



TC03947

Appeal number: LON/2007/08072

EXCISE DUTY – whether guarantor liable for duty – whether goods had never left the UK or it was impossible to ascertain where they had gone – reference back to FTT from Upper Tribunal on appeal – whether certain journeys could not have taken place as described in evidence before the original FTT – effect on conclusions reached by original FTT

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SDM EUROPEAN TRANSPORT LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 24 – 26 June 2014

Richard Barlow LLB MSc, representative for the Appellant, instructed by Allan Brown, ALM Consultants

Jessica Simor QC and Isabel McArdle, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Following an appeal by HMRC to the Upper Tribunal (Judge Sinfield and Judge
5 Hellier – “the UT”) against the decision of the First-tier Tribunal (Judge Wallace and
Mr Coles – “the original FTT”) (see [2011] UKFTT 211 (TC)), which had allowed
the appeal of the Appellant (“SDM”) against an assessment to excise duty of
£6,306,137 under regulation 7(1) of the Excise Duty Points (Duty Suspended
10 Movements of Excise Goods) Regulations 2001 (“DSMEG Regs”), the UT set aside
the FTT decision and remitted the case to a different panel of the First-tier Tribunal
with directions for its reconsideration.

2. This is the decision of this tribunal on that reconsideration.

Background

3. The following introductory summary is taken from [2] and [3] of the UT
15 decision.

4. SDM is a haulier and was the transporter and guarantor of movements of 65
consignments of spirits between duty warehouses in the UK and duty warehouses in
Belgium, Germany and Latvia in 2006. HMRC concluded that none of the
consignments reached their destinations and that SDM, as guarantor, was liable for
20 the duty in the UK on the basis that an excise duty point had arisen under regulations
3 or 4 of the DSMEG Regs because the goods had either never left the United
Kingdom and/or it was impossible to ascertain where they had gone.

5. SDM appealed. SDM did not dispute that the spirits had been diverted, that is
25 to say not properly entered in the countries of destination, but contended that the
goods had arrived at the places of destination and, accordingly, duty was payable in
the countries of destination and not in the UK. It was not disputed that the burden of
proof was on SDM to show that the goods arrived at their destinations. It was
accepted that, if the FTT could not determine in which Member State the irregularity
30 occurred, then excise duty was due in the UK. It followed that the only issue of fact
for the FTT was whether the goods were delivered to their destinations.

The background facts

6. As I shall describe, the referral back from the UT requires me to undertake a
detailed, but limited, further factual enquiry. But to put that enquiry into context, the
following is the summary of the background facts, and of the original FTT’s
35 conclusion, that the UT set out at [8] to [15] of its decision. Those facts had been
found by the original FTT from substantial documentary evidence, and from the
evidence of 13 witnesses for SDM (along with witness statements for two witnesses
for SDM who were unable to attend, the contents of which were not accepted by
HMRC) and six witnesses for HMRC, as described by the UT at [6] and [7]:

5 “6. The FTT heard evidence from two directors of SDM, Mr Cranny and Mr Hodgkins. The FTT also heard evidence from Mr Bunce who traded as J&J International (“JJI”) until August 2006 and then operated through Connie International BV (“Connie”) and was himself a driver of two consignments. Four other drivers gave evidence: Mr Waters who was the driver of eight consignments for JJI and Connie; Mr Blunsden, a self-employed owner-driver, who drove eight consignments; Mr Francis who drove four consignments for Mr Woods, a sub-contractor who also gave evidence; and Mr Parnham, a self-employed owner-driver, who was the driver of five consignments. All the drivers, including Mr Bunce, said that they delivered the consignments to their destinations. No tachograph discs were produced by any of the drivers or subcontractors covering any of the movements.

15 7. The FTT heard evidence from personnel of the consigning warehouses in the UK. The FTT also heard evidence from Mr Airlie, director of Doktor Czech UK Limited (“Dr Czech”) which sold the spirits which were the subject of 57 of the movements under consideration. The FTT also considered witness statements of two witnesses who were not available to give live testimony, namely Mr Chahal, director of Liquid Marketing Limited (“Liquid Marketing”) which sold six of the consignments of spirits, and Mr Wild, a self-employed owner driver who drove 14 consignments. Six witnesses, all officers of HMRC, gave evidence for HMRC concerning the investigation of the movements.”

25 7. Between July and November 2006, SDM was engaged by Dr Czech to transport 57 consignments of spirits to an excise duty warehouse at Vaux-sur-Sûre in Belgium operated by Aldi SA (“Aldi”). Two of the consignments were spirits that had been sold to Tele Audio Group (“TAG”) based in Belgium. The other 55 consignments were spirits sold to Cyber Comp (“Cyber Comp”) based in Luxembourg.

30 8. Between July and October 2006, SDM was engaged by Liquid Marketing to transport six consignments of spirits, which had been sold to TAG or to Cyber Comp, to the Aldi warehouse at Vaux-sur-Sûre.

35 9. In September 2006, SDM was engaged by Tradium Limited to transport a single consignment of spirits to Unistock SA in Latvia. In December 2006, SDM was engaged by Pierhead Purchasing Limited to transport a single consignment of spirits, which had been sold to Intermediaire Europe Eurl Limited, to Dialog Logistik GmbH in Germany.

40 10. All the movements were subcontracted by SDM. Mr Bunce said that Connie carried out approximately 28 movements to Aldi for SDM. Connie also transported goods to Latvia when Mr Bunce drove.

45 11. In August 2006, HMRC made enquiries of the Belgian authorities which informed HMRC on 31 October 2006 that the goods in question had not arrived at Aldi. HMRC obtained copies of AADs in relation to 18 movements to Aldi. They bore forged Belgian Customs stamps and forged Aldi stamps and signatures. No AAD was returned for the other 47 movements. All CMR International Consignment

Notes to Aldi carried Aldi stamps of a type not in use at the time apart from eight which carried no Aldi stamp. Two Aldi employees made statements to the Belgian police to the effect that Aldi did not receive the goods at the warehouse. A Belgian Customs officer, formerly responsible for the Aldi warehouse, was arrested on 30 November 2006 and later admitted forging 11 AADs in relation to consignments by Dr Czech and Liquid Marketing to the Aldi warehouse.

12. HMRC formed the view that none of the consignments reached its destination. HMRC assessed Dr Czech, Liquid Marketing and five subcontractors, Connie and four of the owner-drivers, for duty on the consignments with which they were concerned under regulation 7(2) of the DSMEG Regs as having caused the occurrence of the excise duty points. As stated above, SDM was assessed under regulation 7(1) of the DSMEG Regs on the basis that it was strictly liable for the duty as guarantor. The original FTT records in [8] of the FTT decision that there was no allegation in HMRC's statement of case or skeleton argument that SDM caused any irregularity.

13. The original FTT concluded that, on the balance of probabilities, all the movements arrived at their destinations except for one movement, Movement 65, intended for Germany. The original FTT therefore allowed the appeal in relation to all the movements except that one.

The UT decision

14. HMRC put forward four grounds of appeal to the UT. The UT rejected all but one.

15. The ground on which the UT found in favour of HMRC was described in the UT decision as Ground 3. As described by the UT at [47], this ground was that the original FTT had not been entitled, on the evidence, to find that all the loads, save for Movement 65 consigned for Germany, had been delivered to their intended destinations. This therefore was a challenge to the conclusion of the original FTT on the basis that it was contradicted by the evidence and was one that no reasonable tribunal properly instructed as to the relevant law could have come to on the evidence (*Edwards v Bairstow* [1956] AC 14 per Lord Radcliffe at p 36).

16. This was, in essence, an attack on the original FTT's acceptance of the evidence of the drivers, Mr Waters, Mr Blunsden, Mr Parnham and Mr Francis, that they made the deliveries to Aldi. But to understand the significance of that evidence I need to refer back to the FTT decision for the discussion of what the original FTT described, at [471] and [475], as competing scenarios, based on the respective submissions of the parties.

17. The "competing scenarios" were, first, what the original FTT described as HMRC's scenario, that the goods never reached Aldi, which involved active participation by the drivers wherever the diversions occurred and knowledge by the ringmasters of the diversion as to the individual movements of the drivers, and secondly, the scenario put forward by Mr Barlow on behalf of SDM, that the drivers were not involved and that the diversions or irregularities took place after arrival at

Aldi. This was the way in which the original FTT described the position, but as the UT noted, at [38], this was no more than a way of addressing the question whether SDM's proposition (that the goods were taken to Aldi) was more likely than not – the “not” being what was described as HMRC's scenario.

5 18. As the UT, at [39], found it was right to do, the original FTT, at [442],
considered the logical consequences of the diversions taking place before the goods
reached Aldi. It found that in those circumstances the drivers would have to have
been involved. The ringmasters could only involve the drivers if they knew who the
driver would be for each of the particular movements. On the evidence there
10 appeared to be no way in which the ringmasters could have known the identity of the
drivers of each movement if the goods were never delivered at Aldi, and no
explanation had been proffered by HMRC.

19. However, as the original FTT identified, at [445] and [446], there were on the
other hand substantial difficulties with SDM's scenario that the drivers were not
15 involved in the irregularities and did deliver the goods to Aldi. For that to have been
the case, the original FTT observed, there would need to have been at least one (and
probably more than one) dishonest employee at Aldi. The insiders could not have
known when the goods would arrive. The insiders would have needed to ensure that
the AADs and CMRs were not processed by anyone not involved in the conspiracy
20 and that the consignments were not entered into Aldi's stock records.

