evidence was that on a review of the policy in December 2013 it was decided supplier conditions were no longer fit for purpose and potentially a restriction on trade and therefore HMRC decided to introduce instead a requirement that WOWGR holders carry out due diligence on their suppliers before trading with them. We will refer to this as the due diligence condition.

119. And since 2013, the main control measure has been to require WOWGR holders to undertake due diligence of their buyers and sellers with a view to identifying any risk of excise duty fraud in the supply chain. Since the end of 2013, HMRC have not imposed a condition prohibiting re-export or restricting the identity of customers. As the appellants lost, or were refused, their WOWGRs on 13 December 2013 on the basis (in part) of the breach of the supplier condition in 2012/13, they never traded at a time when due diligence conditions were imposed on WOWGR holders.

120. We accept the appellant's case that the due diligence condition was equally if not more effective than the supplier condition at preventing excise duty fraud but at the same time was less restrictive of trade.

121. It was at least as effective because both conditions involved undertaking due diligence on the proposed supplier, such as considering the probability of it being involved in excise duty fraud. But unlike the supplier condition, the due diligence condition threw the burden of the due diligence on the trader rather than HMRC and also should have meant the due diligence was more up to date (taking place before a trade rather than before the WOWGR was granted). And a failure to undertake effective due diligence by the trader, whether or not fraud actually took place, would be a breach of a WOWGR and could lead to loss of the WOWGR status, thus eliminating from the approved status traders who did not undertake due diligence or made poor decisions on the basis of the due diligence which they did undertake. It should therefore have been at least as effective as the supplier condition in preventing risky trades. Moreover, the due diligence condition applied to buyers as well as sellers and, as we understand it, was imposed on all WOWGR holders, unlike the supplier condition which was only imposed on new WOWGR holders. So it should be more effective at preventing risky trades.

122. But the due diligence condition would also be less restrictive of trade than the supplier condition as (1) it left the trader able to trade with anyone as long as the due diligence was satisfactory (2) and while carrying out due diligence was a precondition to trading, this ought to have been a much quicker process than waiting potentially for months, as happened on the evidence in this case, for HMRC to decide whether or not to authorise a new supplier. The due diligence condition should therefore have been significantly less restrictive of cross border trade than the supplier condition.

123. In any event, as we have said, it was Mr Charlton's evidence that HMRC chose to replace the supplier condition with a due diligence condition as more fit for purpose and less restrictive of trade and we agree with that assessment.

The law

124. As we have said, there are five decisions under appeal:

(1) HMRC's decision of 21 March 2013 to apply a Commissioners' Direction to goods owned by Euro Trade and held in an authorised warehouse

(2) HMRC's decision of 2 May 2013 to refuse to restore those same goods which were seized on 11 April following the Commissioners' Directions.

(3) HMRC's decision of 2 May 2013 to refuse Euro Trade's application to amend the conditions on which its WOWGR was granted;

(4) HMRC's decision of 13 December 2013 revoking Euro Trade's WOWGR;

(5) HMRC's decision of 13 December 2013 refusing Drinks' application for a WOWGR.

Jurisdiction of Tribunal

125. The jurisdiction of the Tribunal is contained in s 16 Finance Act 1994 which provides as follows:

> "In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say –
>
> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
>
> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review of further review as appropriate to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

126. It was accepted that all five of the decisions in this appeal were within the definition of 'an ancillary matter' which was contained in Schedule 5.

127. HMRC relied on the explanation of the tribunal's jurisdiction given in the cases of *Cain* (2007) 1425601 at [10-12] reciting *Wednesbury Corp* [1948] 1 KB 223 and *Splendour Trade Ltd* [2014] UKFTT 366 at [29]. We did not understand the extent of our jurisdiction was in dispute and we agree with HMRC that the Tribunal can only allow the appeal against any of the decisions if satisfied that the decision was unreasonable in the sense that no HMRC officer acting reasonably could have reached it or that the decision was wrong in law or that the HMRC took into account irrelevant matters or failed to take relevant matters into account; and that even if the appeal is allowed, the only effect is that we can cancel HMRC's decision leaving HMRC to consider matter again. We can not re-make the decision ourselves.

128. In opening Mr McGurk made an argument based on [43] of *CC&C* [2014] EWCA Civ 1653. Nothing really need to be said on this as it was, we understand, withdrawn in closing. However, for the sake of completeness we note that he suggested there was some kind of mirror image of jurisdiction between the administrative court and this Tribunal when the reasonableness of an ancillary decision of HMRC was challenged. Underhill LJ said:

> "…where the challenge to the decision is not simply that it is unreasonable but that it is unlawful on some other ground, then the case falls outside the statutory regime and there is nothing objectionable in the Court entertaining a claim for judicial review or, where appropriate, granting interim relief in connection with that claim. A precise definition of that additional element may be elusive

> and is unnecessary for present purposes. The authorities ….refer to 'abuse of power', 'impropriety', and 'unfairness.'….'capriciously', or 'outrageously' or in bad faith. Those terms sufficiently indicate the territory that we are in……"

129. This led Mr McGurk to suggest that only ordinary unreasonableness could be alleged in this Tribunal; any allegation of really serious misconduct by HMRC would have to be retained for a judicial review action. We indicated at the time that HMRC would have an uphill battle to persuade us that this Tribunal, under s 16 FA, did not have the power to set aside a decision of HMRC on an ancillary matter that was so unreasonable it was susceptible to judicial review. We remain of this view: while Underhill LJ was stating that only the more serious kinds of unreasonableness could be judicially reviewed when the s 16 FA route for appealing existed, he was not suggesting that this Tribunal could only consider the less serious kinds of unreasonable behaviour. In any event, Mr McGurk withdrew the submission.

Amendment to grounds of appeal

130. The first issue in the appeal was the appellant's introduction of a new point of law in its skeleton argument. HMRC's position was that it was too late for the Tribunal to consider as HMRC had been unable to prepare a response, particularly, as Mr McGurk said, it wasn't really clear what the new point of law was.

131. It seemed to us that what the appellant was really saying is that the conditions imposed on Euro Trade's WOWGR (see §14) were not a proportionate derogation from the fundamental freedom of movement of goods. We considered that the point on legality of the conditions on the WOWGR was very significant in this case. It was accepted (and we find) that Euro Trade had broken the conditions. *If* the conditions imposed on Euro Trade's WOWGR were unlawful, then it would seem (subject to the deeming point we discuss below at §§142-151) that not only the refusal to amend the conditions, but also the Commissioners' Direction in respect of the goods, the refusal to restore the goods, and the revocation of Euro Trade's WOWGR potentially should not have taken place as they were all based on the assumption that the conditions were lawfully imposed and unlawfully breached. It affected Drinks' appeal, too, as whether Ian Hercules was fit and proper to direct a company with a WOWGR might depend at least in part on whether Euro Trade had been in breach of lawful conditions imposed on its WOWGR while he was a director of it.

132. We mention in passing that HMRC took the position that a breach of even unlawful conditions was something which would make Euro Trade's directors not fit and proper persons to hold a WOWGR: we entirely reject this. If the conditions were unlawfully imposed on Euro Trade, a breach of them would be, as the appellants said, immaterial to the question of whether the Hercules were fit and proper persons.

133. It is unfortunate that the issue surrounding the legality of the conditions, which was so fundamental to the case, was not really recognised until the hearing was about to commence and unfortunate that it was not then clearly enunciated. But this is a tribunal: even though a relevant point is not put in a timely or clearly articulated manner, we need in so far as possible consistent with justice to consider it. While the

Tribunal had sympathy with HMRC's predicament, and while it seemed that the only reason the point of law had not been raised in good time in the Notice of Appeal was that the appellants had only just thought of it, nevertheless the point of law appeared arguable and in view of the importance of the case to the appellants and the need for the Tribunal to administer justice, we ruled that we would consider it subject to (1) the appellant clearly stating its position on the point and (2) HMRC being given the opportunity in post-hearing submissions to respond to it.

The condition prohibiting re-export

134. At the start of the hearing, the appellant's case was that the condition prohibiting re-export (§14(1)) was a quantitative restriction on export which was unlawful under Treaty on the Functioning of the European Union ('the Treaty'). The difficulty for the appellants with this case was that although that condition was imposed on Euro Trade, HMRC had never taken any action against Euro Trade over a breach of it. While it appears on the facts that Euro Trade had in at least one transaction been in breach of that condition, the Commissioner's Directive and the seizure, and the subsequent decisions, were based solely on the breach of the 'supplier condition' (see §14(3)) restricting the number of suppliers from whom Euro Trade could make purchases in duty suspense. Whether or not the condition prohibiting re-export was lawful was irrelevant to the HMRC decisions at issue in this case.

135. By the time of closing submissions, therefore, the appellants' position had changed to being one that the supplier condition was effectively was a quantitative restriction on import and a breach of article 34 of the Treaty. We permitted this argument to be made: it was not sensible to allow the alleged illegality of one of the conditions to be argued but not the other and in any event HMRC were being given time to respond.

136. We will not refer again to the condition prohibiting re-export. Whether or not unlawful, it had no causal relationship with the decisions at issue in this appeal. We do consider the lawfulness of the supplier condition.

