[2017] UKFTT 0375 (TC)

TC05840

Appeal number: TC/2016/03593

Customs and excise – importation of controlled drugs concealed in machinery – seizure of commercial vehicle – appeal by haulier against refusal of restoration – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOSÉ ANGEL BLANCO **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE SARAH FALK
MRS CATHERINE FARQUHARSON

Sitting in public at The Royal Courts of Justice, The Strand, London WC2A 2LL on 11 April 2017

The appellant did not attend and was not represented.

Tom Rainsbury, Counsel, instructed by the Home Office Cash Forfeiture & Condemnation Legal Team, for the Respondents

DECISION

1. This is an appeal under s 16 Finance Act 1994 ("FA 1994") against a review of a decision not to restore a Renault tractor unit (the "unit") and curtain side trailer (the "trailer") seized under s 139 Customs and Excise Management Act 1979 ("CEMA"). The unit and trailer had been intercepted at Dover on 26 November 2015. The load was found to contain 2,200 kg of herbal and resinous substances that the Border Force identified as cannabis, and the vehicle and load were seized. The appellant requested restoration of both the unit and trailer, which the Border Force refused. That refusal was confirmed on review and the appellant appealed to this Tribunal.

Preliminary points

2. The appellant did not attend and was not represented at the hearing. The appellant's Spanish based representative had clearly been notified of the hearing on 4 February 2017, having confirmed by a letter dated 14 December 2016 that there were no dates to avoid. The same letter also confirmed that there were no additional documents or information that the appellant wished to include in the documents list prepared by the respondents and indicated that the appellant was not proposing to call any witnesses. Other directions were not complied with by the appellant, including in relation to the preparation of bundles. Despite prompting from the Tribunal there appears to have been no further communication from the appellant's representative until Saturday 8 April 2017 (three days before the hearing). On that date the appellant's representative sent an email to the Tribunal administration explaining that the appellant was unable to assume the cost of a trip to London due to the lack of his truck (and therefore his means of livelihood), and requesting that the hearing be postponed until the appellant had sufficient financial means to allow him to travel. No date was indicated as to when this might occur.

3. We were satisfied that, in all the circumstances, it was in the interests of justice to proceed with the hearing under rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal rules"). No attempt appears to have been made to contact the Tribunal at an earlier stage about the appellant's financial difficulties, and there was no suggestion that the appellant's position had changed during the course of the appeal process. There was no indication that any attempt had been made to explore alternatives that might have been available to the appellant, for example pro bono representation, or that there was any identifiable timescale within which the appellant's financial difficulties might be sufficiently resolved to allow him to attend a hearing. In addition it appears from earlier correspondence between the appellant's representative and the Tribunal that the appellant was continuing to work using a hired truck, which is not obviously consistent with the email sent on 8 April. The December 2016 letter also conveyed the impression that there were no additional documents or information that the appellant wished the Tribunal to consider, beyond the documents compiled by the respondents.

4. The appeal to the Tribunal was also late. The respondents did not object to this and we decided to admit the appeal.

Legal and procedural background

5. Section 3 of the Misuse of Drugs Act 1971 prohibits (subject to irrelevant exceptions) the importation of controlled drugs. Section 49(1)(b) CEMA provides:

> "Where… any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; … those goods shall be liable to forfeiture…"

6. Section 139(1) CEMA provides:

> "Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard."

7. Section 141(1) CEMA provides:

> "(1) Without prejudice to any other provision of the Customs and Excise Acts 1979, where any thing has become liable to forfeiture under the customs and excise Acts—
>
> (a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture…
>
> shall also be liable to forfeiture."

8. The effect of paragraph 5 of Schedule 3 to CEMA is that, unless a notice of claim that the item seized was not liable to forfeiture is lodged within one month, the seizure is treated as valid and it is not possible to claim subsequently that it was not duly condemned as forfeited: see *HMRC v Jones and another* [2011] STC 2206 ("*Jones*"). No such claim was lodged in this case, and in any event we did not understand there to be any dispute about the fact that the load being carried did include controlled drugs.

9. However, there is power to grant restoration under s 152 CEMA:

> "The Commissioners may, as they see fit … (b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under the customs and excise Acts."

