TC05783

Appeal number: TC/2016/02733

TYPE OF TAX – Excise duty. E. U. principle and U.K. common law principle of proportionality applies to restoration decisions.
Restoration – a necessary provision for Parliament to render the forfeiture regime A1P1 compliant.
A restoration decision that fails properly to consider proportionality or, having considered it, is disproportionate, is flawed and unreasonable.
***Principles set out in Newbury v Commissioners of Customs & Excise [2003] 1 WLR 2131* applied.**
Principles for drawing inferences of fact.
Procedural fairness.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR MARK BORISOV **Appellant**

U A B GIDONELIJA (a company registered in Lithuania)

- and -

BORDER FORCE **Respondent**

TRIBUNAL: JUDGE GERAINT JONES Q. C.
MR. IAN MENZIES-CONACHER FCA.

Sitting in public at The Royal Courts of Justice, London on 05 April 2017.
Miss Patyna, counsel for the Appellant.
Mr. Rupert Davis, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondent.

DECISION

The Background.

1. The appellant, Mr Borisov is a citizen of Lithuania. In his witness statement he refers to being a Director of U A B Gidonelija, a Lithuanian registered company. This raises the issue of whether the real appellant is Mr. Borisov or the company which, he says, owns the Mercedes Benz 315 sprinter vehicle bearing the Lithuanian registration number HTR 025. We have little doubt that the company is the proper applicant and so the proper appellant.

2. On 15 August 2015 the vehicle referred to in paragraph 1 above was being driven by the appellant's employee, Mr. Vaskys, in circumstances where the vehicle had been hired to the hirer with an accompanying driver. The driver was the appellant's employee; not the employee of the hirer.

3. On 15 August 2015 the vehicle was stopped at Dover and it was found that it was being used to transport beer and cigarettes which were not for the personal use of the people travelling in the vehicle, but were in commercial quantities. Accordingly, the beer, cigarettes and the vehicle were each seized by the respondent under its powers set out in sections 139 and 141 of the Customs and Excise Management Act 1979 ("the 1979 Act"). The respondent was not served with any notice requiring it to commence condemnation proceedings and, accordingly, the items referred to above were deemed forfeit in accordance with paragraph 5 of schedule 3 to the 1979 Act.

4. On 09 September 2015 the appellant's representatives wrote to the respondent requesting restoration of the vehicle. It was contended that the appellant, as hiree of the vehicle, had no knowledge of the improper use to which the vehicle had been put and had done nothing to cause or encourage the vehicle to be used for any illicit purpose.

5. On 08 February 2016 the respondent offered restoration, but conditional upon the appellant paying £9,925 which, said the respondent, represented the then trade value of the vehicle.

6. The appellant was not satisfied with that decision and requested a Statutory Review. The conclusion of that Statutory Review is contained in a letter dated 29 March 2016 where the original decision was upheld.

7. The appellant now contends before this Tribunal that the Review Decision (for that is the material decision upon which we must focus) is not one that could reasonably have been arrived at by the respondent.

8. As we record below we have heard oral evidence, cross examination and submissions from each party. Each party has provided us with a bundle of documents but there is very substantial overlap between the contents of those bundles.

The Relevant Law.

9. By section 16(1) Finance Act 1994 ("FA 1994") an appeal against a review decision may be made to this tribunal. The decision which must attract our attention is that made on review, not the original decision. It follows that it is the reasoning process of the Review Officer, on the basis of the facts taken into account by her, that we must examine before arriving at our conclusion as to

whether this appeal succeeds or fails. The reasoning and/or approach of the officer who took the original decision might be informative in respect of those matters considered by the Reviewing Officer, but has no relevance other than that. Thus the essential evidence concerning the factors taken into account (or not take into account) in arriving at the Review Decision must necessarily come from the Review Officer, Mrs Norfolk. She was called to give evidence. We must focus upon the content of, and the reasoning in, her Review Decision, not the content of the respondent's Statement of Case which has no evidential status, together with Mrs Norfolk's oral evidence.

10. By section 16(9) FA 1994, read with section 16(4), the power of this tribunal on any such appeal is confined to a power, if we are satisfied that the decision could not reasonably have been made, to

    (a) direct that the decision is to cease to have effect;

    (b) require HMRC to conduct a further review in accordance with our directions; and

    (c) where the decision cannot be remedied, give directions to secure that repetition of the unreasonableness does not occur in future.

By the concluding words of section 16(6) the burden of proof in any such appeal is placed upon the appellant.

11. In the Review Letter it was stated that the Reviewing Officer had concluded that the appellant was complicit in the attempt to evade excise duty upon the importation of excisable goods into this country. This raises the subsidiary point as to who bears the burden of proving what is, undoubtedly, an allegation of dishonesty or complicity in fraud on the part of the appellant. On behalf of HMRC it was submitted that by reason of section 16(6) FA1994, the appellant bears the onus of disproving dishonesty or complicity in fraud once that issue has been trailed by HMRC.

12. The rules of pleading, if fraud and or dishonesty are asserted, are beyond doubt. One has only to refer to the well-known passage in the speech of Lord Millett in **Three Rivers [2003] 2 AC 1 :**

Ld. Millett :

The pleadings: demurrer

183 Having read and re-read the pleadings, I remain of opinion that they are demurrable and could be struck out on this ground. The rules which govern both pleading and proving a case of fraud are very strict. In *Jonesco v Beard [1930] AC 298* Lord Buckmaster, with whom the other members of the House concurred, said, at p 300:

"It has long been the settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires" (my emphasis).

184 It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently

particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see Kerr on Fraud and Mistake, 7th ed (1952) , p 644; *Davy v Garrett (1878) 7 Ch D 473* , 489; *Bullivant v Attorney General for Victoria [1901] AC 196* ; *Armitage v Nurse [1998] Ch 241* , 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.

185 It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulently", it may not be enough to say "wilfully" or "recklessly". Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort.

186 The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.

187 In Davy v Garrett 7 Ch D 473, 489 Thesiger LJ in a well-known and frequently cited passage stated: "In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intent." This is a clear statement of the second of the two principles to which I have referred.