20. It was thus in the context of the two alternative scenarios, each of which
presented substantial difficulties, that the original FTT turned to consider the evidence
of the drivers. It set the scene for its consideration of that evidence in the following
way (at [449]):

25 “It is clear that there was an overall conspiracy in relation to the
Belgian consignments on either scenario, although different persons
were no doubt involved at different times. Logically if we are satisfied
that any one of the drivers did deliver the goods at Aldi, that would
show that there were one or more dishonest insiders at Aldi and this
30 would be relevant to all the Belgian movements. Equally if we
conclude that any one driver was involved in the conspiracy and did
not deliver to Aldi, that would show that somehow the ringmasters
were able to discover in advance who that driver was and presumably
who the other drivers were.”

35 21. At [475], the original FTT pointed out that, faced with the difficulty of the two
competing scenarios, the burden of proof which rested on SDM was important. It
concluded that, on the basis of the evidence of the relevant drivers, it was satisfied
that on the balance of probabilities they had made the relevant deliveries to Aldi,
saying “their evidence tips the balance in respect of those deliveries”.

40 22. The original FTT's reasoning in this respect was found by the UT, at [52], to be
important. It demonstrated the significance of the drivers' evidence, as it showed that
it was only on the basis of that evidence that the original FTT had been able to make
its findings regarding the Aldi deliveries. As a consequence, the UT reasoned that if

the original FTT's acceptance of the drivers' evidence had been unreasonable, then its conclusion at [475] could not stand.

23. At [54] the UT expressed its view that the original FTT's acceptance of the drivers' evidence could be unreasonable either on a narrower ground that there were one or more material facts which were so inconsistent with the evidence as to make a conclusion that a material part of it was truly impossible, or on the broader ground that the sheer weight of concerns with the drivers' evidence made it impossible to believe it (or to accept the balancing exercise the original FTT had conducted).

24. In the event, the UT rejected the broader ground. It focused on the narrower ground, for which HMRC relied on evidence in relation to the timing of the journeys as showing, according to the submissions made on their behalf by Ms Simor, that some of the journeys which the drivers claimed to have made were impossible within the time taken according to other evidence. The UT found that the resolution of the issue of these "impossible" journeys had been critical to the original FTT's conclusion. As the UT said at [63]:

"If evidence established that it was impossible for a driver to make a particular journey which the driver testified he had made then it would be impossible to accept that driver's evidence in relation to that journey. Further, the existence of evidence that showed that a particular journey was impossible would call into question the truthfulness of that driver's evidence in relation to other journeys. If one driver's evidence could be shown to be unreliable then that would also cast doubt on the evidence of the other drivers that they had made similar journeys."

25. The UT criticised the way in which the original FTT had dealt with HMRC's submissions in respect of the "impossible" journeys at [467] where the original FTT had said:

"Miss Simor contended that many movements were impossible within the timescales indicated by the documents. We heard evidence from the drivers that they variously timed their arrivals on the continent for the early part of the day when the roads were quiet, chose routes which were known to have few traffic police and did not strictly observe legal speed limitations. Under these circumstances they were able to cruise at speeds of up to 80mph. The Tribunal analysed the timings of all the movements identified by Ms Simor in the light of the drivers' evidence, and concluded that only one movement, Movement 29, was impossible ... Overall, we conclude that the journey timings offer no support to Customs' case that the goods could not have reached Aldi."

The UT accepted that what the original FTT was doing in [467] was weighing the competing evidence and deciding which it preferred, and that it had analysed the timings of the allegedly impossible journeys in the light of the evidence of the drivers that they had travelled when the roads were quiet and at speeds above the legal limits and concluded that the claimed journeys were not impossible. But, at [68], the UT found that the original FTT had not explained why it had concluded that the timings of the journeys were possible.

26. The UT elaborated its concerns in the following way (at [70]):

5 “The simple recitation in that paragraph of the factors of traffic density and speed, does not seem to us to explain the significant gap between the minimum time (10½ hours) apparently required to complete the round trip when unloading and loading are taken into consideration and the actual times recorded in relation to some of the movements. Nor is it clear how these factors permitted the conclusion in Mr Wild’s case. The times shown for the return trip from Coquelles to Vaux-sur-Sûre in movements 17, 19, 24, 29 and 37 are all materially less than the 10½ hours apparently required. The FTT does not expressly indicate whether or not it accepted that the drivers were travelling at a time of day when the roads were quiet and were exceeding the speed limits (and there was some apparently contradictory evidence on this score); but even if it was implicitly accepted (without resolution of those conflicts), we cannot understand how the FTT concluded that those journeys could have been made in the times shown for those movements.”

27. The UT postulated, at [72], that either the original FTT’s conclusion could not have been reached on the evidence, or that the original FTT had not adequately explained why it felt able to ignore the disparity between the evidence of how long the round trip would take and the evidence of the actual, much shorter, times taken in at least some of the movements identified by HMRC, or how the original FTT had reconciled any disparity with the drivers’ evidence. The UT then found, at [74], that the error of law by the original FTT was its failure to give reasons for accepting the evidence of the drivers that the journeys in Movements 17, 19, 24, 29 and 37 took place as described in the face of other evidence that, on the original FTT’s own calculation of the time required, showed that the journey times were impossible.

28. The UT concluded that the case should be remitted to the First-tier Tribunal. It described its reasons for not re-making the decision at [77]:

30 “Not having heard the witnesses and consequently being unable to attach relevant weight to material parts of their evidence we are unable on the material before us fairly to reach any conclusion as to whether or not any of the nine allegedly impossible journeys, apart from movement 29, were in fact possible and, if any were impossible, what effect that would have on the evaluation of the evidence in relation to the other journeys: and without being able to address the FTT’s reasoning we cannot fairly conclude whether the FTT’s conclusion was one it could or could not have reached on the evidence. We are thus not equipped to remake the decision.”

40 **The UT’s direction**

29. Had the UT been able to do so, it would have remitted the case to the original FTT panel with a direction to give reasons for its conclusion on the issue of the “impossible journeys” (UT decision, at [78]). It was not able to do so because Judge Wallace had by then retired. The case was therefore remitted to a differently-constituted tribunal, and after a hearing on 11 November 2013 the following

directions were made on 20 November 2013 with respect to the conduct of the remitted appeal:

“...

2. That the case be remitted to the First-tier Tribunal to

5 a. determine whether all or any of the journeys described in the schedule of the ten allegedly impossible journeys produced at the hearing (other than movement 29) could not have taken place as described in the evidence of the drivers as recorded in the [FTT] Decision by reference to the evidence that was before the First-tier
10 Tribunal at the hearing, including the witness statements, oral testimony as set out in the transcript and documents;

b. in determining the issue at (a), the First-tier Tribunal shall have regard to the propositions of law and findings of fact (other than in relation to the allegedly impossible journeys) in the Decision;

15 c. if it is found that all or any of the journeys could not have taken place as described, consider what effect such finding has on the conclusion in the Decision that

i. the goods carried on those journeys were delivered to Aldi in Belgium, and

20 ii. the goods carried on other journeys, not alleged to be impossible, were delivered to Aldi in Belgium;

and take such steps as they consider just to determine the appeal either with or without hearing further evidence; and

25 d. if it is found that all of the journeys could have taken place as described, to determine the appeal on the basis of the other findings contained in the Decision.”

30. Movement 29 is the one which, as I have noted earlier, was the single one of the allegedly impossible journeys that the original FTT had found was impossible (see FTT decision, at [467]). Self-evidently there is no need for me to consider whether
30 that journey could have been made; it has been conclusively determined that it could not.

31. That determination nonetheless remains relevant to consideration of the effect on the conclusion reached in the original FTT’s decision. At [74], the UT referred to the absence of explanation by the original FTT for accepting the evidence of the
35 drivers in relation to a number of allegedly impossible movements, including Movement 29. It was unable to reach a conclusion on the effect of journeys found to be impossible on the evaluation of the evidence generally. That included the effect of the finding in relation to Movement 29, as well as findings in relation to the allegedly impossible journeys that I have been directed to make. It is clear to me, therefore,
40 that I must address the questions posed by Direction 2c in relation to Movement 29 at least, whether alone or with other journeys I have found to have been impossible. Furthermore, if I find that all the journeys (apart from Movement 29) could have taken place, I must still, by virtue of Direction 2d, take into account the fact that Movement 29 has been found to have been impossible.

32. It is also apparent from the UT's direction that, despite the UT describing itself as not being able on the material before it fairly to reach any conclusion as to whether or not any of the allegedly impossible journeys (apart from Movement 29) were in fact possible, the determination of that question by this tribunal is to be by reference only to the evidence that was before the original FTT. It is only when dealing, in accordance with Direction 2c, with the broader effect of journeys found to be impossible that I would have to decide whether further evidence should be heard.

33. Thus it was that this was not a re-hearing in the true sense. I had before me the relevant documentary evidence from the original hearing before the FTT, and a transcript of the hearing. I heard submissions from Mr Barlow and Ms Simor on those materials. But, unlike the original FTT, I did not hear the witnesses. As directed by the UT, I have regard to the findings made by the original FTT, except in relation to the allegedly impossible journeys.