The post hearing submissions

137. We directed submissions after the close of the hearing to give HMRC the opportunity to respond to this new ground of appeal. We asked the parties for submissions on:

> the appellants' case that the conditions prohibiting re-export and trading with suppliers and customers not named in a WOWGR were a breach of the EU Treaty and, if that case is right in law, what impact that should, in their opinion, have, and why, on the five appeals by reference to the evidence in front of the Tribunal. The representations should also address the relevance, if any, of the Court of Appeal's decision in *Jones and Jones* and the Upper Tribunal decision in ***Race.***

138. HMRC's complaint was that in closing and in their post-hearing submissions the appellants ranged far beyond what was permitted and made an attack on the

WOWGR regime itself. It had also become in the post hearing submissions the appellants' case that the conditions were not lawful under the Excise Directive 2008/118/EC ("the 2008 Directive"). This was no part of even their amended grounds of appeal, but again it is difficult to separate out from the question of legality under the Treaty the question of legality under the 2008 Directive, and we permitted it to be argued.

139. So as the first round of submissions raised yet more issues, we directed a second set of submissions to deal with the question of proportionality. The second round of submissions asked for comments on:

> The Tribunal originally asked for post hearing submissions on the issue of whether the conditions imposed on the WOWGR of Euro Trade Ltd 'were a breach of the EU Treaty' and if they were, what impact that ought to have on the five appeals. Consideration of the legality of conditions imposed may, in the Tribunal's preliminary view, require the Tribunal to consider whether the conditions, and the national and EU legislation under which they were (on HMRC's case) imposed, were proportionate. Neither parties' submissions appear to address this point and so the Tribunal would like submissions on the following issues by the following dates:
>
> - whether 'proportionality' is relevant to the question of legality of the conditions at issue in this appeal;
> - what is the test for proportionality applicable in this appeal? (the parties are asked to have regard to the decision of the Supreme Court in *ex parte Lumsdon* [2015] UKSC 41 (24 June 2015)
> - is there sufficient doubt such that a reference to the CJEU should be made?

140. As HMRC's second round of submissions failed to deal with the Tribunal's concerns over the interpretation of the 2008 Directive (see §§209-235 below) and in particular whether it required or permitted regulation of traders in duty suspended goods, further submissions were invited. Responses were received in early 2016 and we take them into account in our conclusions below.

141. Our understanding of the appellants' new grounds was that the supplier conditions was unlawful under the European Treaty as it restricted intra-EU trade and was not justified by public policy and even if it was, it was not proportionate.

Can Appellant challenge legality of conditions in this Tribunal?

142. Before we even consider the new ground of appeal, we have to consider whether the supplier conditions has been deemed to be lawful, because, if so we cannot consider the new grounds of appeal at all. This concern arises out of the deeming provisions in Customs and Excise Management Act 1979 ("CEMA") and the fact that Euro Trade did not challenge the forfeiture of the goods (§24).

143. S 139 CEMA deals with forfeiture; Schedule 3 paragraph 5 provides:

> "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, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited."

The appellants accepted that they had not given notice within time or at all to challenge the seizure and so that the seized goods were under this provision duly condemned as forfeited.

144. In a case on restoration, this provision has operated to prevent the legality of the seizure being questioned: *Jones and Jones* [2011] EWCA Civ 824. In a case on an assessment and penalty arising out of the same importation, this provision operated to prevent the legality of the seizure being questioned: *Race* [2014] UKUT 0331 (TCC).

145. Does that provision mean here that the appellants cannot challenge the legality of the supplier condition imposed on Euro Trade's WOWGR, a breach of which led to unchallenged seizure, in an appeal against (a) the Commissioners Directions, (b) the refusal to restore, (c) the refusal to grant wider conditions, (d) the revocation of Euro Trade's WOWGR, and (e) the refusal to grant Drinks a WOWGR?

146. In *Jones and Jones* and *Race* the challenges to the seizure were factual: the appellants in those cases asserted that the goods were for personal and not commercial use. Here the challenge is legal: the appellants accept that the supplier condition was breached, but assert that the condition was unlawfully imposed. Does the deeming provision of Sch 3 para 5 apply equally to the law as to facts?

147. The decisions in *Jones* and *Race* do not really address this: it was not an issue in those cases. For instance, Mummery LJ at [71] in *Jones & Jones* said:

> "…(5)…It was not open to [the FTT] to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact they were being imported for own use…."
>
> …(7) …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…." (our emphasis)

Warren J at [31] in *Race* said:

> "…there is no room for further fact-finding on the question of whether seized goods were duty paid or not once the Schedule 3 procedure had determined the point." (our emphasis)

148. We do not consider that it is coincidence that what Mummery LJ and Warren J said referred only to facts when considering the deeming effect. Parliament would not have intended the law to be deemed to be something other than what it is. So while

CEMA has deemed that the goods were lawfully seized it has not deemed the conditions to be lawful. That remains a question of law open to a relevant court of tribunal to decide in any proceedings in which that question is relevant.

149. We are fortified that this is the right conclusion to reach by consideration of the European Communities Act 1972. This provides:

> **Section 2(1) General implementation of Treaties**
>
> All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies.

It seems to us that even if we are wrong about deeming provisions in general only applying to facts and not law, in any case involving European law, by S 2(1) ECA Parliament has provided that the European Union law will be given effect to, so that *if* the condition was unlawful under European Union law then CEMA cannot deem the condition to be lawful.

150. Mr Shelley also points to *Simmenthal (*C-106/77) where the CJEU said that national measures conflicting with directly effective Community measures are rendered 'automatically inapplicable'. This only reinforces the view we expressed in the immediately preceding paragraph.

151. In conclusion, HMRC cannot rely on CEMA, *Jones & Jones* or *Race* as authority to prevent the lawfulness of the supplier condition being challenged by the appellants in these appeals.

What did the appellant challenge?

152. As we have said, our understanding of the appellants' new grounds was that the supplier condition was unlawful under the European Treaty as it restricted intra-EU trade and was not justified by public policy and even if it was, was not proportionate.

UK implementation

153. We did not understand the appellant to suggest that the supplier condition was unlawfully imposed under UK law. Nevertheless, for the sake of completeness we set out our understanding of the UK law position.

154. The conditions imposed on Euro Trade were imposed under Customs and Excise Management Act 1979 s 100G which provided:

> **100G Registered excise dealers and shippers.**

(1)For the purpose of administering, collecting or protecting the revenues derived from duties of excise, the Commissioners may by regulations under this section (in this Act referred to as "registered excise dealers and shippers regulations")—

(a)confer or impose such powers, duties, privileges and liabilities as may be prescribed in the regulations upon any person who is or has been a registered excise dealer and shipper; and

….

(2)The Commissioners may approve, and enter in a register maintained by them for the purpose, any revenue trader who applies for registration under this section and who appears to them to satisfy such requirements for registration as they may think fit to impose.

(3)In the customs and excise Acts "registered excise dealer and shipper" means a revenue trader approved and registered by the Commissioners under this section.

(4)The Commissioners may approve and register a person under this section for such periods and subject to such conditions or restrictions as they may think fit or as they may by or under the regulations prescribe. (our emphasis)

155. The regulations made under this section were the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 no 1278 commonly known by the acronym WOWGR. We will refer to them as the Warehousekeepers etc Regulations 1999 to distinguish them from the use of the same acronym to signify registration under the regulations as a registered warehousekeeper or owner.

156. Paragraph 12 of the Warehousekeepers etc Regulations 1999 provides:

Privileges of a registered owner

12.—(1) Subject to regulation 14 below, a registered owner shall be afforded the following privileges in respect of relevant goods.

(2) A registered owner may–

(a) hold relevant goods that he owns in an excise warehouse; and

(b) buy relevant goods that are held in an excise warehouse.

157. The effect of these provisions was that only a person WOWGR registered could own and trade in duty suspended goods held in a tax warehouse. And HMRC could decide whether or not to grant WOWGR registration and could impose conditions on holders of WOWGR registrations. We find that under the UK legislation the supplier condition was entirely lawful.

158. It was the appellants' case that the supplier condition was unlawful under the Treaty, and so that is what we consider.

Restriction on a fundamental freedom?

159. The appellants' case that the supplier condition was unlawful relied on the right to free movement of goods. In particular, the appellants relied on Treaty of the Functioning of the European Union Art 34 and 35:

> **Article 34**
>
> Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.
>
> **Article 35**
>
> Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.
>
> **Article 36**
>
> The provisions of articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial or commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Was the supplier condition a breach of Art 34?

160. The appellants' position was that the supplier condition was a breach of Article 34 which was not justified under Article 36.

161. So far as breach of Article 34 was concerned, Mr Shelley relied on the *ANETT* [2012] C456/10 case. In that case national rules required tobacco retailers to obtain their supplies from national wholesalers. They could not buy directly from wholesalers in other countries. The rule was found to breach Article 34. (It was then ruled unlawful as unjustified by Article 36, although this part of the decision is really irrelevant here).