188 In *Armitage v Nurse [1998] Ch 241* the plaintiff needed to prove that trustees had been guilty of fraudulent breach of trust. She pleaded that they had acted "in reckless and wilful breach of trust". This was equivocal. It did not make it clear that what was alleged was a dishonest breach of trust. But this was not fatal. If the particulars had not been consistent with honesty, it would not have mattered. Indeed, leave to amend would almost certainly have been given as a matter of course, for such an amendment would have been a technical one; it would merely have clarified the pleading without allowing new material to be introduced. But the Court of Appeal struck out the allegation because the facts pleaded in support were consistent with honest incompetence: if proved, they would have supported a finding of negligence, even of gross negligence, but not of fraud. Amending the pleadings by substituting an unequivocal allegation of dishonesty without giving further particulars would not have cured the defect. The defendants would still not have known why they were charged with dishonesty rather than with honest incompetence.

13. It is true to say that the legal burden of proof rests upon the appellant throughout. We appreciate the foregoing citation deals primarily with rules relating to pleading and not specifically to where the burden of proof lies. However, it underscores the proposition that if fraud or dishonesty is pleaded and that pleading is a non-essential averment to a cause of action or to the defence to a cause of action, the burden is upon he who so alleges to plead it properly and, we are satisfied, to prove it.

We deal with this issue because it was canvassed during the hearing before us and each party sought to put in supplemental submissions relating thereto; for which we are grateful. It must be remembered that the appellant bears the onus of proving that the decision reached upon Review was unreasonable. If, as a sub-issue, or as one reason for contending that its decision was reasonable, HMRC alleges dishonesty or complicity in fraud was involved on the part of the appellant, there can be no doubt that HMRC bears the burden of proof on that discrete issue.

14. However, we make it plain that our overall decision does not turn upon the niceties of where any burden of proof might lie, as will appear below.

15. We must also, of necessity, keep in mind the principal judicial guidance upon when it will or will not be proper to draw an inference of fact (or make a secondary finding of fact) based upon established primary facts. That is to be found in the judgement of the Court of Appeal (given by Lord Justice Laws) in **Regina v Alan Peter Ronald Hedgcock, David Charles James Dyer, Robert Mayers [2007] EWCA Crim 3486 :**

Laws L. J. :

19. "There has been some little controversy (at least in the written arguments with which we have been supplied) as to the correct approach to be taken by the jury in a criminal case to an invitation by the Crown to draw an inference adverse to a defendant from primary facts. Here the inference would be the actual intention of the appellants to carry out the agreement to rape. Lord Diplock's observations in *Kwan Ping Bong v R [1979] AC 609* , 615G were cited to the judge as follows:

"The requirement of proof beyond all reasonable doubt does not prevent a jury from inferring, from the facts that have been the subject of direct evidence before them, the existence of some further fact, such as the knowledge or intent of the accused, which constitutes an essential element of the offence; but the inference must be compelling — one (and the only one) that no reasonable man could fail to draw from the direct facts proved."

That is the test which the trial judge appeared to apply in ruling that there was a case to answer.

20 Sir Alan Green QC for the Crown draws attention, however, in his skeleton argument to the decision in *R v Jabber [2006] EWCA Crim 2694* in which the court said:

"*20. Read literally, Lord Diplock's dicta might be understood to be saying that an inference was only to be regarded as compelling if all juries, assumed to be composed of those who are reasonable, would be bound to draw such an inference. In short, an inference could only be drawn if no one would dissent from it".*

21. We reject that as an approach to be taken by the judge at the close of the prosecution case, even where the evidence is only circumstantial. The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence."

We do not consider, with great respect, that there was any real distance between the authorities here. Elementarily the jury must apply the criminal stand of proof to the exercise of drawing inferences as to every other facet of the fact-finding process.

22. The question was whether a reasonable jury properly directed, not least as to the standard of proof, could draw the inference proposed and thus (as it was put in Jabber) reject all realistic possibilities consistent with innocence. That approach it seems to us is entirely consistent with Lord Diplock's remarks. If at the close of the Crown's case the trial judge concludes that a reasonable jury could not reject all

realistic explanations that would be consistent with innocence, then it would be his duty to stop the case. What then is the position here?

16. That principle applies equally in the sphere of civil litigation as it applies in criminal litigation, save that there must necessarily be substituted a reference to the civil standard of proof, rather than the criminal standard of proof".

17. The jurisdiction given to this tribunal is of a similar nature to that upon judicial review; but not identical. A decision could not reasonably have been made if relevant facts were ignored, irrelevant factors were taken into account, a material error of law was made or the decision was otherwise such that no reasonable body could have made it. Furthermore, it could not reasonably have been arrived at if one or more of the principles of European or domestic law, applicable to public law decisions, was infringed.

18. If an issue arises as to the facts by reference to which the reasonableness or otherwise of the decision should be judged, there are three possible answers concerning what facts may be taken into account :

    (1) the facts available to the person who made the original decision;

    (2) the facts available to the person who makes the review decision, and

    (3) the facts as found by this tribunal.

19. In **Balbir Singh Gora v HMCR [2003] EWCA Civ 255** the Court of Appeal considered an appeal against a decision not to restore goods seized under the 1979 Act. The provisions of FA 1994 applied to that appeal in the same way as they apply in the circumstances of the current appeal.

20. Two preliminary points were considered by the Court of Appeal. One of these was whether the jurisdiction of the tribunal was sufficient to satisfy the requirements of Article 6 of the European Convention on Human Rights. In the course of argument, it emerged that HMRC took a broader view of the jurisdiction of the tribunal than had originally appeared. HMRC said that, although "strictly speaking" it appeared that section 16 limited the tribunal to considering whether there was sufficient evidence to support the appealed decision; in practice the tribunal could make findings of fact and then in the light of its factual findings decide whether the decision was reasonable. Pill L.J., with whom the other members of the Court agreed, said at [39] that he would accept that view of the jurisdiction of the tribunal subject only to doubting whether the "strictly speaking" limitation was correct, once it had been accepted that the tribunal had a fact finding jurisdiction.

21. In **Charles Miller Ltd v Home Office [2015] UKFTT 556 (TC)** the Tribunal (Judge Jonathan Richards) put the position admirably succinctly at [34] "*In Balbir Singh Gora v C&E [2003] EWCA Civ 525 Pill L. J. accepted that the Tribunal could decide for itself primary facts and then go on to decide whether, in the light*

of its findings of fact, the decision of restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and a decision which, in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal."

We adopt that statement of principle.

22. Thus, in restoration cases, the function of the tribunal is to determine whether, by reference to the facts it finds (rather than the facts before the decision maker) which existed at that time, the decision was unreasonable. The only caveat is that these must be facts in existence at the time when the Review Decision was taken. We must also examine whether the inferences of fact or secondary facts relied upon by the Reviewing Officer could or could not reasonably be arrived at, based upon the established primary facts.