34. In these circumstances it was perhaps inevitable that disputes would arise as to the nature of the submissions made by the parties. This manifested itself most particularly in the submission by Ms Simor that I should refuse to entertain any argument on the part of SDM that the timings on documents produced by SDM as part of the evidence of the drivers were not in fact correct. Ms Simor argued in this respect that no evidence had been adduced to support such a submission, and that no such evidence would be admissible at a second hearing when it could have been provided at the first hearing. For his part, Mr Barlow argued that the relevant documents were produced by SDM to corroborate merely the fact that, as the drivers testified, they were in on the relevant occasions in Belgium, and no reliance had been placed on them by SDM to prove precise timings.

35. As a general matter it is clear that the UT expected, and indeed directed, that this tribunal should re-consider the question of the allegedly impossible journeys by reference only to the evidence that had been before the original FTT. However, it was at the same time envisaged that this tribunal would have a hearing so that the parties could put forward their rival submissions on that issue. The extent to which new evidence might nevertheless be admitted is a matter for this tribunal; I shall in that connection refer to certain evidence concerning the purchase of vignettes at Folkestone, and useful information derived from various searches of Google Maps. But submissions that go to the weight to be attached to particular evidence that was before the original FTT are to be given due regard. It is inevitable, and accordingly must have been envisaged by the UT when it made its directions, that the parties' submissions at this renewed hearing would not follow precisely the lines adopted at the original FTT hearing. I view SDM's submissions concerning the reliability of document timings as falling into that category, and it is on that basis that I do have regard to those submissions.

36. In connection with timings on the face of the documents, there was one issue where I ruled that additional evidence should be obtained. It became evident in the course of submissions that it was unclear whether the time shown on a vignette (a permit for lorry travel on relevant routes in Belgium) purchased at the Eurotunnel terminal at Folkestone, rather than on mainland Europe, was according to Central

European Time (CET) or Central European Summer Time (CEST) as opposed to the relevant UK time. The issue was not resolved during the hearing, as conversations had by each of the parties with different operators had produced conflicting responses. As this appeared to be an important fact (the time difference of one hour could be material in assessing the possible timings of certain journeys), and one that ought to have been capable of being objectively determined by a simple letter to the person responsible for the operation of the relevant machines, I directed that the parties should jointly approach such operator and inform the tribunal of the answer.

37. Remarkably, the result of those enquiries was not to provide a clear answer, but to confirm the confusion. A representative of the Freight Commercial Department of Eurotunnel wrote to HMRC on 14 July 2014 confirming that a vignette purchased at Folkestone would refer to local (that is, UK) time. But, in a letter dated 4 August 2014 from one of its Foreign Exchange Sales Consultants to HMRC, Travelex, who have, I understand, taken over the issue of vignettes from Eurotunnel, say that the machines have always been set up to register the European time of issue. Thus, a vignette purchased at Folkestone would carry the European time and not the UK time.

38. Faced with this conflict of evidence, I must make a finding of fact. I find that the vignettes purchased at Folkestone register the European, and not the UK, time. I make this finding on the basis that all the examples I was given of vignettes purchased at Folkestone had stated timings a matter of an hour and a few minutes after the relevant check-in time. It seems to me unlikely that in every case a driver would have waited at least an hour after check-in before purchasing a vignette, and still less that there would have been no driver who purchased a vignette less than an hour after check-in. These factors point strongly to the conclusion that the hour is a time difference, and that routinely the drivers purchased their vignettes within a few minutes of arriving at Folkestone and their check-in times.

39. This conclusion also accords with the other evidence in relation to Movement 17, which I describe below. If it had been the case that the vignette in relation to that journey had been purchased at 1032h (UK), rather than 1032h (Europe), it would not have been possible for Mr Blunsden to have reached Coquelles before 1232h (Europe), which would be inconsistent not only with Mr Blunsden's own evidence of the time he would have arrived, but also the time at which he purchased fuel at Watou in Belgium (1235h (Europe)).

40. I should also say that, in the event, the issue whether the times on the vignettes purchased at Folkestone were UK or European has turned out not to be material. As I will describe in more detail, five of the movements I am asked to examine involved the purchase of a vignette at Folkestone. In one case, Movement 17, the arrival time at Coquelles (and consequently the correct time on the vignette) is irrelevant, because the relevant timings are ascertained first by reference to the time when fuel was purchased at Watou. In the other four, Movements 22 (on my analysis), 38, 43 and 57, the time of arrival at Coquelles is immaterial, because for the purpose of ascertaining whether the journey was impossible the driver is either assumed to have taken a rest before proceeding further, or to have travelled to Vaux-sur-Sûre overnight. Of the other movements, there was no vignette for Movements 24 and 37,

and Movement 19 had a vignette purchased in euros, and thus accepted as bearing a European time.

41. Before turning to the evidence and submissions on the question of the allegedly impossible journeys, I should note that the UT's direction is expressed in terms of "impossible" journeys, and the determination is whether those journeys "could not have taken place" as described in the drivers' evidence. That does not, in my judgment, impinge on the principle, which the original FTT described at [440] and the UT (at [32]) acknowledged was correct, that the legal burden of proof rests on SDM, in that it is SDM that has to satisfy the tribunal on the balance of probabilities that the irregularities were committed in Belgium, and that the issue is whether the tribunal is satisfied on the balance of probabilities that the goods were delivered to Aldi.

42. On the other hand, the direction to this tribunal to consider whether the journeys could not have taken place (and not whether they did, or did not, take place, or even whether it was more likely than not that they did, or did not, take place) as described reflects the context in which that question is material to the conclusion to be reached on the appeal as a whole. That context includes the acceptance by the original FTT that there were two possible scenarios as have been described above, the one being the antithesis of the other, and its acceptance of the drivers' evidence that the deliveries were made to Aldi as tipping the balance in favour of SDM's case. The question is one of the evidential burden; as the UT put it at [63] (see above), whether the drivers' evidence that a particular journey was made can be accepted depends on whether the evidence establishes that it was impossible for that journey to have been undertaken.

The allegedly impossible journeys

43. There was no direct evidence before the original FTT, or before me, on the question whether the journeys as described by the drivers' evidence were either possible or impossible. None of the drivers accepted that any of the journeys were impossible, and neither party produced witness evidence, such as expert evidence, that directly addressed the question of the possibility or impossibility of the journeys.

44. That is not to say that there was no evidence pertinent to that question. I shall describe in a moment the witness evidence that included estimates of the time it would typically take for a journey, or an element of a journey, and evidence of the significance of dates and times that could be ascertained from contemporary documents. There is also information obtained from web-based sources, such as Google Maps, although there was no evidence as to the reliability of those sources.

45. The weight to be attached to the documentary evidence, and the timings those documents disclosed, was a matter of submission. This arose because, as I described earlier, Mr Barlow argued that certain errors had been found in some of the documents, and that in relation to Movement 29, which the original FTT had found was impossible on the face of the timings shown in the documents, the original FTT had preferred the evidence of the driver, Mr Blunsden, and had accordingly rejected those timings. He invited me likewise not to take documents at face value in any case

where, on the basis of those documents, I would otherwise find that a journey was impossible.

46. In this regard Ms Simor referred me to *Grace Shipping and others v C F Sharp & Co (Malaya) Pte Ltd* [1987] 1 Lloyd's Rep 207 in the Privy Council where, giving
5 the judgment of the committee, Lord Goff had emphasised the important place which documentary evidence has where, for any reason, including the passage of time, the evidence of witnesses is likely to be unreliable, and where in commercial cases there was usually to be found a substantial body of contemporary documentary evidence.

47. It is clear that, as Lord Goff said, when faced with the task of assessing witness
10 evidence which might be unreliable, it is crucially important for the tribunal to have regard to the contemporary documents and to the overall probabilities. But that of course does not mean that there must be slavish acceptance of the accuracy of those contemporary documents. The evidence must still be weighed with all the other evidence, including the evidence of the witnesses. There is no question of new
15 evidence as to the timings displayed on the face of the documents having been adduced in the present proceedings. But, as I have described earlier, there can be no bar on a submission on behalf of SDM that, if the timings show a journey to have been impossible, the conflict between that and the evidence of the drivers might be resolved by preferring the evidence of the drivers to the stated timings.

48. On the question of timings generally, I should at this stage address a submission
20 made by Ms Simor that the UT had, at [58], found that the minimum time for a round trip from the Eurotunnel terminal at Coquelles, France, to the Aldi depot at Vaux-sur-Sûre and back to Coquelles, including the picking up of a return load on the way back to Coquelles, was 10½ hours, and that I must proceed on that basis, as it was binding
25 on this tribunal.

49. I do not accept that submission. The starting point for the figure of 10½ hours
was the original FTT's own finding, at [453], that a round trip, including only unloading at Vaux-sur-Sûre, and without a break during the trip, could legally be
30 achieved in 9 hours 45 minutes. The decision of the original FTT has been set aside, and accordingly there is no appropriate starting point for the UT's own calculation. In any event, it is perfectly clear from the directions made by the UT on its referral back that the issue of the impossible journeys is to be considered by me only by reference to the evidence that was before the FTT, and the findings of the FTT (and not any of the UT) on matters other than the impossible journeys. I do not therefore consider
35 that my task is constrained as submitted by Ms Simor.