162. The CJEU said:

> [32] …all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are to be considered as measures having an effect equivalent to quantitative restrictions within the meaning of Art 34 TFEU….

163. Mr Shelley also relied on *France* C-216/11. In that case France had a rule which deemed possession of tobacco in certain quantities to be for commercial purposes and subject to excise duty; and a administrative practice that possession of tobacco was only checked at border posts (indeed the measure was to prevent tax tourism). The CJEU found that the effect was a quantitative restriction on import of tobacco. He also relied on *Italy* (C-110/05) to make much the same point.

164. HMRC did not agree that there was any breach of Art 34, so the question of justification and proportionality did not arise. Mr McGurk pointed out that Euro Trade was not restricted from buying from or selling to whomever they chose by the conditions which were imposed: they were only restricted in choice of supplier if they wished to import goods in duty suspense. Mr McGurk said that no one has a directly effective right to trade in goods held in duty suspense. HMRC did not accept that Art 34 & 35 were applicable to restrictions on trade in duty suspended goods.

165. While we accept that, literally, Euro Trade could trade with whomever it chose and there is no directly effective right to trade in duty suspended goods, nevertheless, the CJEU case law makes it clear that 'all trading rules … which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are to be considered as measures having an effect equivalent to quantitative restrictions within the meaning of Art 34 TFEU…' (*ANETT)* That is a wide definition and it seems to us that it would apply to conditions such as those in this case which would act as a financial disincentive to make purchases from anyone other than the named suppliers, as only those purchases could be in duty suspense.

166. One of Mr Shelley's objections was that the public policy exception could only be prayed in aid where the limitation itself was spelled out in legislation. For this surprising submission, he relied on *ANNET,* it seems on the passage where it referred to national authorities adopting a measure. However, *ANNET* did not raise this issue and the CJEU cannot be taken to have ruled on something not in issue in front of them. As the CJEU has never considered form to be important, we do not consider that they would do so here. And here of course, in any event, while the conditions were imposed by administrative action, the ability to impose conditions was contained in the legislation to which we referred at §§153-158.

167. We see nothing that would require the specific conditions imposed to be contained in legislation: such a requirement would make the imposition of conditions specific to individual traders virtually impossible and the CJEU have never suggested that there is such a requirement.

168. Nevertheless, our tentative conclusion is that the appellant is right the supplier condition was caught by Art 34 for the reasons given in §165. We come back to this in §235.

Breach justified under Article 36?

169. If the supplier condition was caught by Art 34, the question becomes one of justification under Art 36. The only possibly applicable justification is public policy.

170. There is clear public policy in the regulation of trade in duty suspended goods in order to prevent excise duty fraud. This public policy was set out in and underlies the 2008 Directive whose object was to both authorise, and make uniform across the EU certain aspects of, the regulation of the trade in duty suspended goods. From the recitals, it seems accepted that excise goods are a special case where free movement

of goods is concerned because of the need to ensure that member States can collect excise duty:

> **Recitals - Excise Directive 2008/118/EC**
>
> (5) In order to ensure free movement, taxation of goods other than excise goods should not give rise to formalities connected with the crossing of frontiers.
>
> (15) Since checks need to be carried out in production and storage facilities in order to ensure that the tax debt is collected, it is necessary to retain a system of warehouses, subject to authorisation by the competent authorities, for the purpose of facilitating such checks.
>
> (16) It is also necessary to lay down requirements to be complied with by authorised warehousekeepers and traders without authorised warehousekeeper status.

171. Whether or not the 2008 Directive itself authorises or requires regulation of traders in duty suspended goods, the public policy which underlies that Directive would justify the regulation of traders in duty suspended goods.

172. We find as a fact, relying on Mr Charlton's evidence, that the purpose of the supplier condition imposed on Euro Trade was to regulate trade in duty suspended in pursuance of public policy, and in particular the public policy recognised by the 2008 Directive. We reject the appellants' case that there was no applicable public policy justification. There is clear public policy in regulating the trade carried on by persons trading in duty suspended goods because of the risk of excise duty going unpaid, and in particular there is clear public interest in limiting the ability of such traders to make purchases from companies involved in, for example, inwards diversion fraud.

173. However, even though it was justified by public policy, EU law also requires the public policy to be implemented in a proportionate manner. So the question of the lawfulness of the supplier condition depends on whether it was a proportionate response to the threat of excise duty diversion.

Proportionality of supplier condition?

Introductory

174. Neither party used the language of proportionality in the hearing despite the appellant's clear if belated challenge to the legality of the conditions. And their failure to address the point in the first round of submissions led us to ask for a second round of submissions to address this point. We also drew the parties' attention to the case of *ex parte Lumsdon* [2015] UKSC 41.

175. We find certain measures and administrative acts are required to be proportional in the EU sense of the word. These are measures concerned with the fundamental freedoms:

> [37] …Proportionality as a ground of review of national measures, on the other hand, has been applied most frequently to measures interfering with the fundamental freedoms guaranteed by the EU Treaties. Although private interests may be engaged, the court is there concerned first and foremost with the question whether a member state can justify an interference with a freedom guaranteed in the interests of promoting the integration of the internal market, and the related social values, which lie at the heart of the EU project. In circumstances of that kind, the principle of proportionality generally functions as a means of preventing disguised discrimination and unnecessary barriers to market integration.…*ex parte Lumsdon (below)*

176. What is meant by 'proportionality'?

177. The view of the Supreme Court in *ex parte Lumsdon* was that although the CJEU may formulate the test of proportionality in the same way, in reality its application is different dependant on context and in particular the different contexts are:

(1) Measures of EU institutions (§§40-49 of *Lumsdon)*

(2) National measures derogating from fundamental freedoms (§§50-72 of *Lumsdon)*

(3) National measures implementing EU measures (§§73-74 of *Lumsdon).*

178. In this case, the legality of the Directive is not challenged. If it was, it would fall within (1) as a measure of an institution. In such a case,

> "the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue." *R v Secretary of State for Health, Ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (Case C-491/01) at [123]

There was no suggestion that the Directive was manifestly inappropriate in its objective of controlling trade in duty suspended goods, and we are not aware of any grounds on which such a challenge could be made.

179. The test of proportionality for national derogations (category (2)) is harder to meet. The Supreme Court in *Lumsdon* adopted Advocate General Sharpston's views:

> 'Whilst it is true that a member state seeking to justify a restriction on a fundamental Treaty freedom must establish both its appropriateness and its proportionality, that cannot mean, as regards appropriateness, that the member state must establish that the restriction is the most appropriate of all possible measures to ensure achievement of the aim pursued, but simply that it is not inappropriate for that purpose. As regards proportionality, however, it is necessary to establish that no other measures could have been equally effective but less restrictive of the freedom in question.'

180. So what is the test appropriate to category (3)? The Supreme Court said at [73]:

> ‘Member states must also comply with the requirement of proportionality, and with other aspects of EU law, when applying EU measures such as directives. As when assessing the proportionality of EU measures, to the extent that the directive requires the national authority to exercise a discretion involving political, economic or social choices, especially where a complex assessment is required, the court will in general be slow to interfere with that evaluation. In applying the proportionality test in circumstances of that nature, the court has applied a "manifestly disproportionate" test: see, for example, *R v Minister of Agriculture, Fisheries and Food, Ex p National Federation of Fishermen's Organisations and Others* (Case C-44/94), para 58. The court may nevertheless examine the underlying facts and reasoning: see, for example, *Upjohn Ltd v Licensing Authority established by the Medicines Act 1968* (Case C-120/97), paras 34-35.’

In other words, the category (3) test is similar to the category (1) test and therefore much easier to meet than the category (2) test.

181. We note that it is for HMRC to establish the proportionality of the measures they implement. In ANNET the CJEU said:

> …it should be noted that it is for the national authorities, where they adopt a measure derogation from a principle enshrined by European Union law, to show in each individual case that measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. The reasons invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments….

We therefore have to decide if HMRC have to meet the test for cases within (2) or (3) above before we can decide whether they have established proportionality. And the two tests are very different. So which test is it?

WOWGR registration

182. In so far as it was the appellant’s case that the *registration* of traders in duty suspended goods was not a proportionate means of controlling trade in duty suspended goods, we reject it. Firstly, we reject it as the appellants have never clearly articulated their case on this and occasionally expressly stated that it was not a part of their case. Secondly, we reject it as, even though HMRC have the burden of proving this and even if it is the most strict test which applies (the least restrictive measure of equal effectiveness possible), we think that registration of traders in duty suspended goods must meet that criteria. Without registration, it would be impossible to exert any meaningful control whatsoever over trade in duty suspended goods with a view to preventing inwards and outwards diversion fraud.

The supplier condition

183. What was really challenged was the actual conditions imposed on Euro Trade by HMRC in implementation of s 100G(4) CEMA. As we have already effectively said in our findings of fact, we consider that the supplier condition was not the least restrictive of equally effective methods of control of trade in duty suspended goods: the due diligence condition was less restrictive (and probably more effective) at achieving the same result of discouraging inwards and outwards diversion fraud (see §§110-123.