23. There is another applicable issue of law in this case which relates to the requirement of both Community Law and domestic law that public law decisions must be proportionate.

24. We remind ourselves of the following principles. Where the competent authorities of a Member State are acting within the scope of EU law, it is well established that:

    a. The competent authorities of the Member States are required to comply with fundamental rights standards: see *Wachauf*.[1]

    b. These rights include rights guaranteed by the European Convention on Human Rights ("ECHR"). Article 6 of the Treaty on European Union, originally introduced by the Treaty of Maastricht in 1992, makes explicit reference to the ECHR as a source of such rights within the EU.[2]

    c. The protection of fundamental rights arises as a matter of EU law independently of UK ratification of the ECHR and was applied long before the HRA 1998 was adopted to "bring rights home" in the United Kingdom. See, e.g., Case 29/69 *Stauder* [1969] ECR 419, para. 7.

    d. The Charter of Fundamental Rights is incorporated into the Treaty on the Functioning of the European Union and is a source of rights and a guide to interpretation of EU law within its scope.[3] The rights protected by the Charter overlap to a considerable degree with the ECHR and are to be interpreted consistently with the ECHR.[4]

25. Similarly, the EU Treaties and secondary legislation made under those Treaties are to be interpreted in accordance not only with fundamental rights but also with the

[1] Para. 19: "the requirements of the protection of fundamental rights in the Community legal order … are also binding on the Member States when they implement Community rules"
[2] Article 6(3) TEU: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".
[3] See the 30th Protocol to the Treaty on the Functioning of the European Union, which specifically confirms this position in relation to the United Kingdom and Poland.
[4] Article 52(3) of the Charter.

general principles of EU law, and in particular the principles of proportionality and legal certainty:

> "These principles have constitutional status. They are binding on the Community institutions and a measure, whether legislative or administrative, which infringes one of them is illegal and may be annulled by the Court. They are also binding on the Member States".[5]

26. The proportionality principle is summarised in the following passage from the judgment of the ECJ in Case C-331/88 **R v Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa [1990] ECR I-4023**, paragraph [13]:

> "By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".

27. In the present context that principle is applied, not to the prohibition of an economic activity, but to the proportionality of refusing restoration in the factual matrix which we consider below.

28. The ECtHR in **James v U. K. [1986] 8 EHRR 123** having found that measures designed to address "social injustice" could be "in the public interest", considered the next hurdle for compliance with Article 1 of the First Protocol of the ECHR ("A1P1") :

"This, however, does not settle the issue. Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised…This latter requirement was expressed in other terms …by the notion of the "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights." [§50]
The ECtHR continued:
"The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden". [§50]

29. **In Barnes v Eastenders Cash & Carry plc [2015] A. C. 1** Lord Toulson JSC put the matter in this way :

"56. In James v United Kingdom (1986) 8 EHRR 123 , para 37, the court clarified what it meant by A1P1 comprising "three distinct rules". The court said that the three rules were not "distinct" in the sense of being unconnected. The second and third rules were concerned with particular instances of interference with the right to peaceful enjoyment of property and were therefore to be construed in the light of the general principle clearly enunciated in the first rule. The court rejected an argument that

[5] Tridimas, "The General Principles of EU Law", 2nd ed., p. 6.

the “public interest” test in the deprivation rule is satisfied only if the property is taken for the use or benefit of the public at large. It held that a taking of property effected in pursuance of legitimate social, economic or other policies may be “in the public interest”; that the margin of appreciation open to a national legislature in implementing social and economic policies is a wide one; and that the court will respect its judgment as to what is in the public interest unless that judgment is manifestly without reasonable foundation: paras 39–45.

57. However, in order for a taking of private property to be compliant with A1P1 , not only must the measure under which the property is taken pursue a legitimate aim in the public interest, but there must be a reasonable ***31** relationship of proportionality between the means employed and the aim sought to be realised. The court in the James case repeated its statement in the Sporrong case that a “fair balance” must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, and it added that the requisite balance will not be found if the person concerned has had to bear an individual and excessive burden: para 50.

58. The court held that the requirement in the deprivation rule that the taking must be in accordance with “the general principles of international law” does not apply to a taking by a state of the property of its own nationals: para 66. However, the court stated that the requirement that any taking shall be “subject to the conditions provided for by law” refers not merely to municipal law but relates also to the quality of the law, requiring it to be compatible with the rule of law and not arbitrary: para 67.

59. In Lithgow v United Kingdom (1986) 8 EHRR 329 the court held that the phrase “subject to the conditions provided for by law” requires the existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions: para 110. As to the need for a reasonable relationship of proportionality between the means employed and the aim sought to be realised, and the requirement that a balance must be struck between the general interest to the community and protection of the individual's fundamental rights, it said that the taking of property without reasonable compensation would normally constitute a disproportionate interference: paras 121–151.

And

87. The critical question is whether in the circumstances of the present case an order that the receiver's costs and expenses should be met out of the companies' assets is disproportionate, in that it would not achieve a fair balance between the interest of the community and protection of the companies' right to their own property.

88. I start from the position that the taking of property without compensation will normally be a disproportionate interference with a person's A1P1 rights. Although this was said in a case about compulsory purchase, it is a general principle, but it is only a starting point. To give an obvious example, a confiscation order under POCA is a taking of property without compensation, but it is done for the salutary purpose of depriving a ***38** criminal of the proceeds of his crime. A restraint order and receivership order may also be proportionate if reasonably ancillary to that process.

And

94. This case is distinguishable from Raimondo 18 EHRR 237 , Andrews 26 September 2002 , *Hughes [2003] 1 WLR 177*, *Capewell [2007] 1 WLR 386* and *Sinclair v Glatt [2009] 1 WLR 1845* , because all those cases were decided on the premise that the original receivership order was rightly made. In Sinclair v Glatt the applicant was not the defendant, but the relevant property was in the defendant's legal ownership and was therefore held to be properly included in the receivership order. In the present case, however, not only were the companies not defendants, but at the time when the receiver's powers were activated there was no reasonable cause to believe that their assets were assets of the defendants. The question is whether on those facts it strikes a fair balance between the general interest of the community and the protection of the companies' rights to the peaceful enjoyment of

their property that the companies' assets should be taken to pay for the costs and remuneration of the receiver. At this point I part company with Laws LJ and agree with Underhill J that this would not be a fair balance. As Lord Reed JSC observed in *AXA General Insurance Ltd v HM Advocate [2012] 1 AC 868* , para 128, the assessment of proportionality requires careful consideration of the particular facts. In this instance there was no good arguable case for assimilating the companies' assets with those of the defendants, and Underhill J aptly described it as simply a confiscation of a third party's assets to fund the execution of an order that should not have been made in the first place".