50. As I have described, the question before me is not one of likelihood or of
probability. It is whether the journeys described by the drivers could have been made. If such journeys were indeed possible (or, to put it another way, not impossible), then, however unlikely it might be that the journey took place as so described, the finding
40 would be that the journey could have been made. Thus, to the extent that it was possible that drivers would not comply with the law, by driving faster than the relevant speed limit, or by failing to take the necessary breaks, those factors should not inhibit a finding that a journey could have been made. Issues of compliance with

the law are nonetheless relevant to the cases of individual drivers where those drivers gave evidence as to their own behaviour.

51. The test of possibility must be considered by first establishing a benchmark time for the journey and comparing that with the evidence of the actual timings. In the absence of any evidence directly addressing the issue of impossibility of particular journeys, that benchmark time falls to be ascertained from a consideration of all the relevant evidence. Having then applied the benchmark to the particular journey, if it is found that the journey could not have been completed by the time of check-in at Coquelles, a judgment has to be made as to whether that time could possibly have been made up, or whether there could be some other explanation for the apparent impossibility.

The evidence

52. All the relevant timings start with the check-in time at the Folkestone terminal, the evidence for which was provided by reference to the entry in relation to the relevant shuttle number for the journey and the invoice sent by Eurotunnel to SDM. Timings for the return shuttle were likewise evidenced by such invoices. The possibility of the UK leg of a particular journey was not itself in dispute, but was in some cases relied upon by Ms Simor in relation to particular journeys where legal breaks may have been required, and which it was argued could have affected the possible journey timings after check-in at Folkestone.

53. Other relevant evidence of times was provided, first, by the times shown on vignettes which, as I mentioned earlier, could be purchased both at Folkestone and on the continent. Vignettes purchased at Folkestone could be identified, as the amount paid was a sterling amount, whereas those purchased on the continent were in euros. In all cases, as I have found, the time stated on a vignette, whether purchased at Folkestone or on the European mainland, was the European, and not the UK, time.

54. Secondly, there was in some cases evidence of the times at which fuel was purchased. These times were ascertained from invoices sent to the relevant account holder, which detailed the date and time of the transaction and the place at which the fuel had been purchased.

55. Given a starting point of the check-in time at Folkestone, with or without a timing on a UK purchase of a vignette, it is necessary, in some cases, to establish a benchmark, or base, time between arrival at Folkestone and arrival at Coquelles. Relevant evidence in this respect was given by Mr Cranny, a director of SDM, and by two drivers, Mr Blunsden and Mr Parnham, each of whom had driven on one or more of the alleged impossible journeys. Mr Cranny's evidence was that the shuttle probably ran every 30 to 40 minutes. The actual journey time on the shuttle was between 25 and 30 minutes. If the shuttle was running correctly, Mr Cranny said, "you can be motorway to motorway within an hour"; this I take to be a reference essentially to arriving at the Folkestone terminal and exiting the terminal at Coquelles.

56. Mr Blunsden's evidence was to the effect that, although on a bad day the journey time from check-in at Folkestone to arrival at Coquelles could take 20 hours, if everything went absolutely perfectly, it could probably be done within an hour or an hour and a half. Later in his evidence he reiterated the one hour as representing the time if things were "running efficiently well". Mr Parnham, whilst also acknowledging that things could go wrong, saying that the longest time he had taken had been 10 hours, which was unusual, gave evidence that the usual time for an evening crossing on a Thursday with a 9.30 pm check-in time was between two and three hours. But he said that, if everything was going to plan, the quickest such a journey from Folkestone to Coquelles could have been done was one hour.

57. From this I conclude that the benchmark, or base, time that it would take from check-in time at Folkestone to arrival at Coquelles is one hour. Whilst it is the case that it is likely that some or all of the journeys would have taken longer, the question is one of possibility, and not probability or likelihood. I have for this purpose inferred, as I consider must be the case, that the references by the witnesses to the one-hour period included the time it would have taken to purchase a vignette at Folkestone in those cases where that was done. As I described earlier, I observe that in all such cases the vignette was purchased a matter of a few minutes after a driver's check-in.

58. A crucial question is the time that I should adopt as the benchmark time for a journey by a driver between Coquelles and the Aldi depot at Vaux-sur-Sûre. Evidence in this respect was given by Mr Cranny, Mr Blunsden and Mr Parnham, and also by Mr Waters who was a self-employed owner-driver who had driven in respect of a number of consignments relevant to the appeal as a whole, but on none of the alleged impossible journeys.

59. Mr Cranny's evidence was that the journey would possibly take about four or four and a half hours. Mr Waters said that, depending on the traffic, it would normally take about four and a half hours from Calais (Coquelles) to Vaux-sur-Sûre. Mr Blunsden's evidence for the same journey was that it would take between four hours and four and a quarter hours, although he also told the original FTT that it could probably be done in three and a half hours. Modern vehicles could cruise comfortably at 70 to 80 mph, and speed limiters on the vehicles could be turned off. Mr Parnham's evidence was equivocal; his starting point, when it was suggested by Ms Simor in cross-examination that other evidence had suggested a journey time of four and a half hours, was that the journey times would vary, but that it could take "four, four and a half hours, maybe five. Maybe three and a half." Challenged whether a journey time of three and a half hours would have been possible, and that such a journey would certainly be over the speed limit (90 kilometres per hour, or about 56 mph), Mr Parnham agreed that four and a half hours sounded reasonable, but said "don't hold me to it". All this evidence was on the basis of what might be described as a typical such journey; none of it related to any of the actual journeys under consideration, nor did any of it specifically describe the shortest possible time.

60. Information as to journey lengths and prospective timings is readily obtainable from a number of independent sources. Amongst those is Google Maps. Ms Simor

produced various pieces of information derived from searches of Google Maps, including information as to the length and duration of a journey between Coquelles and Vaux-sur-Sûre, and back again (so a round trip), taking a number of possible routes. The results were almost identical for each route.

- 5 61. The following table summarises the results of applying Google Maps searches to various routes put forward by Ms Simor:

Route	Mileage	Time of travel	Average speed (kph/mph)
<p><u>Route A</u></p> <p><u>Outward journey</u></p> <p>The outward journey on this route proceeded first through France, via Lille and crossing the Franco-Belgian border close to Tournai. It then travelled via Charleroi and Namur to Vaux-sur-Sûre.</p> <p><u>Return journey</u></p> <p>The return journey was via Liege, Brussels and Ghent to Coquelles.</p>	<p>360 km</p> <p>397 km</p>	<p>3h 33 min</p> <p>3h 42 min</p>	<p>101.4 kph (63 mph)</p> <p>107.3 kph (66.7 mph)</p>
<p><u>Route B</u></p> <p><u>Outward journey</u></p> <p>The outward journey on this route was via Watou in Belgium, Ghent, Brussels and Namur to Vaux-sur-Sûre.</p> <p><u>Return journey</u></p> <p>The return journey was via Namur, Tournai and Lille to Coquelles.</p>	<p>365 km</p> <p>360 km</p>	<p>3h 26 min</p> <p>3h 33 min</p>	<p>106.3 kph (66 mph)</p> <p>101.4 kph (63 mph)</p>
<p><u>Route C</u></p> <p><u>Outward journey</u></p>			

The outward journey on this route was the same as Route A.	360km	3h 33 min	101.4 kph (63 mph)
<u>Return journey</u> The return journey was via Namur, Brussels and Ghent to Coquelles.	365 km	3h 26 min	106.3 kph (66 mph)
<u>Route D</u> <u>Single route only</u> Vaux-sur-Sûre to Coquelles via Namur and Brussels, with a detour from the E40 at Ghent to Ooigem, returning to the E40 south of Bruges.			
Vaux-sur-Sûre to Ooigem	250 km	2h 18 min	108.7 kph (67.5 mph)
Ooigem to Veurne	89 km	59 min	90.5 kph (56.2 mph)
Veurne to Coquelles	70.3 km	44 min	95.8 kph (49.5 mph)

62. In seeking to ascertain a benchmark journey time for this purpose, it would be wrong in my view to place determinative weight on evidence of drivers who were answering a question as to typical journey times. They were not asked, and their answers did not address, the real question of the quickest time at which the journey could be undertaken. Nor, when the question is one of possibility, and not probability or likelihood, would it be right to make any assumption that the journeys would be undertaken without any transgression of the law, such as the speed limit. It must be remembered that the reason the question of the impossible journeys was referred back to this tribunal is that it is only if a journey is impossible that it can cast doubt on the acceptance by the original FTT of the reliability of the drivers' evidence that the various loads had in fact been delivered to Aldi.

63. I accept that certain drivers gave evidence that they did not exceed the speed limits. Of these, only Mr Parnham was a driver of one of the allegedly impossible journeys (Movement 37). Mr Parnham's answer was in connection with questions in cross-examination about the destruction of his tachographs. It was put to him that they were destroyed to prevent detection of "these diversions". This was denied by

Mr Parnham; he explained that the reason was because he had insufficient insurance cover to transport beverages and wished therefore to reach his destination as quickly as possible to avoid risk of theft. When asked to confirm that he destroyed the tachographs to hide the evidence of speeding, Mr Parnham said that it was possible to shorten breaks rather than drive fast.