184. If the appropriate test of proportionality is (2) then the test is whether HMRC have shown that 'no other measures could have been equally effective but less restrictive of the freedom in question' and clearly HMRC have failed to establish that with the supplier condition.

185. Test (3) is easier to establish. Which test applies depends, as we have said on whether the Member State is derogating from a Treaty freedom or implementing a Directive. The strict (2) test applies to derogation from a Treaty freedom, the easier to meet 'not manifestly inappropriate' test (3) applies to implementing a Directive.

186. We only have to decide whether Test (2) or (3) is the appropriate test if the supplier condition passes the 'not manifestly inappropriate' test. In other words, if the supplier condition failed both tests, it would not matter which test applied. So we need to consider whether the supplier condition passes the 'not manifestly inappropriate' test.

Was the supplier condition manifestly inappropriate?

187. The appellants framed their complaint about the supplier condition in terms:

(a) The conditions were not imposed on all WOWGR holders;

(b) Notice 196 did not specify the type of conditions that might be imposed and Euro Trade was taken by surprise by the conditions and/or did not consent to them;

(c) The conditions were ineffective to counter fraud and/or went further than necessary.

We consider them in turn.

188. *Discriminatory*? There was evidence that there was discrimination in the issue of WOWGRs: the most obvious discrimination was that not all applicants would be given a WOWGR registration (eg Drinks was refused). And there was discrimination between WOWGR holders in that some holders would be subject to conditions and others would not. And the conditions would not necessarily be the same.

189. The question however is not whether there is discrimination but whether it was unfair. We heard no evidence that satisfied us that there was any unfairness. Mr Charlton gave evidence that there was a new policy in 2011 to apply conditions on 'clean skins' (new applicants for WOWGR) limiting them to customers/suppliers pre-

approved by HMRC on their WOWGR. This did not apply to existing WOWGR holders as such persons already had a track record with HMRC. This seems a rational policy and we do not see how Euro Trade can complain. Persons in relevantly different situations were treated differently.

190. The appellants do complain. They say that they should have been granted unrestricted WOWGRS because Euro Trade and PPL were close companies with a common management, common premises, common employees etc. If PPL had an unrestricted WOWGR it made no sense, says the appellant, to restrict Euro Trade's. This case is, of course, inconsistent with their case that Richard Hercules was not managing Euro Trade, but as we have rejected that case, we need to consider this discrimination point.

191. We consider there is nothing in it. If Euro Trade truly was carrying on exactly the same business as PPL under exactly the same management, there was no sense in it having a WOWGR at all if PPL had one. But by the time the Euro Trade's WOWGR was reinstated with the conditions complained of, PPL no longer had a WOWGR and Euro Trade's was only reinstated on the basis it had different management to PPL. Therefore, it was reasonable for HMRC to treat Euro Trade as a new company and impose conditions. Had HMRC known it had the same management (ie Richard Hercules) the WOWGR ought not have been reinstated at all, and for the reasons given at §97-98, we consider that that would have been the only reasonable decision HMRC could have reached.

192. *Taken by surprise?* Mr Shelley frequently complained that Euro Trade was taken by surprise by the conditions; PPL had no conditions on its WOWGR so Euro Trade did not expect conditions. While Notice 196 said that HMRC could impose conditions, it did not set out their new 2011 policy of imposing conditions on new applicants restricting the persons with whom they could trade.

193. Notice 196 provided at 2.1 that:

> "Only persons who can demonstrate that they are fit and proper to carry out an excise business will be authorised or registered."

194. Section 5 dealt with registration as an owner of excise goods in an excise warehouse. It stated that the guidance at 3.2 for warehousekeepers would be applied to applicants to be a registered owner as well. That guidance was:

> "Reasons for refusing an application my include circumstances where:
>
> - The legal entity (this includes the directors or any of its key employees) has been involved in revenue non-compliance or fraud;
> - The application is incomplete or inaccurate;
> - You (the directors in the case of a limited company) have unspent convictions;

- There are proven links between the legal entity or key employees with other known non-compliant or fraudulent businesses;
- The business is not commercially viable;
- You have not been able to demonstrate the business is genuine;
- The legal entity applying for authorisation has been involved in significant revenue non-compliance;
- You are unable to provide adequate financial security as required;
- You do not have an accounting system that satisfies us;
- [irrelevant]

The above list is not exhaustive….We will notify you of the reason or reasons for the refusal."

The Notice also contained the following statements:

"**5.4 Conditions that may be applied to a registration**

All owners and duty representatives must comply with the conditions and restrictions detailed in this notice. In addition, we may apply specific conditions (for example, restrictions on the type of goods that can be warehoused) which we will list on your certificate of registration."

5.6 Cancellation of registration

We may cancel your registration at any time. If we do so, then we will inform you in writing and give our reasons for the cancellation…..

195. So far as the question of 'fit and proper' Euro Trade was clearly warned that directors and key employees must be fit and proper persons. It was warned that proven links with non-compliant businesses could lead to a refusal.

196. It was warned HMRC might impose conditions on a WOWGR. It was not warned in January 2012 of the specific type of conditions that might be imposed. However, it is difficult to see why the Euro Trade needed advance warning of the conditions, and, if it had been given it, how the company would have behaved differently as a result.

197. In closing Mr Shelley said that because the imposition of such conditions was not anticipated it had affected the business plan submitted. What we understood him to mean was that had Euro Trade anticipated HMRC would use its business plan as the basis for conditions, it would have ensured more suppliers were listed in the business plan. However, there are two answers to this. Firstly, Mr Shelley's submission did not reflect the evidence in the case: there was no evidence that had Euro Trade anticipated the conditions it would have submitted a different business plan. Secondly, even if this were true, Euro Trade would only have itself to blame for submitting a business plan that did not in fact reflect its intended trading partners.

198. We reject any contention that the lack of warning of the imposition of the conditions was unlawful; in EU law terms we do not consider that that made the imposition of the conditions manifestly inappropriate.

199. We also note in a practical sense, that the breach of the conditions for which Euro Trade was penalised took place well after the grant of the original WOWGR with the original conditions back in January 2012; so there was nothing unexpected about the conditions at the time they were breached (late 2012/early 2013); moreover the conditions were in line with its business plan so any surprise that they were restricted to trading in accordance with their business plan should not have caused them difficulties.

200. It seems it was also part of the appellants' case that the revocation was unlawful as unexpected. Mr Shelley relied on [47] of *CC and C* (above). This was a case where a holder of a WOWGR which was revoked applied to the administrative court for interim relief (reinstatement of the WOWGR) pending an appeal to the tribunal against the decision revoking it. The Court refused to grant the relief but stated in [47] that HMRC's practice of revoking WOWGR registrations without warning might in some cases amount to such unfairness that interim reinstatement of the WOWGR could be granted. The Court recommended HMRC consider issuing precursor letters indicating an intention to withdraw a WOWGR giving the appellant a chance to persuade them otherwise.

201. As we understand it, whatever HMRC's practice after *CC&C Ltd,* it was not its practice to issue precursor letters before that case, and the facts in this appeal all took place before those in *CC&C.* If it is the appellant's position that a precursor letter ought to have been issued and in lieu of such they were entitled to interim relief, then this is the wrong court in which to raise the matter. Only the administrative court has the jurisdiction to grant such relief. It is difficult to see whatever relevance [47] of *CC&C* has to this appeal as the Court of Appeal did not suggest the lack of a precursor letter could make the decision to revoke itself unreasonable. Indeed, that would be illogical. If the decision to revoke was otherwise unimpeachable, the fact it was imposed without warning could not make it impeachable. In any event, we find that HMRC did issue a warning that the WOWGR itself was under review in a letter to Euro Trade.

202. Conditions ineffective?: The appellant seemed to complain that the conditions per se would be ineffective to prevent fraud and that, in its particular circumstances, the conditions did not prevent fraud as HMRC had never even suggested that its trade with the additional 44 unauthorised suppliers would have led to excise duty evasion. There was no suggestion that the goods which were seized were part of a fraudulent supply chain.

203. But the question of the appropriateness of the supplier condition in combating fraud is not whether the particular transactions undertaken would have led to fraud, but whether the policy overall led to a decrease in fraud. Clearly a system of regulation where a breach of it could only be punished where fraud was proved would be no system of regulation at all.

204. And so far as we understand it, whether a measure is manifestly inappropriate has to be measured prospectively. It is no good looking back and saying with the benefit of hindsight that it didn't work. The question is whether it was reasonable to expect that it would work.

205. In any event, Mr Charlton's evidence was that the policy was successful. The concern addressed was persons who sought and gained WOWGR registration on the basis of a business plan which showed they would not be trading in risk areas; but who, once registered, commenced trading in risk areas. Restricting trade to suppliers/customers stated in the business plan was not a manifestly inappropriate method of dealing with this problem, particularly as traders were able to apply to increase the list of intended suppliers/customers.

206. We are in any event bound by authority, from the Court of Appeal in *CC&C* and the High Court in *R (oao HT & Co (Drinks) & Anor) v HMRC* [2015] EWHC 659 (admin) that registration for WOWGR is a privilege to be afforded only to those HMRC can trust not to abuse the privilege; in particular to be afforded only to those HMRC can trust not to use the privilege in such a way to risk evasion of excise duty by others.