30. Ld. Toulson specifically recognises that forfeiture may be a legitimate tool of the legislature to deliver a salutary message for the purpose of depriving a criminal of the proceeds of his crime. That does not chime with the present circumstances, because they do not involve a proceeds of crime case. We take from those authorities that although forfeiture may be designed to provide the salutary lesson referred to by Lord Toulson, Parliament recognised that a mechanism was required to address what might amount to disproportionate forfeiture in any given factual circumstances. It chose to address that by providing for restoration and although restoration is at the discretion of the respondent it is at that stage that the principle of European law which requires proportionality to be considered in an individual case, comes squarely into play. Without such a mechanism, which is perhaps the only check and balance against the forfeiture regime being used oppressively by the state, the entire forfeiture regime would probably be disproportionate, at least in certain easily imagined factual circumstances.

31. It is also to be remembered that at common law there is a requirement of proportionality. In the recent Court of Appeal case of **J P Whitter (Waterwell Engineering) Ltd v HMRC [2016] EWCA Civ 1160** Henderson L. J. (with whom the other members of the court agreed) said :

"68. Although Mr Chacko did not place this at the forefront of his submissions, it is appropriate to begin by considering whether HMRC's power to cancel must be exercised proportionately as a matter of common law. As Lord Toulson JSC has recently stressed, in R (Ingenious Media Plc) v Revenue and Customs Commissioners [2016] UKSC 54, [2016] 1 WLR 4164 , at [28]:

"It is important to emphasise that public bodies are not immune from the ordinary application of the common law … The common law is multi-faceted and remains the bedrock of the English legal system."
Accordingly, if there was a common law requirement of proportionality in cases of the present type, it would have formed part of the background to the enactment of the CIS legislation, and it would need to be taken into account both in construing the legislation and in its application. (Emphasis added).
69. Mr Chacko argued that, because removal of registration would have a significant impact on the Company's business, the case was analogous to the removal of a licence, where a requirement of proportionality is imposed at common law. Mr Chacko referred us to the decision of the Court of Appeal in R v Barnsley Council, Ex p. Hook [1976] 1 WLR 1052 , which concerned the termination of a market trader's licence in the Barnsley market following an incident where he had been seen urinating in a side street after the market had closed in the evening and the public lavatories were locked. The principal ground of decision was that the rules of natural justice had not been followed in

the procedure adopted by the council to revoke Mr Hook's licence, but two members of the court (Lord Denning MR and Sir John Pennycuick) also relied on the point that the punishment was wholly disproportionate to the offence: see 1057H — 1058B, and 1063B. As Lord Denning put it, at 1057H:
"Now there are old cases which show that the court can interfere by certiorari if a punishment is altogether excessive and out of proportion to the occasion … It is quite wrong that the Barnsley Corporation should inflict upon [Mr Hook] the grave penalty of depriving him of his livelihood. That is a far more serious penalty than anything the magistrates could inflict. He is a man of good character and ought not to be penalised thus. On that ground alone, apart from the others, the decision of the Barnsley Corporation cannot stand."
The third member of the court, Scarman LJ, while not founding his judgment on any requirement of proportionality (see 1062E), pointed out at 1058G-H that revocation of an existing licence is usually a more serious matter than refusal to grant a licence in the first place.
70. More recently, in Pham v Secretary of State for the Home Department [2015] UKSC 19, [2015] 1 WLR 1591 , Lord Reed JSC, in the course of some helpful observations on the relationship between reasonableness and proportionality as principles of domestic administrative law, referred to the Hook case at [114] as a case "in which a finding of unreasonableness was based on a lack of proportionality between ends and means."
71. I am prepared to accept that there are many contexts in which the common law will require proportionality between ends and means to be observed by a public authority in the exercise of its functions, although whether such a requirement exists as an independent ground of review of administrative action, or only as an aspect of review for unreasonableness, remains a controversial question upon which the Supreme Court has yet to pronounce definitively. Even if that assumption be made, however, I do not think that it assists the Company in the present case".

32. It should be pointed out that this is nothing novel in the law. In **Customs and Excise Commissioners v Newbury [2003] EWHC 702 (Admin), [2003] 1 WLR 2131** the Divisional Court of the Queen's Bench Division had to consider whether the forfeiture of goods would be lawful if the forfeiture offended the principle of proportionality. That was a case where a motor car had been seized when it was found that it was carrying dutiable goods (tobacco products) in commercial quantities. Condemnation proceedings took place before the Magistrates Court at which the tobacco products were condemned as forfeit. Upon appeal by the motor car owner to the Crown Court, that Court held that it had a residual discretion not to order condemnation of anything liable to forfeiture if such forfeiture would be disproportionate.

33. The Commissioners appealed that decision of the Crown Court by way of case stated to the High Court. The Divisional Court (Lady Justice Hale and Mr. Justice Moses) held, dismissing the appeal, that the forfeiture of the car was an unjustified interference with the car owner's property rights and that its seizure and condemnation engaged that owner's right to the peaceful enjoyment of her possessions. The facts were that Mr. Newbury had borrowed his wife's car to undertake a trip to France (with three other people) and the vehicle owner, Mrs Newbury, was not one of the people who had attempted to evade excise duty.

34. The Divisional Court held that seizure and condemnation of the motor car would be incompatible with Mrs Newbury's right to the peaceful enjoyment of her possessions (A1P1) unless it was a proportionate response in the factual circumstances applicable in that case. The Divisional Court also held that a Court (and so also a Tribunal) seized of the issue of whether property is liable to confiscation by the state was under a duty to consider whether such liability would be in breach of the owner's Convention rights.