10. Following a request by the appellant the Border Force decided on 22 March 2016 not to restore the unit and trailer. A review was requested under s 14 FA 1994, and on 19 May 2016 the decision was upheld on review. The appellant appealed to the Tribunal against the review decision under s 16(1) FA 1994. The Tribunal's powers are set out in s 16(4), which provides:

> "(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—
>
> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
>
> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

11. The effect of s 16(8) is that the decision not to restore was a decision in relation to an "ancillary matter". In addition, s 16(6) has the effect that the burden of proof is on the appellant: see *Golobiewska v Commissioners of Customs & Excise* [2005] EWCA Civ 607, which also makes it clear that the civil standard applies, that is the balance of probabilities.

12. The Tribunal's powers under s 16(4) are limited. As noted by Mummery LJ in *Jones* at [71(9)] they are confined to the application of principles of judicial review. This includes questions of reasonableness and, because Article 1 of Protocol 1 to the European Convention on Human Rights is potentially engaged (peaceful enjoyment of possessions), proportionality. The general test of reasonableness in this context is whether the decision was so unreasonable as to be irrational or perverse, such that no reasonable authority could have reached that decision (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). Grounds for review would include failing to take account of relevant considerations or taking account of irrelevant considerations.

Evidence

13. We heard oral evidence from Raymond Brenton, a Higher Officer of the Border Force who made the review decision. Mr Brenton also produced a short witness statement with exhibits covering documents he relied on to conduct the review. Mr Brenton answered supplementary questions both from Counsel and from the Tribunal. We accept Mr Brenton's evidence as to matters of fact, and are grateful for his assistance in answering the Tribunal's questions. Documentary evidence principally comprised documents considered by Mr Brenton during his review. These documents included papers handed over by the appellant when the vehicle was intercepted together with documents supplied subsequently by the appellant's representative, as described further below.

Findings of fact

14. On 26 November 2015 the unit and trailer were intercepted at the port of Dover while being driven by the appellant. The appellant told the Border Force officer that his load was machines which he had observed being loaded, and that the pick up and drop off points were at the addresses of the consignor and consignee as set out on the CMR document (see below). He explained that he ran the company José Angel Blanco Cuquejo and was an owner driver with one truck. He also confirmed that he was not carrying prohibited goods.

15. The CMR document (essentially, the standard form consignment note) held by the appellant stated that the sender of the goods was Multitrade S.L., with an address in "Molina Segura (Spain)", and that the consignee was Euro Auctions UK Ltd, with a head office address in County Tyrone, Northern Ireland. The pick up point was stated to be Molina de Segura and the delivery point was an address in Kent. (Probably due to his poor English, the appellant initially indicated that the drop off was at the consignee's address in Northern Ireland, but this was corrected when an interpreter was present.) The CMR listed three items being carried, indicated that the goods were being delivered "after maintenance servicing", and included a security seal number in a box marked "sender's instructions". Other documents in the appellant's possession and handed over to the Border Force included delivery notes, a document in Spanish which (based on a subsequent English translation provided by the appellant's representative) was a loading order from the consignor, some technical details in Spanish which related to one of the items being carried, a large tanker shaped object described as an autoclave, and a business card from what appeared to be the appellant's contact at the consignor.

16. The business card names the appellant's contact as Leocadio Del Pino, described as "Director" of a company called "RM Multitrade Concept S.L.". The postal address provided on the card is a unit in an industrial estate in Molina de Segura, Murcia, Spain. Website details and an email address for Mr Del Pino are also included together with a phone number. A similar but not identical postal address appears on the delivery notes and CMR, together with the same website details. As indicated above the CMR names the consignor slightly differently, as "Multitrade S.L.", and also includes a generic email address. The loading order gave an email address for Mr Del Pino which is also slightly different from the one on his business card, but includes the same phone number as on the business card with the name "Leo" as the contact for the company's "traffic department".

17. The description of the goods in the various documents is mainly in Spanish. The largest, stated to weigh 10,261 kg, was the large tanker object. The other two comprised an "industrial steam generator" stated to weigh 3,837 kg, and an item which appeared to comprise components or accessories weighing 1,736 kg.