> [50]….More significantly it misses the mark of recognising that maintenance of a 'privilege' (for that is what it is) requires the HMRC to repose in a trader a high degree of trust to ensure that trade is carried on in a way which minimises exposure to the Revenue of unlawful trade practice. A flawed understanding of the purpose of effective due diligence (see [27] above) may to some extent have wrongly fed the Claimants' sense that revocation of authorisation was, and is, disproportionate. *HT*

> "[42] ….The statue describes the right to trade in duty suspended goods as a privilege and the nature of the business is such that it is a privilege that should only be accorded to those whom HMRC believe they can trust…." *C C and C*

In view of the unchallenged evidence from Mr Charlton of the scale of excise duty fraud, such an approach to regulation of trade in duty suspense does not appear to us to be manifestly inappropriate.

207. *Conclusion:* We are satisfied for the above reasons that the supplier condition imposed on Euro Trade was not manifestly inappropriate for the purpose of implementing the public policy of decreasing excise duty fraud and in particular inwards diversion.

208. As, however, we have found that it was not the least restrictive measure of equivalent effect, we must decide whether the supplier condition was implemented by the UK in implementing a Directive or was a derogation from a fundamental freedom, as the test for proportionality is different in these two different circumstances. In other words, the supplier condition fails test (2) but passes test (3) so we do have to decide which test is applicable. So does UK law under which the supplier condition

was imposed implement a directive? The only directive suggested to us as relevant was the 2008 Directive and we move on to consider it.

The 2008 Directive

Was the 2008 Directive a breach of Art 34?

209. It was not really a part of the appellant's case that the 2008 Directive was unlawful. We see no grounds on which such a case could be advanced: even if the 2008 Directive involves a restriction on trade, its public policy (set out in its recitals and referred to at §170 above) gave justification within Article 36 and the test for proportionality, as set out in *ex parte Lumsden* (see above at §177) would look at whether the provisions were manifestly inappropriate. The appellant did not suggest that they were and we see no grounds on which such a suggestion could be made.

Are traders in duty suspended goods regulated in the 2008 Directive?

210. What regulation of traders in duty suspended goods was required or authorised by the 2008 Directive? Euro Trade did not operate a warehouse. It dealt in duty suspended goods and stored them in premises belonging to third party warehousekeepers with the appropriate licences.

211. The recitals provide so far as relevant:

> **Recitals - Excise Directive 2008/118/EC**
>
> (5) In order to ensure free movement, taxation of goods other than excise goods should not give rise to formalities connected with the crossing of frontiers.
>
> ….
>
> (15) Since checks need to be carried out in production and storage facilities in order to ensure that the tax debt is collected, it is necessary to retain a system of warehouses, subject to authorisation by the competent authorities, for the purpose of facilitating such checks.
>
> (16) It is also necessary to lay down requirements to be complied with by authorised warehousekeepers and traders without authorised warehousekeeper status. (our emphasis)

212. It would be odd for legislation to mention a purpose in the recital which was not then reflected in the active provisions. So, for instance, having mentioned authorised warehousekeepers in the recitals, the 2008 Directive then went on to lay down general rules for authorised warehousekeepers, such as Article 16 which provided,

> The opening and operation of a tax warehouse by an authorised warehousekeeper shall be subject to authorisation by the competent authorities of the Member State where the tax warehouse is situated.
>
> Such authorisation shall be subject to the conditions that the authorities are entitled to lay down for the purposes of preventing any possible evasion or abuse.

213. But there is no mention in the body of the 2008 Directive of 'traders without authorised warehousekeeper status' other than in Recital (16). It seems to us that this is not a mistake; rather it reflects the later active provisions relating to movement of goods and consignors and consignees (Chapter IV Articles 17-31). Both parties were agreed that the appellants did not act as consignees and consignors. The definition of both (in Article 4) made it clear that consignors actually despatched goods moving in duty suspense and consignees actually received goods moving in duty suspense. Euro Trade never physically held the duty suspense alcohol it owned.

214. So under what provisions of the 2008 Directive did the UK regulate traders in duty suspended goods, who simply bought and sold goods in duty suspense, holding them in tax warehouses? HMRC's case (set out eventually in its third submissions post hearing) was that the 2008 Directive permitted member states to regulate traders in duty suspended goods in article 15. HMRC did not suggest any other article of the directive permitted or required regulation of traders in duty suspended goods. That article provided as follows:

> **Article 15**
>
> 1. Each Member State shall determine its rules concerning the production, processing and holding of excise goods, subject to this Directive.
>
> 2. The production, processing and holding of excise goods, where the excise duty has not been paid, shall take place in a tax warehouse.
>
> (our emphasis)

HMRC's case was that the use of the word 'holding' enabled the UK to regulate traders in duty suspended goods in that they were the persons who 'held' the goods in a tax warehouse.

215. It is not obvious to us that the word 'holding' in this context was meant to authorise Member States to regulate traders in duty suspended goods.

216. Firstly, having expressly mentioned 'traders without authorised warehousekeeper status' in the recitals, it would seem odd that drafters of the Directive would then intend the mere word 'holding' in the active clauses to set out the regulation of such traders, particularly as it was used in an article dealing specifically with regulation of tax warehouses. And as we have said, the later detailed provisions on consignees and consignors were probably those intended to reflect the reference to 'traders without authorised warehousekeeper status' in the recitals. The word 'holding' was not obviously intended to require or permit regulation of traders duty suspended goods.

217. Secondly, even more significantly, the word 'holding' is the third in a sequence being 'production, processing and holding'. These words appear to refer to physical actions rather than legal actions. So 'holding' is, it seems to us, likely to be concerned with the physical possession of the goods rather than the legal ownership of them. That fits with Art 15(2) which requires duty suspended goods in effect to be physically located in a warehouse. Art 15(2) would make no sense if it was to be read

as saying legal ownership of duty suspended goods 'shall take place in a tax warehouse'.

218. And if 'holding' refers to physical possession rather than legal ownership, then it is inapposite to refer to traders in duty suspended goods. Such traders legally own the goods: they do not physically hold them as such goods must (as per Art 15(2)) be held in a tax warehouse.

219. Weighed against this interpretation, we have accepted the evidence (XXX) that there is a real risk of some traders in duty suspended goods being complicit in excise diversion fraud because inwards or outwards diversion would normally require the complicity of such a trader. It may therefore be seen as surprising if the 2008 Directive did not give Member States a mandate to regulate such traders. Certainly HMRC's submissions were that it would be absurd if the 2008 Directive was read as not authorising the UK to regulate such traders.

220. *UK case law on the issue?* Moreover, we are bound to consider the recent case of *R (oao HT & Co (Drinks) & Anor)* where Cobb J said:

> [54] *Article 15(1)* of the *2008 Directive* provides for each Member State to determine its own rules concerning the "production, processing and holding of excise goods" subject to the Directive. It is therefore for national systems of Member States to make judgements about the precise structures and systems that should be put in place to serve the objective of protecting the public revenue by detecting and controlling fraud under the *2008 Directive*. The *2010 Regulations* have introduced a penalty system enabling HMRC to seize goods, assess for excise duty and issue a penalty where there is evidence of wrongdoing.
>
> [55] For the purposes of this application, I reject the Claimants argument that the *1999 Regulations* are *ultra vires* the *2008 Directive*. It seems to me that the *1999 Regulations* contain a regulatory regime which is entirely consonant with the objectives of the *2008 Directive*; …

221. That case was factually similar to the *CC&C* case (above) in that it was a judicial review action in which WOWGR holders which had their WOWGR revoked applied for injunctive relief and for permission to judicially review HMRC's decision to remove their WOWGR status. It had some similarity to these appeals in that the WOWGRs were revoked for failure to adhere to conditions imposed on the WOWGRs.

222. The judge refused interim relief and refused permission for judicial review; applying *CC&C,* he appeared to be of the opinion that there had to be something fundamentally unlawful in HMRC's actions before a judicial review action could be successful because Parliament had provided the FTT with supervisory jurisdiction over HMRC's decisions in these sorts of cases.

223. Putting that aside, and although he only referred to the Warehousekeeper etc Regulations 1999 at this point, it seems that the Judge's view was that UK law which

permitted the imposition of conditions on WOWGR holders was not ultra vires the 2008 Directive.

224. Analysed carefully, we think that what the judge said here is not strictly on the point we have to decide. He concluded that the UK legislation controlling traders in duty suspended goods was not ultra vires the 2008 Directive but 'consonant' with its objectives. We have independently reached the same conclusion, see §219. What the Judge was not asked to address was whether the UK legislation controlling traders in duty suspended goods *implemented* the 2008 Directive. So we do not think the Judge expressed a view, binding or otherwise, that the UK legislation on traders in duty suspended goods implemented the 2008 Directive.

225. In any event, as this decision was one on an application for permission to bring a judicial review action, rather than on a judicial review itself, we think that the decision is not binding on us as the Judge did not purport to actually decide the points of law: rather he decided whether the appellant had an arguable case. This explains why the view stated was stated without reasons.