35. After referring to the arguments advanced on behalf of the Commissioners, Lady Justice Hale, giving the judgement of the Court, said at [12] :

"12. That argument is deeply unconvincing. The right conferred by article 8 is not simply a right not to pay United Kingdom duty on the goods. It must encompass a right to import those goods without paying that duty. When a load of goods is brought into the country in circumstances where customs officers have reasonable suspicions which they wish to investigate, temporary seizure may well be justified. But the court is then charged with determining the facts with a view to deciding whether the goods are in fact liable to forfeiture. Once the court is satisfied as to which goods a person was himself bringing in for his own use then there is no liability to duty and no need at all for his goods to be forfeit in order to enforce any liability to duty upon those goods. The argument, however, is that it may be necessary to do so in order to enforce the liability to duty of other goods found in the same vehicle. At this point the Community law concept of proportionality becomes relevant. In Louloudakis v Elliniko Dimosio (Case C-262/99) [2001] ECR I-5547, 5596, para 67, it was recognised that as penalties were not harmonised within the Community it remained open to member states to choose the penalties which seem appropriate to them.
"They must, however, exercise that power in accordance with Community law and its general principles, and consequently with the principle of proportionality … The administrative measures or penalties must not go beyond what is strictly necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty …"

36. The Learned Judge then explained why it was "deeply unconvincing," in paragraphs 21, 22 and 23 of the judgement, where she said :

"21. We can understand why the commissioners might want to keep this issue under their control, subject to a specialist tribunal. But courts are used to finding facts and applying their judgment to the consequences of the facts found. There are many other contexts in which courts at all levels have to make the sort of judgments required here. If section 7(1)(b) of the 1998 Act is to have any meaning, how can a court which is seized of the issue of whether property is liable to confiscation by the state not have a duty to consider whether such liability would be in breach of the owner's Convention rights? If it would be, the court cannot condemn the property: it would itself be acting in breach of Convention rights. It is not compelled by CEMA to do so because the concept of liability to forfeiture is capable of incorporating more recently enacted Convention rights.
22 The argument that the condemnation and restoration procedures, taken as a whole, are sufficient to provide "full jurisdiction" for the purpose of article 6 of the Convention does not meet the point that seizure and condemnation are themselves acts of interference with the peaceful enjoyment of property and therefore acts incompatible with Convention rights if forfeiture is disproportionate. It is not sufficient to wait until an owner seeks a review and then exercises his right to appeal. The right to peaceful enjoyment is engaged from the moment of seizure and continues thereafter. The initial act of seizure may not be disproportionate because the commissioners are entitled to investigate. But the interference should cease once an opportunity is available properly to consider whether it complies with Convention rights. The court should not be asked or expected to make an order which is not only in breach of those rights in itself but also legitimates continuing breach by the commissioners unless and until the review process takes place.
23 However, section 7 of the 1998 Act does not give the court any wider powers than it already has: see section 8(1) . Here, the court's powers are "all or nothing". So the court can only refuse to condemn if to forfeit at all would be disproportionate. In this case, where only one passenger was making the sort of non-commercial but not necessarily permitted import contemplated by *Lindsay v*

Customs and Excise Comrs [2002] 1 WLR 1766 , and neither the car owner nor the car driver knew about it, the Crown Court was clearly entitled to find that any forfeiture was disproportionate. Intermediate cases where forfeiture would not be disproportionate if terms were imposed may have to be left to the more sensitive powers of the commissioners and the tribunal".

37. We also remind ourselves that in Pusinskas v Border Force [2017] UKFTT 172 (TC) this Tribunal found at [25] that a restoration decision (as well as a forfeiture or condemnation decision) would be flawed and not lawfully arrived at absent a full and proper consideration of the principle of proportionality by the person taking the relevant decision:

"25. We have read the decision of the Reviewing Officer in detail. It is striking that it makes no reference whatsoever to the principle of proportionality, nor is there any consideration whatsoever of whether, on the facts which the Reviewing Officer considered to be relevant and established, it was disproportionate to refuse restoration either at all or conditionally. In our judgement that is a fundamental flaw in the Review Decision. We should add that this is not a simple enquiry into whether or not the word "proportionate" or "proportionality" appears in any given Review Decision. The essence of the enquiry is to determine, after reading the Review Decision in its entirety, whether the mind of the Reviewing Officer turned to the issue of proportionality, howsoever that might be expressed. We cannot, on any fair and proper reading of this Review Decision, find anything that suggests that the Reviewing Officer turned her mind to the issue of proportionality. That, of itself, renders this Review Decision flawed so that we must direct that it ceases to have effect".

38. We are in no doubt that the principles considered and enunciated by the Divisional Court in Newbury apply equally in cases involving restoration. And perhaps more so because it is the availability of restoration that provides at least one of the checks and balances sufficient to render the general forfeiture regime capable of being compatible with Article 1 of the First Protocol to the European Convention on Human Rights.

39. It thus follows that if the decision taken upon an application for restoration is disproportionate, the decision will, *ipso facto,* be unlawful and consequently flawed and unreasonable.

40. We observe that in the Review Decision dated 19 April 2016 the Reviewing Officer, Mrs Norfolk, cites extensively from the Border Force Restoration Policy for Seized Commercial Vehicles. That is a policy drawn up by the respondent but there is no provision under which it has the force of law. It is an internal policy. We make that observation because Mrs Norfolk's oral evidence was that she is unaware of that Policy containing any provisions or guidance relating to the need to consider proportionality. A policy that does not recognise the need for any decision taken in respect of restoration, to have regard to the principle of proportionality is inherently deficient. It should, as a minimum, make it explicit that restoration decisions must pay heed to the principle of proportionality. A

restoration decision that is not a proportionate decision will not be a lawful decision as the Divisional Court explained in Newbury.

The Evidence.

41. At the outset of the hearing before us Miss Patyna informed us that she had hoped to call three witnesses, but that none of them had attended from Lithuania. It was then agreed between the tribunal and counsel that the hearing would continue with Miss Patyna opening the appeal following which, if her witnesses had not attended by that time, HMRC would call its sole witness. We would then take stock once the evidence of that witness was completed.

42. Mrs Karen Norfolk gave evidence by adopting the content of her witness statement (pages 16 – 17 of the respondent's bundle) as her evidence in chief. It is uninformative and brief. It concludes with the sentence *"I am satisfied that I considered every matter that was relevant and disregarded everything that was irrelevant"*. There is little doubt that that was inserted as a standard or stock phrase and is not an assertion upon which we should place any reliance whatsoever.

43. Mrs Norfolk was asked supplemental questions in chief. She said that her Review Decision dated 19 April 2016 refers to the Border Force Policy on restoration which, she said, does not refer to proportionality. Nonetheless, she went on to say that she did consider proportionality and that it is mentioned in her Review Decision. She then went on to say that she had considered proportionality based upon the explanations that had been given to her and in conjunction with the policy.