64. Even though, when put to him that he would get to his destination as quickly as possible within the speed limit he responded “More like it, yes”, I do not conclude from this that Mr Parnham must be taken, for this purpose, to have kept within the speed limit of 90 kph in relation to Movement 37. It seems to me that his evidence cannot be taken as removing the possibility that he would, on occasion, have exceeded the speed limit. Nor is the evidence of another driver, Mr Francis, unconnected to the allegedly impossible journeys, sufficient to rule out the possibility of speed limits being exceeded. When asked, in relation to a particular journey, if he would have needed to speed, Mr Francis said no more than “I wouldn’t have thought so, no”. On the other hand, when the question of speeding was put to Mr Blunsden in re-examination, he candidly admitted that he did not always observe speed limits; his evidence suggested that he accepted the “on the spot” fines he would receive as an occupational hazard.

65. As regards the need for drivers to take breaks required by law, both Mr Cranny and Mr Waters confirmed the legal requirement for minimum breaks. So too did Mr Blunsden. Mr Blunsden’s evidence was that if he had driven a full nine hours to his destination he would be required to take a break there of nine or eleven hours. He would never not bother to take this break and simply head straight back to Coquelles; he would park his vehicle and go to sleep. Although from this evidence I can conclude that Mr Blunsden would generally take a break when he reached his destination, it does not persuade me that I should factor provision for breaks into the base time for journeys generally. It seems to me perfectly possible in practice that a driver could drive for a full nine hours without a break, and possibly longer having regard to the evidence of Mr Parnham. Even Mr Blunsden, in re-examination, admitted that he would not always observe break times.

66. In those circumstances, although I accept that the timings ascertained via Google Maps are directed at car journeys and not those by HGV vehicles, there was no evidence that would lead me to conclude that the average speeds revealed by the Google Maps information could not be achieved by the drivers on the journeys at issue in this case. I note that Mr Blunsden at one point in his evidence said that drivers were “not always as slow as [these] Google maps make out”, but that was in the context of seeking to show that Movement 29, which was clearly an impossible journey, had taken place. On that basis, there is nothing to persuade me that the base time I should apply for this purpose is in principle materially less than that provided by Google Maps. Furthermore I reach my conclusion notwithstanding that there was evidence that the vehicles would carry over 40 tonnes when loaded; there was no evidence what effect that might have, apart from the fact that such a load would make the vehicle more stable in a cross-wind. To conclude that benchmark times different from those identified by Google Maps should be applied would, it seems to me, require reliance on my own inexperienced impression of the speeds at which HGVs, as

opposed to cars, could travel on the roads in France and Belgium, which would be inappropriate.

5 67. Having regard therefore to all the relevant evidence in this connection, I conclude that it is reasonable, as a starting point, to apply as the base times for the journeys set out in the table the shortest of those which are described in the table. Accordingly, I do not accept that the possibility of the relevant journeys must be assessed, as HMRC have done, by reference to a journey time between Coquelles and Vaux-sur-Sûre of four and a half hours. The timing that I have concluded should be applied in that respect is 3 hrs 26 mins. I accept that, if the matter was being considered on the balance of probability, it is unlikely that it would be concluded that all the allegedly impossible journeys would have been achieved on that basis, but that is not the test I have been directed to apply.

15 68. In the case of each of the movements it is necessary to consider the possible journey times between a number of locations. Apart from Folkestone, Coquelles and Vaux-sur-Sûre, the journeys described in the evidence include stops for fuel and to pick up loads on the return journey. It is necessary to ascertain base times for each of those stages in the journeys. I was provided with evidence obtained from online searches with Google Maps; where I did not find that I had sufficient such information I have made my own searches of that site.

20 69. I have then sought to apply those base timings to the journeys as described in the evidence before the original FTT. The aim has been to ascertain whether, using those base timings, the journey as described could have been undertaken and the driver could have returned to Coquelles by the time of his recorded check-in at the Eurotunnel check-in there. Where the application of the base timings has the result that the driver could have arrived at Coquelles before the relevant time, I have concluded that such a journey was not impossible.

30 70. In those cases where the base timings lead to the result that the arrival at Coquelles on the return journey would, on that basis, have been after the check-in time, I have reviewed the case to check whether that leads to a conclusion that the journey must be regarded as impossible. I set out the methodology I have adopted in that respect later when considering such journeys.

35 71. With that approach in mind, I now turn to consider the alleged impossible journeys. These were identified by movement number to correspond with a more comprehensive list that was before the original FTT. Although 10 such movements were identified as allegedly impossible, one (Movement 44) had been wrongly identified as such, and does not therefore require to be considered by me. Another of the 10 is Movement 29, which was found by both the original FTT and the UT to have been impossible, and which is excluded by para 2a of the UT's directions from further review by me in that respect. Accordingly, I now consider the remaining eight in numerical order.

Movement 17

72. Movement 17 was a journey by Mr Blunsden in vehicle registration number GN06HCK.

5 73. According to the relevant documentation, on the afternoon of 28 September 2006, Mr Blunsden picked up from Edwards Beers & Wines at Leighton Buzzard a load of vodka, sold by Dr Czech to Cyber Comp, with Aldi as the destination. Mr Blunsden checked in to the Eurotunnel at Folkestone on 29 September at 0924h (UK). He purchased a vignette at Folkestone at 1032h (Europe); in other words a few minutes after check-in.

10 74. According to my analysis of the shortest possible journey time from check-in at Folkestone to arrival at Coquelles, Mr Blunsden could have arrived at Coquelles at 1124h (Europe). This is calculated by taking one hour as the base journey time and adding one hour's time difference between UK and European time. The resultant time of arrival does not quite accord with the evidence of Mr Blunsden, who accepted
15 in cross-examination that he would probably have arrived at Coquelles between 1130h and 1200h (Europe), but as I have explained there is a difference in approach between ascertaining probability and determining possibility. It is not inconsistent with the purchase of fuel for the vehicle at Watou in Belgium at 1235h (Europe); the base time for the journey from Coquelles to Watou is 49 minutes.

20 75. I did not have information from Google Maps as to the length and duration of a journey from Watou to Vaux-sur-Sûre. My own search of the Google Maps site revealed that the shortest journey time was achieved by essentially following Route A. From Watou to Vaux-sur-Sûre is a journey of 294 km, with a journey time of 2h
25 46 min (that is, an average speed of 106.2 kph (66 mph)). This would give an arrival time at Aldi of 1521h (Europe).

76. I allow 25 minutes for unloading at Aldi. Mr Blunsden's evidence was that, if everything "really went well" the tipping process, which the drivers could operate themselves, could be done in less than 20 minutes. But some additional time has to be added for the stamping at the office of the relevant paperwork and receipt of the
30 CMR. Mr Blunsden also said that the unloading at Aldi could take between 25 minutes and one hour. It seems to me reasonable for this purpose to take 25 minutes as the possible unloading time. Mr Blunsden could therefore have left Aldi at around 1545h (Europe).

77. Although there was some dispute as to the return load picked up by Mr
35 Blunsden, his evidence was that, although the documentation (the CMR) indicated the pick up of a return load from Illkirch in France, that load had been picked up by him from a cold store in either Bruges or Gullegem. In the case of Bruges, that would suggest (from Google Maps) a journey time from Vaux-sur-Sûre to Bruges of 2 hrs 31 mins, 25 minutes loading time, and a journey from Bruges to Coquelles of 1h 14
40 mins. The return journey in that case would take 4hrs 10 mins. In the case of Gullegem, the timings are: Vaux-sur-Sûre to Gullegem, 2hrs 22 mins, and Gullegem to Coquelles, 1hr 26 mins. Allowing for pick up at Gullegem, the total return journey would be 4 hrs 13 mins.

78. On that basis, the time of arrival at Coquelles would have been around 1955h (Europe). A journey with those timings would not therefore have enabled Mr Blunsden to have arrived at the departure terminal in time for the check-in at 1846h (Europe).

5 **Movement 19**

79. Movement 19 was a journey by Mr Blunsden in vehicle registration number S20FH.

80. In this case, Mr Blunsden checked in at the Eurotunnel terminal at Folkestone at 2020h (UK) on 3 October 2006, having picked up his load of Glens vodka from
10 Leighton Buzzard. As with Movement 17, the seller was Dr Czech and the purchaser Cyber Comp, and the destination was Aldi.

81. No vignette was purchased at Folkestone. The vignette produced in evidence was denominated in euros, and so was purchased after Mr Blunsden had arrived at Coquelles. It is timed at 0824h (Europe) on 4 October 2006. Ms Simor proposed,
15 generously as she put it, to assume that the vignette had been purchased on the Franco-Belgian border, that is on the E42 between Lille in France and Tournai in Belgium. This, estimated Ms Simor, would mean that Mr Blunsden could not have reached Vaux-sur-Sûre before 1124h (Europe). However, taking the base timing from Google Maps, the journey from Lille to Vaux-sur-Sûre is 248 km, and the estimated
20 journey time is 2 hrs 18 mins, at a speed of 107.8 kph (67 mph). On that basis, Mr Blunsden could have arrived at Vaux-sur-Sûre by 1042h (Europe).

82. Allowing 25 minutes for unloading at Aldi, Mr Blunsden's return journey could have begun at 1107h (Europe). According to Mr Blunsden, his return load was picked up at Ooigem. The Google Maps timing of a journey between Vaux-sur-Sûre and
25 Ooigem is 2 hrs 18 mins, giving an arrival time at Ooigem of 1300h (Europe). Allowing 25 minutes loading time, the journey from Ooigem to Coquelles would have started at 1325h (Europe). With a journey time (from Google Maps) of 1 hr 34 mins (155 km; 98.9 kph; 61.5 mph), Mr Blunsden could have arrived at Coquelles by 1500h (Europe), in time therefore for his return check-in time of 1537h (Europe).