226. *Can the question be referred?* We note in passing that even if we had concluded that the Judge had decided that UK legislation implemented the 2008 Directive, we could nevertheless refer the question to the CJEU. The effect of the European Communities Act 1972 is that this Tribunal is bound to give effect to EU law as explained by the CJEU. EU law is that national laws, even the doctrine of stare decisis and precedent (the law that means this tribunal is bound by the decisions of courts of record, such as the Administrative Division of the High court in which the *HT & Co* application was decided) are themselves subordinate to EU law. The CJEU said in *Elchhinov* C-173/09:

> [25]…the existence of a rule of national procedure such as that applicable in the case in the proceedings cannot call into question the discretion of national courts not ruling at final instance to make a reference to the court for a preliminary ruling where they have doubts, as in the present case, as to the interpretation of European Union law.
>
> [26] It is settled case law that art 267 TFEU gives national courts the widest discretion in referring matters to the court if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case…National courts are free to exercise that discretion at whatever stage of the proceedings they consider appropriate…
>
> …
>
> [31] In addition, it is appropriate to point out that in accordance with settled case law, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law, is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, that is to say, in the present case, the national procedural rule set out in para 24 of this judgement, and it is not

> necessary for the court to request or await the prior setting aside of that national provision by legislative or other constitutional means…

Nevertheless, this Tribunal is bound by the interpretation of CJEU judgments given by courts of record and the Upper Tribunal in *S & I Electronics* [2012] UKUT 87 (TCC) said that what Chadwick LJ said in the earlier *Conde Nast* case [2006] EWCA Civ 976 is good law even though it preceded what the CJEU said in *Elchinov:*

> [17] Mr Patchett-Joyce observed that Chadwick LJ did not have available to him the subsequent decisions of the ECJ in cases such as *Skatteverket v Gourmet Classic Ltd* (Case C-458/06), *Ku□cu□kdeveci v Swedex Gmbh & Co KG* (Case C- 555/07), and *Elchinov v Natsionalna zdravnoosiguritelna kasa* (Case C- 173/09). We do not think, however, that these cases undermine what Chadwick LJ said in the *Condé Nast* case.

227. And in the *Conde Nast* case Chadwick LJ had said:

> "[44] I am content to assume that there may be circumstances in which the obligation imposed on courts by s 3(1) of the European Communities Act 1972 would require this court to refuse to follow its own earlier decision as to the meaning and effect of a Community instrument—including, in the present context, the effect of a judgment of the Court of Justice. Those circumstances would, I think, include a case in which the judgment of the Court of Justice under consideration by this court in the earlier case had been the subject of further consideration—and consequent interpretation, explanation or qualification—by the Court of Justice in a later judgment. But, as it seems to me, one constitution in this court should not substitute its own view as to the effect of a judgment of the Court of Justice for the view which has been reached by another constitution in this court in an earlier case on consideration of the same judgment in circumstances in which there has been no opportunity for the Court of Justice to review that judgment. In those circumstances, if persuaded that there are strong grounds for thinking that the earlier decision is wrong (as a matter of Community law) this court may think it right to refer the point to the Court of Justice for a preliminary ruling. Or it may follow the earlier decision and give permission to appeal. But it should not refuse to follow the earlier decision merely because, on the same material and the same arguments, it is satisfied that a different conclusion should have been reached.
>
> [45] The need for a disciplined adherence to precedent in a comparable (but not precisely analogous) field was emphasised by Lord Bingham of Cornhill (with whom the other six members of the House expressly agreed on this point) in his speech in *Lambeth London Borough Council v Kay; Price v Leeds City Council* [2006] UKHL 10 at [40]–[45], [2006] 2 WLR 570 at [40]–[45]. After referring to the observation of Lord Hailsham of St Marylebone LC in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1054, that 'in legal matters, some degree of certainty is at least as valuable a part of justice as perfection', Lord Bingham said this (see [2006] 2 WLR 570 at [43]):

> '[43] ... That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent. It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here.'"

228. The effect of all this is that if what Cobb J had said in *HT & Co* was a binding ruling that UK legislation implemented the 2008 Directive, then (bearing in mind that that is not the view we would have taken otherwise) we would have two options:

(a) Refer the matter to the CJEU

(b) Follow Cobb J but give permission to appeal.

229. However, as we have said, that is all by the way, as we do not consider that Cobb J did make a binding ruling to that effect. So we do have a third option of deciding the matter against HMRC. We consider whether the issue should be referred to the CJEU.

230. ***Should the question be referred?*** Both parties considered that a reference was unnecessary as the law was clear, but of course took diametrically opposing views on what the law was.

231. Neither party addressed us on the rules on when to make a referral but they are well known. Whether an EU point of law should be referred depends on Art 267 of the Treaty which provides:

> "Where such a question is raised before any…tribunal of a Member State, that ...tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon."

232. Not all questions of European law should be referred. In the well-known case of *Ex parte Else* [1993] QB 534 the Court of Appeal ruled:

> "if the facts have been found and the Community Law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself.…If the national court has any real doubt, it should ordinarily refer."

233. What is meant by 'complete confidence' and 'any real doubt'? The Court of Appeal in the later case of *Littlewoods Organisation plc* [2001] EWCA Civ 1542 said:

> "…A measure of self-restraint is required on the part of the national courts, if the Court of Justice is not to become overwhelmed….
>
> …[a] development which is unquestionably significant is the emergence in recent years of a body of case-law developed by this court to which national courts and tribunal can resort in resolving new questions of Community law. Experience has shown that, in particular in many technical fields, such as customs and value added tax, national courts and tribunals are able to extrapolate from the principles developed in this court's case law. Experience has shown that the case-law now provides sufficient guidance to enable national courts and tribunals – and in particular specialised courts and tribunals – to decide many cases for themselves without the need for a reference…"

234. We were referred to many cases by the appellants and HMRC in their submissions not all of which we have referred to in this decision on the basis that they were of no assistance: we are unaware of an authority (apart from *HT & Co)* in which the question of whether the 2008 Directive authorises or requires Member States to regulate traders in duty suspended goods was even considered. While we are inclined to agree with the appellants that it does not, we do not think the matter acte clair and we do consider it essential to at least a part of our decision because the appropriate test for proportionality is critical to this appeal and depends on whether the UK rules are a derogation from the Treaty or an implementation of a Directive. We cannot resolve it with complete confidence, and while we recognise the need for self-restraint in making referrals, this point is a fairly fundamental one of importance to this appellant.

235. So we consider the question of whether the UK legislation imposing a registration regime with conditions on traders in duty suspended goods was in derogation from the Treaty or in implementation of the 2008 Directive ought to be referred; as that is being referred it seems right at the same time to leave it open to the CJEU to consider also (a) whether the supplier condition was a breach of Art 34 and if it was whether it was justified under Art 36 (although our preliminary conclusion as we have said is 'yes' to both); and (b) what is the correct test of proportionality for this Tribunal to apply.

236. The exact terms of the reference will need to be determined and we will issue directions separately on this. How does the decision to refer leave this appeal?

Conclusions on Euro Trade's and Drinks' appeals

The Commissioners' Direction

237. There were two Commissioners Directions, one issued to Seabrooks and one issued to BWA. The effect of the Directions were that the warehouses were unable to allow any of the goods stored by Euro Trade to be removed in duty suspense without HMRC's written permission.

238. The officer who took the decision was Ms Sue Holmes. The appellants did not challenge her evidence and she was not therefore called; we have relied on the factual

matters stated in her witness statement. In particular, it was her evidence that she imposed the Commissioners' Directions because she had been informed by other HMRC officers that Euro Trade had operated outside the terms of the conditions on its WOWGR.

239. It remained open to the appellants to challenge her decision on the law and that is what they did: it was their case that the conditions were unlawful.

240. We are therefore unable to resolve this aspect of the appeal without a reply from the CJEU to the referral. It follows that if the CJEU rule that the correct test for proportionality is whether the supplier condition was manifestly inappropriate, or that the supplier condition was not a breach of Art 34, in our view the appeal against the Commissioners Directions must be dismissed. But if the CJEU rule that the supplier condition was not justified, or the test for proportionality is the 'least restrictive measure' then the appeal against the Commissioners Directions must be allowed because the officer's decision would have been erroneous in law as it is not unlawful to breach unlawful conditions.

The refusal to restore

241. We note in passing that this Tribunal only has jurisdiction to consider a refusal to restore where that decision has been reviewed by HMRC: in this case there appears to have been no review, but a review was requested, and therefore there is by statute a deemed review, upholding the original refusal. The decision to refuse to restore was taken by an officer Blackburn. He did not give evidence.

242. We find the seizure and refusal to restore were made on the grounds that the suppliers of all the goods held stored at the two warehouses were purchased from suppliers not authorised by Euro Trade's WOWGR. It is accepted by the appellants that all the goods seized had been purchased by them in breach of the conditions on Euro Trade's WOWGR due to the purchases being from suppliers with whom Euro Trade was not authorised to trade.

243. The appellants' case was that the conditions were unlawful and therefore the seizure unlawful. The position is the same as with the Commissioners Directions in that we cannot resolve that aspect without a ruling of the CJEU.