44. During cross-examination, Mrs Norfolk pointed out that at internal page 8 of her Decision Letter, under the subheading "Conclusion", she stated "*restoration of the vehicle for a fee in these circumstances is proportionate and appropriate"*. It should be kept in mind that one of the circumstances to which she was then referring was her conclusion that the appellant had been complicit in attempted excise fraud. Mrs Norfolk also contended that she had referred to potential hardship to the appellant and that, to her mind, that equated with a full and proper consideration of proportionality. In the Review Decision (internal page 7) she said *"I find on the balance of probability, and with the evidence before me that the more likely explanation is that your client was either complicit or had knowledge of the cigarettes and I therefore doubt the authenticity of the rental agreement. It is*

a common ploy for smugglers to attempt to distance themselves by appearing as purely the rental company …….".

45. The difficulty with that approach is manifest. First, it involves the Reviewing Officer drawing an inference of fact based upon primary facts that were equivocal and could be consistent with the appellant not being complicit in fraud, and secondly, the juxtaposition of the two sentences to which we have referred demonstrates that Mrs Norfolk was not basing her decision purely upon the primary facts that were available to her (from which any proper inferences of secondary fact could be drawn) but was, at least in part, basing her decision upon a prejudice to the effect that those in Lithuania who rent out vehicles may well be doing so as a ploy to permit themselves to engage in excise fraud. She did not claim that that assertion of a ploy was based upon any evidence that was then available to her and certainly she did not refer to any which she considered would justify such a general proposition. It was merely her general experience as a Border Force officer that made her conclude that it could be a ploy to use a rental agreement to distance somebody engaging in excise fraud from involvement in that fraud.

46. It is also relevant for us to record that during cross-examination, Mrs Norfolk's evidence and position was that *"I failed to be satisfied that the appellant had no knowledge of what the driver was doing"*. That was the clearest indication that she took the view that the onus was upon the appellant to establish that it was not involved in fraud or any kind of dishonest evasion of excise duty. That presents two difficulties. The first is that, as we have set out above, there was no onus upon the appellant to establish that negative proposition. The even more serious error and unfairness was that Mrs Norfolk considered that the appellant should bear such an onus because things said by the vehicle driver, during an interview with a Border Force officer, were, according to her, capable of giving rise to the inference that the driver's employer, the appellant, had something to do with the fraud. The seriousness of the error and unfairness is that, as Mrs Norfolk accepted, the appellant did not have a notice of the content of any such interview until such time as she quoted it extensively in her Review Decision. In other words, she was criticising the appellant for not dealing with an assertion or suspicion that it may have been complicit in fraud when it had no reason to believe that anybody was levelling any such allegation against it.

47. Mrs Norfolk gave evidence to the effect that she had reached her overall conclusion on the basis that she had been presented with two different accounts of whether the rental agreement under which the vehicle was rented out by the appellant had been a rental without driver or a rental of the vehicle with driver, notwithstanding that the principal rental agreement contained a provision that a supplemental agreement might be entered into if the hirer chose to have the vehicle with a driver. She plainly considered it relevant that no such supplemental

agreement was produced to her, notwithstanding that the relevant clause of the principal rental agreement, clause 4.5, did not provide that any such supplemental agreement must be in writing.

48. At the conclusion of Mrs Norfolk's evidence, neither the appellant nor any live witnesses on its behalf had attended. In those circumstances Miss Patyna made an application that we should admit three witness statements, being those of Mr Mark Borisov dated 20 February 2017, Miss Reda Maumeviciene dated 21 February 2017 and Mr Saulius Jankaukas dated 20 February 2017, as hearsay evidence. She conceded that in the absence of those witnesses being present and available to be cross-examined it would be a matter for us to consider the extent to which, if any, less weight should be placed upon that evidence, if admitted as hearsay, by reason of the absence of the opportunity for cross-examination.

49. The application was opposed principally on the basis that the respondent would be denied the opportunity to cross examine those witnesses but that is no more than the inevitable consequence of any hearsay application being successful.

50. Keeping in mind that the witnesses hail from Lithuania and both the inconvenience and cost which would no doubt have been necessary for them to attend a hearing in London and keeping in mind the amount at stake in this litigation, we considered that there would be no or no substantial unfairness to the respondent if the statements were admitted as hearsay evidence, subject to us subjecting them to critical examination and keeping firmly in mind the absence of cross-examination. Accordingly, all three statements were taken as read and form part of the evidence available to us. They appear at pages 54a-56a, 62a-63a and 62b-65c in the appellant's bundle. It will also be clear from what we say below that this appeal would succeed even if there had been no evidence from any of the witnesses whose statements we decided to admit as hearsay evidence.

51. It suffices to say that the evidence given by Mr Borisov is that he was not complicit in any kind of fraud or dishonesty, but had hired the Mercedes Benz vehicle to the hirer with a driver, Mr. Vaskys, who had been sourced through an employment agency and who had commenced working for the appellant on 14 July 2015. He says that Mr. Vaskys was made aware of relevant rules and regulations and, in particular, those relating to what goods he could and could not be transported. It is his evidence that if Mr. Vaskys was committing excise fraud, he was on a frolic of his own.

52. Mr. Borisov's statement also contains a commentary upon the Review Decision which we need not summarise.

53. The evidence contained in the witness statement of Miss Maumeviciene is relevant only to the limited extent that it explains that she works as a Recruitment

Consultant and that it was the company for whom she works that placed Mr Vaskys with the appellant as a driver, after recommending him to the appellant.

54. The evidence given by Mr. Jankauskas explains that the company of which he is the Commercial Director had previously employed Mr. Vaskys and that during his employment with that company, Mr Vaskys had sought to smuggle goods into the United Kingdom. In other words, Mr. Vaskys had a track record, at least in respect of one previous episode of excise fraud (whether actual or attempted).

Findings of Fact.