18. The Border Force arranged for the vehicle to be x-ray scanned. It is clear from the notebook of the Border Force officer that did the scan, an Officer Jenkins, that as indicated on the CMR there was a numbered seal around the load which was removed prior to scanning (Mr Brenton described this as a cord threaded through the eyelets in the curtain sides of the trailer and secured by a seal). The x-ray indicated that one of

the three items being carried, the tanker object, contained a number of boxes. A physical search of the tanker was then conducted by Officer Jenkins. His notebook describes the tanker as being enclosed by a wooden frame. Mr Brenton's understanding was that this was a frame designed to support the tanker during transit, rather than a box that fully enclosed it. This is consistent with the notebook's reference to a "large tanker object surrounded by wooden frame" at a point before the vehicle was scanned and would therefore have been visible from the x-ray, and is also consistent with repeated references to a wooden frame rather than a box or container. However, the notebook does describe the need to remove boards to find a way of accessing the inside of the tanker from above, suggesting that that there was at least some covering on top of the tanker. The notebook then describes breaking part of the front of the wooden frame "to access what looks like a door", indicating that the object was indeed at least partially visible through the frame.

19. The physical search of the tanker revealed a large number of packages which totalled 2,200 kg in weight. The packages tested positive for cannabis in a field test. The packages, along with the unit, trailer and goods, were seized. The appellant was arrested and interviewed.

20. The appellant contacted the Border Force from his representative's email address in January 2016 seeking restoration. The Border Force's response requested evidence of ownership of and other details about the unit and trailer, details of how the appellant obtained the contract to carry the goods, the checks he made of the consignor, the consignee and the load, the arrangements to collect and deliver the goods and details of any other measures taken to prevent smuggling. The appellant's representative appears to have attempted to respond by email at least twice during February 2016, but the responses either did not get through at all or what was received by the Border Force did not attach the documentation stated to be included or otherwise respond to the request for information.

21. Restoration was refused by a letter dated 22 March 2016. The letter contained what was described as a summary of the drugs restoration policy for commercial vehicles, namely that "when a vehicle is involved in the smuggling of drugs, the policy is not to restore the vehicle unless there are exceptional circumstances", and stated that despite repeated reminders the Border Force had not received ownership documents or other responses to questions raised. The appellant's representative requested a review of the decision in April 2016. This request enclosed the documentation which the appellant's representative said had been sent in four previous emails, and this time was sent by post and fax. The request stated that the documents showed that the appellant's actions were "more than cautious" and also indicated that the "cause has been dismissed" so there was nothing to justify seizure of the truck. We understand this to be a reference to criminal charges that were at one stage contemplated against the appellant but were not pursued. The correspondence also indicated that the appellant depended on the vehicle for his livelihood.

Documents supplied by the appellant with the review request

22. The documents attached to the review request included an undated and unsigned document in English entitled "Story of the Facts" This was clearly prepared by the appellant's representative in connection with the restoration request. There were also what appeared to be some extracts from the website of "RMC Multitrade Ltd", stated to be "machinery maintenance experts across Europe" based in Molina de Segura. Otherwise nearly all the documents provided were in Spanish with no English translations. English translations of some, but not all, of the documents were subsequently provided. The translated documents primarily comprised the loading orders for the relevant delivery, for what would have been the related return trip and for one previous delivery in September 2015, documents relating to ownership and certain email exchanges.

23. The ownership documents supplied in translation included a document described as a "long-term" lease agreement in relation to the unit between what appears to be a commercial lessor and the appellant as lessee, but (at least in the English translation) without the inclusion of the terms of the lease. A lease agreement was also supplied in relation to the trailer, between an individual with the same surname as the appellant as lessor and the appellant as lessee, at a nominal rent and for an undefined term. In addition an insurance document was supplied in relation to the trailer, naming the appellant as policyholder.