244. However, the appellants also put the case that seizure amounted to a £58,000 penalty for breaching conditions. This was on the basis of evidence that the seized goods were worth about £58,000. The appellants consider that, even if the conditions were lawful, HMRC ought to have offered restoration subject to payment of duty. Euro Trade had indeed made this offer to HMRC at the time of the seizure and was aggrieved HMRC did not accept it.

245. On the assumption that the conditions were lawfully imposed and unlawfully breached, we consider that in view of the fact that the goods were purchased in duty suspense without any authority to do so (as it was outside the WOWGR conditions) that it would have been unreasonable for HMRC to have restored the goods per se.

We also agree that it was reasonable to refuse to restore the goods even subject to payment of the duty on them. This is because seizure is intended to be a penalty: the rules do not provide that persons who have not paid proper excise duty (such as bringing in goods in duty suspense without authority to do so) can keep their goods as long as the duty is paid. On the contrary, the rules provide for the goods to be seized. The purpose of that rule is not that proper excise duty is paid on that particular importation but to ensure that excise duty is paid on other importations: it is a penalty imposed to encourage obedience to the law. It would lose all force as such if this Tribunal regarded it as unreasonable to refuse restoration if the appellant offered to pay the duty. It would, in fact, encourage bringing in goods without payment of proper duty as such a ruling would mean no risk would be run by the taxpayer as the worst that would happen is the taxpayer, if caught, would have to pay the duty he was liable to pay anyway.

246. So *if* the conditions were lawfully imposed, we would find that it was reasonable to refuse to restore even though the appellant offered to pay the duty.

247. Secondly, even if the conditions were lawfully imposed, Mr Shelley relied on the case of *Rogers* [2004] UK E 00773 to suggest that HMRC's actions so extreme that they lacked proportionality and were unreasonable. The facts in that case were very different; in that case the Tribunal considered the refusal to restore not merely harsh but plainly unfair and applied *Roth* [2002] EWCA Civ 158. We cannot accept that the same criticism can be levied here: on the assumption that the conditions were lawfully imposed, the goods were knowingly purchased in breach of Euro Trade's WOWGR. No sensible explanation has been given for this. A system of regulation cannot work if the flouting of regulations is not punished. Indeed, in view of the wholesale nature of the breaches in that every purchase was in breach of the conditions, it would be fair to say that the company knowingly flouted the conditions. HMRC's decision to refuse to restore, *if* the conditions were lawfully imposed, was in our view entirely reasonable.

248. So that leaves us in the same situation with the Commissioners Directions: the outcome of the appeal against the refusal to restore depends entirely on the point of law we are referring to the CJEU. Were the conditions lawfully imposed and unlawfully breached or lawfully imposed and unlawfully breached? If the latter, the appeal on the restoration must be dismissed; if the former, the appeal must be allowed on the basis HMRC's decision not to restore was vitiated by a fundamental error of law (even though the seizure must be deemed lawful). HMRC would have to reconsider their decision.

The refusal to amend the conditions on the WOWGR

249. Mr Charlton took the decision to refuse Euro Trade's application for an extra 44 or so suppliers to be added to its WOWGR as approved suppliers. The ground on which he made this decision was that Euro Trade was in breach of its existing conditions.

250. Again, this decision would be unreasonable in the sense based on an error of law if the condition Euro Trade had breached was unlawful. We need the decision of the CJEU to finally determine this issue.

251. Are there any other grounds on which it could be said Mr Charlton's decision was unreasonable so that the appeal should be allowed even if the supplier condition was lawful?

252. During the hearing, the appellants formulated a case that Mr Charlton's decision was unreasonable because he was not an officer previously involved in Euro Trade's interactions with HMRC and was not familiar with the case. In particular, Mr Charlton admitted that he had not seen all the correspondence between Euro Trade and HMRC on the matter of the WOWGR at the time he took the decision. Mr Charlton was shown the correspondence previously unseen by him and stated that he would not have reached a different conclusion had he known of it at the time. We have reviewed the unseen correspondence and also consider that there was nothing in it which could reasonably have caused the officer to reach a different conclusion (on the assumption that the condition had been lawfully imposed).

253. Mr Shelley was asked in closing to state what factor he thought would have caused Mr Charlton to reach a different conclusion had he known of it. Mr Shelley did not give us a precise answer other than to indicate the 'situation' in general and that (in his view) the application to amend to add additional suppliers had been outstanding for 18 months.

254. On the assumption that the conditions were lawful, we do not consider that there was anything in Euro Trade's situation that justified a breach of its WOWGR conditions , nor justified the granting of the extended conditions despite the breach of its WOWGR conditions. In particular, while Euro Trade had made earlier applications to extend its conditions, these were overtaken by the first revocation of its WOWGR. The new WOWGR was granted on 15th October 2012 but with effect from 29 August 2012, the day on which it was removed. Shortly thereafter, in November 2012 Ian Hercules applied to HMRC for more authorised suppliers to be added, and then in January it applied for another 44 suppliers to be authorised. Euro Trade was told that it needed to supply evidence of intent to trade. It found it difficult to provide this but agreed with Ms Ames that its application should be held pending it supplying this for all 44 proposed suppliers. The credibility visit to Euro Trade was made on 1 March.

255. While Mr Shelley's point might be that Euro Trade had been consistently seeking to add more suppliers to its authorisation, we consider that the above history of events explain why some 16 months elapsed between the original application in January 2012 and the refusal in May 2013 of the one made in January 2013. In any event, we agree with HMRC that an application to amend the WOWGR conditions immediately after the grant would rightly cause concern as it would indicate that applicant was not operating as stated in its business plan.

256. In short, there is nothing in the history which would have been really relevant to Mr Charlton's decision; his failure to consider the entire history did not therefore make his decision flawed.

257. It was also Euro Trade's contention that if the additional 44 suppliers had formed a part of its original business plan, HMRC would have been content to include them on its WOWGR. We accept that that might be true but we do not know: presumably it would depend on whether HMRC were satisfied with this hypothetical business plan, with the due diligence on the 44, with the evidence of intent to trade and so on. But the submission misses the point. And that is that the 44 suppliers were not on the business plan, were not on the WOWGR and Euro Trade knowingly traded with them in breach of its WOWGR.

258. As has been said, a grant of a WOWGR is a privilege granted to those whom HMRC trust to trade in such a manner that the risk of excise evasion is minimised. Trading in breach of the conditions on its WOWGR inevitably erodes HMRC's trust; a refusal to extend the trader's WOWGR in such circumstances is a reasonable decision.

259. Mr Charlton mentioned in his evidence that Euro Trade had agreed to the conditions that it had later breached; part of the appellants' challenge was that (a) Euro Trade had not agreed to the conditions and that (b) had Mr Charlton known this he would have reached a different conclusion.

260. We agree that Mr Charlton's statement that Euro Trade had agreed to the conditions may be putting the matter a little high; but it was clear that the conditions were in line with the business plan put forward by Euro Trade and that at the pre-credibility meeting the plan would have been discussed with Euro Trade. Bearing in mind Euro Trade's systematic flouting of conditions which were well known to it, even if Mr Charlton had thought that Euro Trade was originally entirely taken by surprise by the imposition of the conditions, he must reasonably he must have come to the same conclusion not to extend the WOWGR. Even if Euro Trade was taken by surprise by the imposition of conditions, it never appealed them. A company which did not abide by lawful conditions imposed on it was not a company, it seems to us, that HMRC could reasonably trust with a WOWGR registration.

261. Therefore on the assumption that the supplier condition was lawfully imposed and unlawfully breached, we consider Mr Charlton's decision not to extend the WOWGR to additional suppliers was reasonable at the time it was taken, and accept that his decision would have been the same even if he had seen the unseen correspondence.

262. Whether it was erroneous in law depends on the answer from the CJEU.

The revocation of Euro Trade's WOWGR

263. The decision to revoke Euro Trade's WOWGR was made by Mr Singh on 13 December 2013.

264. The basis of the decision was the breach of the conditions. As has been said, a grant of a WOWGR is a privilege granted to those whom HMRC trust to trade in such a manner that the risk of excise evasion is minimised. Trading in breach of the conditions on its WOWGR inevitably erodes HMRC's trust; a revocation of the WOWGR in such circumstances is a reasonable decision.

265. Moreover, even if the supplier conditions was unlawfully imposed, we would not overturn this decision as it seems to us, were HMRC to consider the decision again, even if the CJEU rules the supplier condition unlawful, then HMRC must come to the same conclusion. And this is because they ought to take all relevant matters into account, and those matters are those that we have found they should have taken into account in respect of Drinks, as the position of the two companies was effectively the same. In particular:

(1) Ian Hercules was the director of Euro Trade and he was not a fit and proper person to be a director of a company holding a WOWGR for the reasons stated at §91-93;

(2) Euro Trade was to a significant extent influenced and controlled by Richard Hercules (see §§51-58). We find for the reasons given at §58 more likely than not he was the guiding mind of the company, although he had ceased to be a director, and for the reasons given at §§65-98 he was not a fit and proper person to be the equivalent of a director or key employee of a company holding a WOWGR.