55. On the basis of that evidence and our consideration of it, we find the following facts proved as a matter of probability :

    a. That the seized Mercedes Benz vehicle was hired out by the appellant company to a hirer, with a driver, Mr Vaskys, who on at least one previous occasion (whilst in the employ of somebody else) had (attempted to) commit excise fraud in this country.

    b. That the goods seized, in addition to the vehicle, were 699 litres of beer and 51,800 cigarettes at a time when the vehicle was carrying seven passengers in addition to its driver.

    c. That the driver was interviewed at Dover on 15 August 2015 as set out in the Review Decision dated 19 April 2016. We acknowledge that he informed the interviewing officer that each of his passengers had about 90 litres of beer. We can make no finding as to whether that assertion was or was not true. The driver, Mr Vaskys, informed the interviewing officer that he intended to sell the beer to shops in the United Kingdom *"but the cigarettes I know nothing about"*. We find that he made that assertion, but we can make no finding as to whether it was or was not the truth. We say that because it was argued on behalf of the respondent that if it was the truth it carried with it the implication that it was the appellant that accepted the luggage containing the cigarettes for transit and so there is an available inference that the appellant's knew the content of those bags. The difficulty with being asked to draw such an inference is that we do not know whether the driver was speaking truthfully or seeking to distance himself from smuggling the cigarettes (with an excise liability of £12,648.91p), as opposed to the beer which had an excise liability of only £657.60p. Either could be the case and, that being so, the claimed primary fact upon which it is said we can draw an inference to the effect that the appellant was complicit in fraud (albeit that others were relied upon in support), is equivocal.

d. That the appellant was not aware of the content of the interview that had taken place at Dover on 15 August 2015 until such time as a transcript of a large part of it was set out in the Review Decision dated 19 April 2016.

e. That neither the original decision maker who allowed only conditional restoration, nor the Reviewing Officer (Mrs Norfolk) who upheld that decision, gave any active consideration to the issue of proportionality. We do not accept the evidence of Mrs Norfolk to the effect that she did give that issue active consideration, for the following reasons :

   i. We set out again the passage which appears under the subheading "Conclusion" in her Decision Letter: "*I am of the opinion that the application of the Border Force policy in this case treats your client no more harshly or leniently than anyone else in similar circumstances: restoration of the vehicle for a fee in these circumstances is proportionate and appropriate"*. It is clear from that passage that Mrs Norfolk was resting her assertion that proportionality had been appropriately considered, not on the basis that she had actively considered it against a basket of factors that she considered relevant to that issue, but on the artificial basis that because she was acting in accordance with the Border Force policy her decision was necessarily proportionate. That, on any view of matters, would be an obvious misdirection. A simple example demonstrates why that is so. In a case where, for example, X decides to enter the "green channel" at Dover carrying 400 cigarettes purchased in Switzerland (not within the E. U.) in his brand-new motorcar for which X has just paid £75,000, any consideration of proportionality would, of necessity, need to look at the amount of duty that could have been evaded upon the excess quantity of cigarettes, that being 200 cigarettes, as compared to the value of the seized motorcar (in which they were being carried) and of which restoration had been requested.

   ii. Further there is nothing in the Review Decision to reveal what factors Mrs Norfolk considered it relevant to take into account upon her undertaking her alleged proportionality assessment. It is reasonably to be expected that where active consideration is given to the issue of proportionality, the main relevant factors that have been weighed in the balance will be identified and some indication given of the weight attached to those main factors when reaching he overall proportionality assessment. Nothing of the kind appears in Mrs Norfolk's Review Decision letter.

f. The approach to that situation, dictated by the decision of the Divisional Court in **Newbury,** is that three questions must be asked. The first is whether the "smuggling" involved criminal conduct or was merely negligent or

unintentional; the second relates to the kind of penalty that one might have expected to be applied by a criminal court if criminal conduct was involved; and the third relates to the overall assessment of proportionality when looking at the size of the penalty compared to the degree of culpability and/or actual or potential revenue loss. It follows that depending upon the facts of each case a differing outcomes might be proportionate depending upon whether there is a finding that the conduct of X did or did not involve criminality.

g. There being no other evidence on the issue and no submissions having been made in respect thereof, we find that the United Kingdom trade value of the vehicle, at the time of seizure, was around £9,925.

h. That the evidence available to the Reviewing Officer and the evidence available to us is wholly insufficient or cogent to give rise to a finding, even as a matter of probability, that the appellant was complicit in fraud or in any other way acting dishonestly or fraudulently. We can understand the basis upon which the respondent may have been suspicious about whether the appellant was complicit in the attempted excise fraud, but we have to determine the issue of complicity in fraud on the balance of probabilities, not on the basis of suspicion partly born of Mrs Norfolk's belief that the hiring of a vehicle arrangement could have been a ploy (based upon her unparticularised experience rather than any evidence justifying such a conclusion).

i. In circumstances where there can be no finding that the appellant was complicit in fraud or otherwise acted dishonestly, we find that a penalty of £9,925 (for that is what this conditional restoration would amount to) against somebody whose vehicle has been hired by a hirer and then seized because it was used to smuggle excise goods, would be completely disproportionate. That is because we test our conclusion against what the likely outcome would have been if we imagine that there had been an offence of strict liability (where proof of complicity in excise fraud is not necessary) of failing to procure that one's vehicle is not used to carry goods where excise duty is evaded or there is an attempt to evade excise duty. In our judgement, it is inconceivable that that imagined strict liability offence would attract a fine of £9,925 or anything approaching it.

The Submissions.

56. The appellant's case was put on three principal bases by Miss Patyna. First, she said that the Review Decision was flawed because it revealed procedural unfairness. She put this on the basis that the Review Decision draws an inference of complicity in fraud against her client (based upon the appellant not giving evidence or providing facts to demonstrate that it was not complicit in fraud) in circumstances where the content of the interview between an officer of Border

Force and Mr Vaskys had not been made known to the appellant and the appellant had had no opportunity to comment upon it or make any representations in respect thereof, let alone to give evidence to the contrary. This criticism was particularly forceful given that on 30 March 2016 the respondent wrote to the appellant's solicitors informing them that it was the appellant's last opportunity to provide the Review Officers (plural) with "*any further evidence or information that they would like to provide in support of this request.……...*". It is a glaring omission that the respondent did not then provide a transcript of the interview, conducted between one of its officers and Mr. Vaskys, if the content of that interview was later to be relied upon to found an adverse inference of complicity in fraud against the appellant on the basis that the appellant had not dealt with that issue.

57. Mr. Rainsbury's response to that submission was that the appellant had been asked to provide all and any information upon which it relied in support of its restoration application. However, that did not meet the gravamen of Miss Patyna's criticism because unless and until the appellant knew of the content of the interview, it could not be expected to guess that it should respond to anything said during that interview.

58. The second attack upon the Review Decision made by Miss Patyna was that there was insufficient evidence or other material available to Mrs Norfolk to justify her in concluding that the appellant was complicit in fraud. She made the point that Mrs Norfolk had, at least to a significant extent, reached her conclusion that the vehicle rental agreement was of doubtful authenticity because she had already concluded that the appellant was complicit in and had knowledge of the fraudulent smuggling of the cigarettes. It was necessary for each piece of evidence to be weighed individually to see whether it properly led to either or both of the findings that Mrs Norfolk felt she could make. Mr Rainsbury submitted that the vehicle rental agreement was "unusual" although he did not particularise in what way it might be unusual. The nearest he came to explaining why it might be unusual seem to be that it contained clause 4.5, which provided for a driver to be provided with the vehicle if the hirer so requested; same being subject to a supplemental agreement.