83. I note that the argument of HMRC, which was put to Mr Blunsden in cross-examination, was that he did not do this journey at all, but that instead he went directly to Ooigem from Coquelles. Part of the basis for that argument was that the mobile telephone records of Mr Blunsden's calls the calls as having been entirely in Belgium between 09.38 hrs (Europe) and 1408 hrs (Europe). However, the original
35 FTT accepted the evidence of Mr Blunsden in this respect.

84. Although Mr Barlow argued that it was equally possible that Mr Blunsden had driven straight to Vaux-sur-Sûre from Coquelles on the night of 3 October 2006, that was not a journey described by Mr Blunsden in evidence, and he was not invited to consider it. It would accordingly be wrong for me to examine it in this context.

Movement 22

85. Mr Blunsden, using vehicle registration number S20FH, picked up a consignment of whisky from Checkprice (UK) Ltd in Norwich on 5 October 2006. This was a consignment sold by Dr Czech to Cyber Comp.

5 86. His check-in time at the Eurotunnel terminal at Folkestone was 2202h (UK). At 2307 hrs (Europe) he bought a vignette at Folkestone with a duration from 6 October 2006 to 12 October 2006. Thus, he could have arrived at Coquelles at 0002h (Europe).

10 87. Mr Blunsden purchased diesel fuel at Watou at 1038h (Europe) on 6 October 2006. Ms Simor's argument proceeded on the assumption that this fuel purchase was made on the outward journey. She based this on the fact that Mr Blunsden had been making calls apparently from France at 1004h (Europe) and the further assumption that he must have taken some time for sleep on arrival at Coquelles. Mr Blunsden's evidence in that respect was that he would probably have driven directly to Aldi, 15 although he could not recall the precise journey. He did not think he would have taken a nine hour break, and regarded 15 hours as plenty of time in which to do a round trip to Vaux-sur-Sûre and back to Coquelles via picking up another load at Cuincy in France, near Douai.

20 88. Mr Simor's hypothesis is that from Watou Mr Blunsden went to Vaux-sur-Sûre. Adopting my timings (which are of course different from those used by Ms Simor) the journey from Watou to Vaux-sur-Sûre could take 2h 46 mins. This would give an arrival time at Aldi of 1224h (Europe). Adding 25 minutes for unloading at Aldi, Mr Blunsden could, on this analysis, have departed 1249h (Europe). It is evident, without making any estimates of the time to travel back to Coquelles via Cuincy, that he 25 would not have been able to have reached the terminal at Coquelles by the check-in time of 1559h (Europe).

30 89. But I do not consider that Ms Simor's hypothesis is the only possible one. In the case of Movement 22 it is entirely possible that, as he himself said, Mr Blunsden drove directly to Vaux-sur-Sûre on his arrival at Coquelles, and both picked up the new load from Cuincy and filled up with diesel at Watou on his return trip to Coquelles. According to the timings I have adopted, Mr Blunsden could have arrived at Vaux-sur-Sûre from Coquelles at 0328h (Europe). That would have given him an opportunity to have a break, albeit one of only three hours or so, after arriving at Vaux-sur-Sûre during the night, enabling him to deliver at the Aldi depot when that 35 depot opened at around 0700h (Europe).

40 90. Leaving Vaux-sur-Sûre at around 0725h (Europe), he would have had plenty of time to drive to Watou (estimate 2h 46 mins) to buy fuel, and then go to Cuincy from there (a journey of 83.5 km; 57 mins), before returning to the terminal at Coquelles (journey 126 kms; 1 hr 14 mins) for a check-in time of 1559h (Europe). This is unaffected by the evidence of the calls in France; Watou is very close to the Franco-Belgian border. It is also possible, since the total time for the return journey, including the 25 minute pick-up at Cuincy and an estimated 15 minutes for fuelling is less than six hours, that Mr Blunsden could have slept for longer at Vaux-sur-Sûre,

delivered at Aldi a little later than 0700h (Europe) and still had plenty of time to complete the return journey.

Movement 24

5 91. This movement was a journey alleged by HMRC to have been carried out by Mr Wild, who did not appear to give evidence, in vehicle registration number X573BUX.

92. The load of Smirnoff vodka was picked up, allegedly by Mr Wild, from Edwards Beers Ltd at Leighton Buzzard on 8 October 2006. It was again a consignment from Dr Czech to Cyber Comp to be delivered at Aldi at Vaux-sur-Sûre.

10 93. The check-in time for the vehicle at Folkestone was 0715h (UK). On the basis of the journey times I have adopted, Mr Wild could have arrived at Coquelles at 0915h (Europe). With a journey time to Vaux-sur-Sûre of 3 hrs 26 mins, he could have arrived at Aldi at 1241h (Europe). Allowing 25 minutes for unloading, he could have left Vaux-sur-Sûre at 1306h (Europe).

15 94. Mr Wild picked up a load at Ooigem. Taking the base time from Vaux-sur-Sûre to Ooigem of 2 hrs 18 mins, he could have arrived at Ooigem at 1524h (Europe). Leaving after loading 25 minutes later, at 1549h (Europe), would have enabled him to make the final part of the journey from Ooigem to Coquelles in the base time of 1 hr 34 mins, arriving in Coquelles at 1723h (Europe), which would have been shortly after the check-in time of 1710h (Europe).

Movement 37

20 95. This movement relates to a journey undertaken by Mr Parnham in vehicle registration number V8AHP.

25 96. Mr Parnham picked up a consignment of vodka from Leighton Buzzard on Friday, 20 October 2006. His evidence was that he then took the vehicle to his home in Leadenham, Lincolnshire, where it was parked in an unoccupied farmyard over the weekend. He accepted that he may have driven down to Folkestone on Sunday night, 22 October 2006.

30 97. The check-in time for the vehicle was on 23 October 2006 at 0725h (UK). Thus, as Mr Parnham accepted in his evidence, he could not have been on the motorway in France until 0925h (Europe).

98. Taking the base time I have determined, this would mean that he could have arrived at Vaux-sur-Sûre 3 hrs 26 mins later at 1251h (Europe). Allowing 25 minutes for unloading, he could have left the Aldi warehouse at 1316h (Europe).

35 99. Mr Parnham is then said to have gone to Geer, Belgium, to pick up a return load. According to Google Maps, Geer is 132 kms from Vaux-sur-Sûre, with a journey time of 1 hr 11 mins. Thus, Mr Parnham could have arrived at Geer at 1427h (Europe). With 25 minutes for loading, he could have departed from there at 1452h

(Europe). The journey from Geer to Coquelles is 272 kms, with a journey time of 2 hrs 28 mins. That would mean that Mr Parnham could have arrived at Coquelles at 1720h (Europe). This would have been in time for his check-in at Coquelles of 1827h (Europe).

5 100. I note Ms Simor's submission that Mr Parnham's own evidence was that it would take three and a half hours from Geer to Coquelles. It is correct that Mr Parnham proffered that time when asked in cross-examination, but at the same time he said "Probably less, actually". He had not, at the time of giving his evidence, undertaken that journey for some four years. In any event, this was not evidence of
10 the actual journey, nor evidence of the shortest possible time such a journey could take. For the reasons I have given in relation to other timings, the issue of possibility (as opposed to probability or likelihood) is better addressed using the base timings I have adopted, rather than the estimated timings given by the drivers in evidence.

15 101. I also take no account, in assessing the possibility of this journey being made, of the sketch plan of the Aldi warehouse which Mr Parnham had prepared, nor of arguments associated with a similar plan drawn by an SDM representative. That evidence does not go to the question whether a particular journey was possible.

Movement 38

20 102. The driver in respect of this movement was Mr Blunsden, in vehicle registration number S20FH.

25 103. The load of High Commissioner whisky, with its destination the Aldi warehouse, was picked up on 23 October 2006 from Leighton Buzzard at around 1300h (UK). Mr Blunsden checked in at Folkestone at 2030h (UK) on that day, and purchased a vignette there at 2136h (Europe). The vignette was valid for travel between 24 October 2006 and 1 November 2006.

104. On the timings I have adopted, he could have arrived at Coquelles at 2230h (Europe).

30 105. The basis of HMRC's case on this movement is that, following his arrival at Coquelles, he took a break at that stage and did not proceed immediately on his journey to Vaux-sur-Sûre. This analysis is based on mobile telephone records produced as an exhibit to Mr Blunsden's witness statement, which show that at 0948h (which I take to be European time) and 0950h (Europe) he made calls from France.

35 106. It is then assumed that he left France at the earliest possible time of 0951h (Europe). The suggested route is through Dunkerque and via Bruges and Brussels to Vaux-sur-Sûre, which on HMRC's timings requires a minimum of four hours to four and a half hours. However, the timing I have adopted for the journey from Coquelles to Vaux-sur-Sûre is 3 hrs 26 mins, so (even taking no deduction from that amount of time to reflect the journey from Coquelles to the Franco-Belgian border) Mr Blunsden could on that basis have arrived at Aldi at 1317h (Europe).