We further explain our conclusions below in relation to Drinks.

266. In other words, whatever the outcome of the reference to the CJEU, it would make no difference to our conclusion that the appeal against the revocation of Euro Trade's WOWGR must be dismissed.

The refusal to grant Drinks a WOWGR

267. The letter refusing to grant Drinks a WOWGR was dated 13 December 2013. It was rather long. The officer who took the decision was Mr Singh. He explained in detail his reasons for the refusal which we summarise as follows:

(1) The involvement of Richard and Ian Hercules and Amanda Nokes in Cellars. Mr Singh's letter listed the matters of non-compliance which we have discussed at §§91-93.

(2) He considered that Richard Hercules was the 'guiding mind' behind Drinks and that he was not a fit and proper person to be in such a position to a company with a WOWGR.

(3) Mr Ian Hercules was the director of Euro Trade which had traded in breach of its WOWGR

268. Whether the third reason listed above was right in law depends on the answer from the CJEU. But as with Euro Trade's revocation, we consider that even if Mr Singh's decision was in part based on an error of law, that the appeal should not be

allowed because HMRC must inevitably make the same decision if required to reconsider the matter taking into account that error if that is what the CJEU determine it to be.

269. This is because of the matters listed at (1) and (2) above. We explain this in detail.

270. So far as point (2) is concerned, we do not consider there to be anything in the main wrong with Mr Singh's decision. The reasons he gave for considering Mr Richard Hercules to be the guiding mind were in summary:

(1) Richard Hercules was funding the business with his £50,000 loan and Ian Hercules was not putting any funds into the business;

(2) Richard Hercules was an authorised signatory on the bank account;

(3) Richard Hercules attended the meetings with HMRC and answered the 'difficult' questions;

(4) Richard Hercules owns PPL which employs Ian Hercules and Amanda Nokes and provides any other employees to Drinks; Richard Hercules owns the premises occupied by Drinks.

(5) Retained profits in Drinks would go to Richard Hercules; Drinks' director takes no dividend or income from Drinks.

(6) Drinks was intended to continue the business of PPL, owned by Richard Hercules.

271. Our views on these matters are as follows:

(1) We agree that Richard Hercules was the only person who was to invest in Drinks, via his loan which would only pay interest out of profits and the provision of staff (via PPL) and premises;

(2) We agree with HMRC that Richard Hercules being a signatory was a factor which could be taken into account for reasons stated at §63;

(3) We agree that the evidence shows that Richard Hercules answered most of the significant questions about the business and its excise compliance;

(4) The appellants' position was that retained profits would not go to PPL; however, we do not accept that. The way in which the business was established meant that Drinks would owe an unspecified amount in management charge to PPL and rent to Richard Hercules. Bearing in mind the loan was to pay interest dependant on the amount of profit made, it seems more likely than not that that was what would happen with the management charge and rent. Most significantly we are unable to accept the appellants' case that Richard Hercules was handing over control of the business to his son, for the reasons explained at §§59-64.

(5) As above.

(6) This was not in dispute.

272. Fundamentally, it was the appellants' case that Richard Hercules had built up the business of PPL over many years, and now, approaching 70 years of age, was ready to hand over the business to his son Ian and retire. Messrs Hercules were entirely open about the intention for Euro Trade and Drinks to take over the business of PPL, once PPL lost its WOWGR. In that sense, Drinks was intended to be a 'phoenix' company.

273. They saw nothing wrong in trying to preserve the profitable duty suspended business of PPL in another company once PPL was unable to continue with it due to the loss of its WOWGR, and they are of course right in that. The concern surrounds the question of who would be operating the new company: was that person suitable to trade in duty suspended goods?

274. Richard Hercules was not a fit and proper person (see §§65-98) and we concur with Mr Singh's conclusion that he would have been the controlling mind behind Drinks for all the reasons given above. Added to what Mr Singh said in his December 2013 letter, we found from the evidence at the hearing that, despite Ian Hercules being the sole director of Euro Trade, he permitted his father to make the decisions on what to purchase, which he agreed was the heart and soul of the business. He permitted Richard Hercules to be at the heart of Euro Trade and it is only reasonable to suppose that the same situation would have existed with Drinks, especially as in reality Richard Hercules was the major investor in it.

275. We would also add that we have found that Ian Hercules was not a fit and proper person to hold a WOWGR so even if Mr Singh had concluded that Richard Hercules' involvement was less than it was, we do not consider that his conclusion could reasonably have been any different.

276. These considerations at point (2) alone dictate that the only reasonable course of action for HMRC was to refuse Drinks' application for WOWGR status.

277. We now deal with Mr Singh's first reason for refusing the WOWGR, which was the involvement with Cellars. As we have already said, Mr Singh took some incorrect considerations into account in reaching this part of the decision (§93(1)). So far as Cellars was concerned, Ian Hercules, we find, had no responsibility for the various breaches. Moreover, in so far as Richard Hercules and Amanda Nokes were concerned, the breaches were not anywhere near as serious as represented. In particular, Cellars did not owe HMRC over half a million pounds in unpaid assessments. And while we have accepted there was an assessment to some £18,000 in VAT (§93(2)), there was no claim by HMRC that this was unpaid.

278. Mr Singh's evidence was that he would have come to the same conclusion even if he had known the matters in the previous paragraph: we do not need to consider whether the Cellars' compliance record by itself was enough to disqualify Richard Hercules and/or Amanda Nokes from being a directing mind/key employee with a company with a WOWGR nearly a decade later because it seems to us that point (2) alone meant that HMRC ought to have refused Drinks' WOWGR status. The non-

compliance by Cellars may well have been an additional reason: whether it would have justified it alone is not relevant.

279. The appellants are aggrieved; they say PPL's profitable business is effectively destroyed as HMRC will not permit it to be transferred to another company; but that is wrong. PPL's business could have been transferred to another company, but for that company to obtain a WOWGR it needed to be a company that which not controlled by Richard Hercules or Ian Hercules and instead was controlled by someone who was fit and proper to be in control of a company with a WOWGR.

Overall conclusion

280. The appeals against the revocation of Euro Trade's WOWGR and the refusal to grant Drinks a WOWGR are dismissed, irrespective of the outcome of the referral to the CJEU. That means Drinks' appeal is dismissed in its entirety. The status of other three appeals by Euro Trade depend on the outcome of the reference to the CJEU.

Footnote - Admissibility of certain witness statements in evidence

281. At the outset of the hearing, the appellants objected to HMRC's reliance on two witness statements. In neither case did HMRC intend to call the witnesses.

282. The first witness statement was a statement served by Mr Shelley in PPL's MITC appeal. Mr Shelley was the appellants' long standing adviser and was their representative in this appeal. It was relied on by HMRC as evidence that the witness evidence contained certain statements.

283. The second witness statement was a statement served by an HMRC officer, Mr White, also in the PPL MTIC. It was relied on for the truth of what was stated in it. It was relied on because it was HMRC's contention it was the cause of or at least a factor in the withdrawal of the PPL MTIC appeal. It was Mr McGurk's position that Mr White, now retired, did not need to be called because the appellants did not dispute the truth of it.

284. The appellants objected to both being admitted. We were referred to CPR 31.22. Our decision was that this CPR was not binding in this Tribunal but we should have regard to the underlying purpose of the rule. We considered that the purpose of the rule was to protect witnesses against unanticipated use of their evidence and documents in proceedings other than those in which they were served.

285. However, whilst the current proceedings were different proceedings than those in which the two statements were served, in practice the parties were the same; HMRC on one side and companies which were or had been controlled by Mr R Hercules on the other. Moreover, Mr White's statement was originally served in support of HMRC's case and was still being used in support of HMRC's case, just in different proceedings. In any event, in so far as the two statements were relied on as a fact of what was said in support of the earlier proceedings, rather than the truth of it, there was no reason to keep the statements out. It was a fact that they had been served

in the other proceedings and excluding that evidence would effectively deny that fact, which was not justice.

286. For this reason, as Mr Shelley's statement was only relied on by HMRC to prove the fact that it was served in the form it took, we saw no reason to keep it out. In the event, HMRC relied on Mr Shelley's statement to show that passages in it were identical to passages in Mr Richard Hercules' statement made some years later in this appeal. The appellants did not deny this: Mr Shelley agreed that he had cut and pasted a section from his earlier statement into Mr Richard Hercules' statement, and Mr Richard Hercules agreed that that had been done and he had signed it. We understood Mr Hercules considered the passages to be accurate and we make no adverse findings against the appellants on the basis that these paragraphs were taken verbatim from Mr Shelley's earlier statement.

287. Mr White's statement was relied on as evidence of the truth of what it contained, and in the absence of Mr White, we saw no reason to admit his evidence. So we said HMC could rely on it as evidence of the fact his statement was served but not as evidence of the truth it contained. If they had wanted to do that they ought to have called Mr White. However, they were entitled to put the contents of the statement to the appellants' witnesses in cross examination to see if it was denied or accepted. This was done and our findings are recorded at §§80-87.

288. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 25 APRIL 2016