59. In our judgement the criticism of the reasoning used by Mrs Norfolk is well made. However, given our finding that there was insufficient evidence (or evidence of insufficient cogency) to permit a finding of complicity in fraud to be made, the foregoing loses much of its relevance.

60. The third attack upon the Review Decision made by Miss Patyna related to the absence of any proper consideration of proportionality. Mr. Rainsbury argued that it was sufficient that the Review Decision mentioned hardship and mentioned proportionality on the basis that a decision made in accordance with the Border Force Policy on restoration would almost always be proportionate. We are quite unable to accept that proposition. We agree that there was no proper consideration

of proportionality, notwithstanding Mrs Norfolk's evidence to the contrary (which we reject). A seizure or restoration decision that is not proportionate is an unlawful decision. The Divisional Court in Newbury explained why that is so and we gratefully adopt the reasoning of Lady Justice Hale in that decision (cited above).

61. We say that a decision to seize or a decision not to restore is unlawful if proportionality has not been considered or if a disproportionate decision is made, keeping in mind the requirement that the decisions of public bodies must be lawful as a matter of public law, as explained by Lord Dyson in **R (Lumba) v Sec of State for the Home Department [2012] 1 AC 245** ***at [65 & 66] :***

"65. All this is elementary, but it needs to be articulated since it demonstrates that there is no place for a causation test here. All that a claimant has to prove in order to establish false imprisonment is that he was directly and intentionally imprisoned by the defendant, whereupon the burden shifts to the defendant to show that there was lawful justification for doing so. As Lord Bridge of Harwich said in *R v Deputy Governor of Parkhurst Prison, Ex p Hague [1992] 1 AC 58* , 162 C – D : "The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it.

.66 The causation test shifts the focus of the tort on to the question of how the defendant *would* have acted on the hypothesis of a lawful self-direction, rather than on the claimant's right not *in fact* to be unlawfully detained. There is no warrant for this. A purported lawful authority to detain may be impugned either because the defendant acted in excess of jurisdiction (in the narrow sense of jurisdiction) or because such jurisdiction was wrongly exercised. *Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147* established that both species of error render an executive act ultra vires, unlawful and a nullity. In the present context, there is in principle no difference between (i) a detention which is unlawful because there was no statutory power to detain and (ii) a detention which is unlawful because the decision to detain, although authorised by statute, was made in breach of a rule of public law. For example, if the decision to detain is unreasonable in the Wednesbury sense, it is unlawful and a nullity. The importance of Anisminic is that it established that there was a single category of errors of law, all of which rendered a decision ultra vires: see *Boddington v British Transport Police [1999] 2 AC 143* , 158 D – E".

62. We find that the Review Decision was not and could not reasonably have been arrived at. We arrive at that conclusion for the following reasons :

    a. The Reviewing Officer gave no active consideration to the requirement of proportionality. It may not be necessary for the words "proportionate" or "proportionality" to appear in such a decision, provided that upon a fair and proper reading of the entire Decision Letter, it becomes clear that proportionality has been actively considered. Furthermore, it is desirable that a decision maker sets out the various factors that have been taken into account in arriving at the proportionality assessment. That will involve setting out those factors which weigh against a refusal of restoration being disproportionate and balancing them against those factors which weigh in favour of a refusal of restoration being proportionate. It is only then that the

fair balance can be struck. We acknowledge that there will be borderline cases where one person might reasonably come to the conclusion that a given outcome is proportionate whilst another person might equally reasonably come to the conclusion that a given outcome is not proportionate. That is the very nature of their being borderline cases.

b. We are satisfied that where Mrs Norfolk referred to proportionality, just under her sub-heading "Conclusion", she did no more than assert that her decision was proportionate because she believed that it followed the Border Force policy, which she had quoted *in extenso*. We have found that she gave no active or adequate consideration to the principle of proportionality.

c. We consider the submission made by Miss Patyna that the Review Decision is vitiated by reason of procedural unfairness (as explained above), to be well founded.

d. Given our finding that complicity in fraud has not been proved to the civil standard, the decision to restore upon payment of £9,925 (which, in reality, amounts to a financial penalty) is manifestly disproportionate and no reasonable decision maker could have decided on the facts of this case (applying our findings of fact) to impose such a penalty. It is to be remembered that that financial penalty is in addition to financial prejudice already caused to the appellant by reason of not having possession of its profit earning chattel, with the attendant commercial loss and inconvenience arising therefrom.

Directions pursuant to section 16(4)(b) & (c) FA 1994.

63. We direct as follows :

a. That the appealed Review Decision be set aside and ceases to have effect.

b. The respondent must undertake a new Review, same to be undertaken by a Reviewing Officer other than Mrs Norfolk, within 30 calendar days of receipt by the respondent of this Decision.

c. The new Review must proceed on the basis of the Findings of Fact set out herein.

d. That the new Review must be undertaken keeping in mind the principles relevant to the appellant's protected property rights under Article 1 of the First Protocol to the European Convention on Rights, as set out and explained by the Divisional Court in Customs and Excise Commissioners v Newbury [2003] EWHC 702 (Admin); [2003] 1 WLR 2131.

e. For the purpose of the new Review the Border Force policy upon Restoration must be read as if it makes it explicit that its officers, upon making a Restoration Decision, must consider whether, objectively speaking, it would be disproportionate to refuse restoration or to grant it only subject to specified conditions.

f. The new Review must make clear the principal factors taken into account when deciding the issue of proportionality, being those factors which weigh against the application and those factors which weigh in favour of the application. The new Review Decision must also be made on the basis that simply applying the provisions of the Policy does not, of necessity, render any particular decision proportionate because each and every case must be considered on its individual facts.

g. So that there is no repetition of the failure to consider proportionality when restoration is being considered we direct that Border Force must amend its Policy upon Restoration so that it makes it explicit that its officers, upon making a Restoration Decision, must consider whether, objectively speaking, it would be disproportionate to refuse restoration or to grant it only subject to specified conditions.

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.

GERAINT JONES Q.C.
TRIBUNAL JUDGE

RELEASE DATE: 12 APRIL 2017