107. Allowing 25 minutes for unloading, Mr Blunsden could have left Vaux-sur-Sûre at 1342h (Europe). He picked up a return load from Geer which, as I have described, has a journey time of 1 hr 11 minutes from Vaux-sur-Sûre. He could, therefore, have arrived there at 1453h (Europe). Allowing 25 minutes for loading, Mr Blunsden could have left Geer at 1518h (Europe).

108. The journey time from Geer to Coquelles is 2hrs 28 mins, which Mr Blunsden could thus have completed by 1746h (Europe), in time for his check-in time at Coquelles of 1834h (Europe).¹

Movement 43

109. Movement 43 is another journey by Mr Blunsden in vehicle S20FH.

110. Although the documents indicate that this load, of Highland Gold Scotch whisky, was arranged to be picked up from Leighton Buzzard on 30 October 2006, it was in fact loaded on 31 October 2006.

111. It was not, however, until the following day, 1 November 2006, that Mr Blunsden travelled to Europe. His check-in time at Folkestone was 1843h (UK), and he purchased a vignette there at 1945h (Europe). The earliest time, therefore, that he could have arrived at Coquelles was 2043h (Europe).

112. Mr Blunsden exhibited with his witness statement a receipt showing that he purchased diesel fuel on 2 November 2006 at Veurne in Belgium (between Ostend and Dunkerque) between 1125h (Europe) and 1131h (Europe). Mr Blunsden's evidence suggested (although this was effectively an assumption on his part) that he would not have purchased fuel on his outward journey to Aldi, but would have done so on the return journey.

113. On that basis, he travelled overnight from Coquelles to Vaux-sur-Sûre, and took a rest break when he arrived there. The Aldi warehouse opened at 0700h (Europe). Allowing 25 minutes for unloading, Mr Blunsden could have left Vaux-sur-Sûre at 0725h (Europe).

114. His pick-up load was at Geer, which is 1h 11 mins from Vaux-sur-Sûre. Arriving there at 0836h (Europe), and allowing 25 minutes for loading, Mr Blunsden could have left Geer at 0901h (Europe).

115. According to Google Maps, the journey from Geer to Veurne (which is en route back to Coquelles) is 206 km with a journey time of 1 hr 52 mins. This therefore accords with the time of the refuelling stop at Veurne. The journey from Veurne to

¹ I should note that, in relation to Movement 38 and also in relation to Movement 43, HMRC's submissions were based on a distance of 326 kms from Geer to Coquelles, which at an estimated speed of 90 kph was said to take 3½ hours. But the distance, according to Google Maps, is 272 kms. Even applying a speed of 90 kph, the journey time would be only just more than 3 hours, which if Mr Blunsden left Geer at 1518h (Europe) would have resulted in him arriving at Coquelles at around 1820h (Europe), also in time for a check-in at 1843h (Europe).

Coquelles takes 44 mins. The total journey time is 2 hrs 36 mins, leaving plenty of time (including the re-fuelling stop) for Mr Blunsden to achieve his check-in time at Coquelles of 1310 hrs.²

Movement 57

5 116. This was another journey by Mr Blunsden in vehicle registration number S20FH, with an initial pick-up on 10 November 2006 (a Friday) from Checkprice (UK) Ltd in Norwich.

117. In this case departure by Eurotunnel did not take place until Sunday, 12 November 2006, with a check-in time of 1940h (UK). The vignette, purchased at
10 Folkestone, was timed at 2043h (Europe). Mr Blunsden could therefore have arrived at Coquelles at 2140h (Europe).

118. Mr Blunsden could have driven overnight to Vaux-sur-Sûre, and rested there. The earliest time he would have been able to deliver at Aldi was 0700h (Europe) on
15 13 November 2006. With 25 minutes allowed for unloading, he could have left Vaux-sur-Sûre at 0725h (Europe).

119. His return load was picked up from Geer, for which the time of travel from Vaux-sur-Sûre is 1hr 11 mins. His possible arrival time at Geer was therefore 0836h (Europe). With loading time of 25 minutes, he could have left Geer at 0901h (Europe). The journey from Geer to Coquelles is estimated at 2hrs 28 mins. Mr
20 Blunsden could, therefore, have arrived at Coquelles at 1129h (Europe), well in time for his check-in time there of 1530h.

120. According to the timings employed in HMRC's case, Mr Blunsden would have arrived back at Coquelles at between 1400h and 1500h (Europe). That would also have been in time for the check-in time. Ms Simor nevertheless argued that Mr
25 Blunsden would have done more than 10 hours of driving of a heavy goods vehicle with no sleep and no rest, which would be contrary to all the rules and highly dangerous. On that basis, it is submitted that this journey, looked at realistically, is impossible.

121. I do not agree. I have already made the point that, in considering possibility, it
30 is necessary to have regard to the possibility that the drivers would not abide by the rules, both as to speed and also as to breaks. But in this case, it is not even necessary to do that. On the base times I have adopted, it is possible that Mr Blunsden could have arrived at Vaux-sur-Sûre shortly after 0100h (Europe). That could have enabled him to rest before Aldi opened at 0700h (Europe). Furthermore, the amount of time

² HMRC's submissions in relation to Movement 43 also included an erroneous distance calculation between Geer and Coquelles (326 kms). On HMRC's submission, Mr Blunsden could have left Geer at 1000h (Europe). Applying HMRC's estimated speed of 90 kph to the true distance between Geer and Coquelles (272 kms) and thus an estimated time of just over 3 hours, it would still have been possible for Mr Blunsden to have arrived at Coquelles in time for the return check-in of 1310h (Europe).

available to him would have enabled him to take another short break during the day, if he had chosen to do so.

Conclusions on the allegedly impossible journeys

5 122. According to my findings, therefore, only two of the journeys that I have been directed by the UT to consider, would not have been achievable on the timings I have employed. The other movements I can definitively conclude were possible, and could have taken place as described in the drivers' evidence. For the two journeys in respect of which that is not the case I now have to consider whether my findings lead to the conclusion that those journeys could not have taken place as so described.

10 *Movement 24*

123. The two journeys in question are Movements 17 and 24. Movement 17 was a journey by Mr Blunsden, and Movement 24 was by Mr Wild. The two journeys that have failed to satisfy the test on the base timings I have used are therefore not by the same driver.

15 124. I take first Movement 24, as this failed the base timings test only marginally. The time difference between what I calculated could have been the time of arrival at Coquelles on the return journey, and the check-in time for that journey, was only 13 minutes. To ascertain whether it would have been possible for that journey to have been undertaken marginally more quickly, I have calculated from the driving
20 distances for that movement and the base timings I employed an average speed for the elements of the journey when the driver would have been on the road. The figures are as follows:

Journey stage	Distance	Base timing
Coquelles - Vaux-sur-Sûre	365 kms	3 hrs 26 mins
Vaux-sur-Sûre - Ooigem	250 kms	2 hrs 18 mins
Ooigem - Coquelles	155 kms	1 hr 34 mins
Totals	770 kms	7 hrs 18 mins

25 125. Employing those figures, the average speed whilst driving is 105.5 kph (65.5 mph).

126. If, instead of assuming a journey time of 7 hrs 18 mins, I take 7 hrs as the journey time – thus enabling the journey to be completed at Coquelles just before, rather than shortly after, check-in time, the average speed would increase to 110 kph (68.4 mph).

127. An increase in average speed to 68.4 mph cannot in my view be regarded as impossible in the context of these journeys. Although it would mean that the speed limit of 90 kph would be breached to a greater extent, I do not consider, for the reasons I have given in relation to speed limits and other legal requirements generally, that this would render such a journey impossible. The speed is well within the cruising capacity of the vehicles in question.

128. Accordingly, I find that Movement 24 was not an impossible journey.

Movement 17

129. That leaves Movement 17. In this case the difference between the estimated arrival time back at Coquelles and the check-in time was more marked, at 1 hr 9 mins. I have tested the possibility that the journey could have been accomplished in a shorter time than that indicated by the base timings in the same way as I did for Movement 24. The calculations are as follows:

Journey stage	Distance	Base timing
Coquelles - Watou	71.4 kms	49 mins
Watou - Vaux-sur-Sûre	294 kms	2 hrs 46 mins
Vaux-sur-Sûre - Bruges	261 kms	2 hrs 31 mins
Bruges - Coquelles	120 kms	1 hr 14 mins
Totals	746.4 kms	7 hrs 20 mins

130. Employing those figures, the average speed whilst driving is 101.72 kph (63.2 mph).

131. To achieve the check-in time at Coquelles, the time taken for the journey would have to be some 1 hr 9 mins shorter. Taking the time at 6 hrs 10 mins would give an average speed of 121 kph (75.18 mph).

132. This requires a finer judgment that was needed for Movement 24. If, without more, I was asked to decide if such a journey was likely, I would conclude that it was not. But in such a case the evidence of the driver could persuade me that the journey was indeed undertaken. However, the question is not one of likelihood, balancing the evidence, but whether a journey is impossible, so that the evidence of the driver in that respect is regarded as unreliable. Were the average speed to have exceeded 80 mph, which was the limit to the comfortable cruising speed referred to in the evidence before the FTT, I would have concluded that the journey was impossible. But where the average speed falls within the 70 – 80 mph range, I cannot conclude that such a journey, although unlikely, is impossible.

133. I therefore find that, although it is a marginal case, Movement 17 was not an impossible journey.

Effect of findings on conclusions of original FTT

5 134. As I described earlier, Direction 2c of the UT's directions requires me to consider the effect of a finding that any journeys could not have taken place on two conclusions of the original FTT. The first is its conclusion that the goods carried on the relevant journeys were delivered to Aldi in Belgium (I interpose to clarify that this must mean delivery to the Aldi warehouse premises, at which they would then have been diverted, and not to Aldi itself). The second is the conclusion that goods carried
10 on other journeys, not alleged to be impossible, were likewise delivered to Aldi.

135. As I explained, my view is that the questions posed by Direction 2c are relevant to Movement 29 irrespective of the fact that I have found that none of the allegedly impossible journeys I was directed to consider was impossible. There remains to be considered the effect of the finding by the original FTT, and accepted by the UT, that
15 Movement 29 could not have taken place. That is also the effect of Direction 2d.

Movement 29

136. The journey related to Movement 29 was undertaken by Mr Blunsden in vehicle registration number S20FH. Having picked up a load at Leighton Buzzard, Mr Blunsden's check-in time at Folkestone was on 14 October 2006 at 0358h (UK).
20 His check-in time on the return journey at Coquelles was on the following day at 1200h (Europe). It was said that the journey included a delivery at Aldi and a pick-up at Herta SA in St Pol sur Tournoise, France. That was not a journey that could have taken place.

137. Although invited to do so, Mr Blunsden offered no explanation for the fact that,
25 as described, the journey related to Movement 29 had been impossible. At first he simply denied that such a journey was physically impossible, a denial that can be seen to be wrong. He then agreed that on the timings put to him, which assumed an arrival at Coquelles at 0630h (Europe) and a journey to Vaux-sur-Sûre of four and a half hours, he could not have arrived back at Coquelles by 1200h (Europe), but asserted
30 that the journey could have been accomplished more quickly. When invited to explain how such a journey could have been achieved, even without the pick-up at Herta, Mr Blunsden gave no explanation, but said only that he had delivered the load to Aldi.

138. The original FTT found, at [463], that it was not surprising that Mr Blunsden
35 could offer no explanation for Movement 29 at such a distance of time from the events in question. The original FTT then, at [467], noted that Movement 29 appeared to have been intended originally as part of a three vehicle delivery that had subsequently been amended to two vehicles, and that it had not been clear therefore which vehicle or vehicles had carried out which part of the journey or journeys. The
40 original FTT had apparently based this observation on an amended fax sheet dated 13 October 2006 from Dr Czech to SDM in which the direction to pick up from Leighton

Buzzard and deliver to Aldi had been amended in manuscript from “3 loads” to “2 loads”.

139. The UT found that this observation by the original FTT did not explain why the impossible journey should be ignored. Having reviewed the evidence, I conclude that there is nothing that enables Movement 29 to be accepted as having resulted in the delivery of goods to Aldi. The evidence of Mr Blunsden in this respect does not do so. Nor does the doubt surrounding which vehicle might have undertaken the journey. The burden of proof in this respect was on SDM. Its case was that Mr Blunsden had undertaken the journey, and Mr Blunsden’s evidence was that he had delivered the goods to Aldi.

140. Mr Barlow argued that accounting documents could be wrong. An assertion that the documents prove that the movement could not have taken place depends, he submitted, on the absolute accuracy of the times stated on the Eurotunnel account. Whilst it may be the case, and I accept, that documents may not be entirely reliable, the difficulty for Mr Barlow, as Ms Simor pointed out, is that the documents he seeks to impugn as unreliable are the very documents put forward in support of the case that Mr Blunsden delivered the goods to Aldi. It would not in my view be right to ignore the content of such documents because of some supposed possibility of inaccuracy, for which no directly applicable evidence was available. The fact that inaccuracies might have been discovered in similar documents from time to time does not lead to the conclusion that the accounts relevant to Movement 29 must have been inaccurate.

141. Mr Barlow submitted that the original FTT had found that either all or none of the deliveries had been made to Aldi. In other words, there was a distinct choice between SDM’s proposition that the diversions had taken place through a conspiracy at Aldi, not involving the drivers, and that of HMRC, where the deliveries were not made to Aldi at all. I do not regard the choice as a binary one, and consequently I do not adopt the same approach as the original FTT. It is in my view quite possible for it to be found, on the evidence, and having regard to the burden of proof, that certain deliveries are proved to have been made to Aldi, and certain have not been proved to have been so made. There is no need to speculate what happened to any deliveries in the latter category. They may or may not have been delivered to Aldi; the point is that, in relation to Movement 29, SDM has failed to show that they were.

142. My conclusion therefore is that SDM has not shown, on the balance of probabilities, that the goods concerned in Movement 29 were delivered to Aldi. I find, therefore, that they were diverted at some unidentifiable place, which means that the excise duty was in that respect due in the UK, and the assessment on SDM must be confirmed to that extent.

143. My conclusion in this respect means that I have not accepted Mr Blunsden’s evidence, which amounted to no more than an assertion, that in respect of Movement 29 he had delivered the goods to Aldi. As the UT observed, at [63], the existence of evidence that showed a particular journey was impossible would call into question the truthfulness of that driver’s (Mr Blunsden’s) evidence in relation to other journeys. The question for me, therefore, is whether the finding that Movement 29, as

described, was impossible means that Mr Blunsden's evidence in respect of all his other journeys must be disbelieved, with the consequence that the "balance" to which the original FTT referred at its [475] would not be tipped in favour of those journeys having resulted in deliveries to Aldi.

5 144. The original FTT had the benefit of seeing the drivers, including Mr Blunsden, give evidence. I have had only the transcripts of the evidence they gave. It is evident from the passage from the transcript of the evidence given by Mr Blunsden that his evidence did not comprise a detailed recollection of the particular journey in question. Of course it is possible that Mr Blunsden recalled the journey perfectly, and was not
10 telling the truth when he asserted that the load had been delivered to Aldi. But that was not the conclusion reached by the original FTT. Having decided themselves that Movement 29 was impossible, the original FTT nevertheless accepted the truth of Mr Blunsden's evidence about all his other journeys (which, in common with my own findings in those respects, they found not to be impossible), concluding, at [463], that
15 Mr Blunsden simply did not recall the journey related to Movement 29.

145. Having considered the transcript of Mr Blunsden's evidence, I find that there is no reason to conclude differently from the original FTT. It is not possible, at this distance from the evidence, to conclude that Mr Blunsden recalled Movement 29, that he knew that the goods had not been delivered to Aldi, and that he deliberately misled
20 the tribunal in that respect. Mr Blunsden did not say that he could not recall the journey, but that was the finding of the original FTT, having heard his evidence. His evidence that he had delivered the load must be regarded as simply an assertion on his part that all the loads carried by him that had been destined for Aldi had arrived there. Although that cannot be accepted in relation to Movement 29 on the evidence in
25 relation to that movement, that does not lead to the conclusion that Mr Blunsden's evidence in relation to the other journeys must be regarded as untrue, or that it must be concluded that SDM have failed to discharge the burden of proving, in relation to those other journeys, that the goods did arrive at Aldi.

146. The original FTT had difficulty weighing the likelihood of the two competing
30 scenarios: on the one hand the conspiracy involving the diversion of goods before they reached Aldi, which required the active participation of the drivers and knowledge by the ringmasters as to the individual movements and the drivers, and on the other the conspiracy at Aldi itself, in which the diversions or irregularities took place after arrival there. The original FTT found, on the basis of the evidence of the
35 drivers, that on the balance of probabilities the goods were delivered to Aldi. The original FTT accordingly accepted that the drivers were not part of any conspiracy involving them all to divert the goods before they reached Aldi. With the exception of Movement 29, having reviewed the witness statements and the transcripts of the evidence, I see no reason to doubt that conclusion in relation to the other movements
40 involving deliveries to Aldi, and it is one that I also reach on the basis of the evidence.

Summary of conclusions

147. I have reached the following conclusions on the issues directed by the UT to be considered:

(1) Direction 2a. I have determined that none of the allegedly impossible journeys (other than Movement 29) could not have taken place as described in the evidence of the drivers as recorded in the original FTT's decision;

5 (2) Direction 2c. I conclude that, in relation to Movement 29, which was an impossible journey, the effect of that finding is that the conclusion in the original FTT's decision that SDM had discharged the burden of proof that Mr Blunsden had delivered that consignment to Aldi cannot be supported.

10 That conclusion does not, on the other hand, have any effect on the conclusions of the original FTT that, in respect of any other journey, the relevant goods were delivered to Aldi, whether those journeys were alleged to be impossible (which I have found could have taken place), or were journeys not alleged to be impossible.

(3) Direction 2d. I determine the appeal by dismissing the appeal in relation to Movements 29 and 65, and otherwise allowing the appeal.

15 **Effect on assessment**

148. My conclusion means that the assessment falls to be adjusted from that determined by the original FTT, to include an assessment to excise duty in respect of Movement 29. The parties are invited to agree the necessary adjustment, but if they are unable to reach agreement in that respect, they have liberty to apply to the tribunal for a determination. Any such application should be in writing, setting out the respective positions of the parties, and be delivered to the tribunal within one month after the date of release of this decision.

Application for permission to appeal

149. 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.

35 **ROGER BERNER**
TRIBUNAL JUDGE

RELEASE DATE: 21 August 2014