24. The translated email exchanges relate to a total of three trips undertaken by the appellant for the same consignor. They commence with an email dated 14 July 2015 from "Leocadio del Pino Cazorla", whose email sign off described him as "Manager: RM Multitrade Concept S.L" and provided a "Tax ID" number plus a website link. The email explained that a driver on their fleet named Gerardo had given Mr del Pino the appellant's email address and phone number, having had dinner with the appellant a couple of days earlier at a service station. Gerardo had told Mr del Pino that the appellant had many years of experience as an international driver and had his own "full rig with tautliner" (curtain sided trailer). The email went on to explain that the company was based in Molina de Segura, Murcia, was engaged in the sale, repair and maintenance of industrial machinery and normally had full load dispatches to Italy, the United Kingdom, Germany etc., and that they were looking for self-employed agents to carry the freight. The terms were €1.35 per kilometre plus VAT, an advance for expenses of €950, and payment by reverse factoring after 30 days or immediately in cash. The email stated that "we almost always have return legs at the same price", but if a return leg could not be provided then compensation would be paid of €0.93 per kilometre plus VAT, which the email said was around 80% of the laden price "as is standard in the sector". The email concluded by asking the appellant to confirm whether he was interested and saying that there were machinery dispatches scheduled for the UK.

25. The appellant responded within a few minutes explaining that he had a Renault tractor and tautliner platform, that he had been doing international and national routes for more than 20 years, that he would be available from the next day and could reach Molina by around Thursday afternoon (this would have been Thursday 16 July). The email said that "I would need a cash advance of €1000 for possible unforeseen

circumstances during the trip, as it is the first trip. The remaining trips we could do as you describe in your message." Mr del Pino replied around half an hour later agreeing to advance €1,000 in cash in addition to the "regular deposit" of €950, asking the appellant to make a note of his phone number and promising the next available trip. The email said that the "UK trips always involve a return leg of freight loaded at the destination itself, as they are regular machinery maintenance clients". The appellant responded saying that he would be at the address provided in Molina de Segura on Friday (this would have been 17 July, three days later) to sign the contracts and load up.

26. The next email is dated 23 September 2015 and was from Mr del Pino to the appellant. It referred to the August "shut down" and September having been very slack, but said that a number of firm orders with the UK were being finalised with three scheduled departures over the following few days. He offered one of them, loading up on Friday 25 September, to the appellant. The email went on to say that because of the "quality protocols we are implementing at the company, and so as to be able to react swiftly in the event of theft of vehicles/freight, all our self-employed drivers and agents subcontracting transportation through us have a locator device fitted to the vehicle". The email referred the appellant to a particular workshop in Murcia and set out the cost of the device. The appellant responded the next morning agreeing to install the GPS and confirming that he was available for the work. Another email on the same date indicates that the loading order was sent to the appellant, apparently from the traffic department at the company.

27. The final set of emails relate to the trip in November 2015 that led to the vehicle being intercepted. An email from Mr del Pino dated 21 November confirmed that €950 had been advanced into the appellant's account for "this trip" and that a corporate credit card would also be provided for use in the event of "breakdown or fine". A subsequent email on the same date indicated that the loading order was sent to the appellant "for the freight destined for Great Britain on 24 November". The appellant confirmed receipt of the loading order and his availability, stating that he could be there on Monday morning (23 November).

28. A print out of a report from the vehicle recognition system at the port of Dover, which we understand covers a six-month period, is consistent with the trips indicated by the email exchanges. It shows the unit and trailer arriving at Dover from Calais on 21 July and 28 September as well as on 26 November 2015. It also shows the vehicle returning from Dover to Calais on 22 July and 29 September. (Two other trips are shown with a different trailer. We understand these to have related to a refrigerated trailer which some of the translated documents also indicate was leased to the appellant.)

29. The "Story of the Facts" described what happened as follows. It stated that the appellant received the order from Mr Del Pino on 20 November 2016 (this must be an error and should have read 2015), the consignor company being RM Multitrade S.L. Loading was on Monday 23 November at RM Multitrade Concept S.L. in Molina de Segura (the address provided is consistent with that on the business card) and the consignee and delivery address were set out, consistent with the CMR document. It

said that the goods were industrial machinery, and explained that months ago the appellant had already carried out other jobs for the consignor without any problem, and noted that the company had its own website, tax identification and "enterprises register number" and had paid what it owed (to the appellant) on time. It went on to say that loading commenced on 23 November but took many hours due to the size of the first machine (stated to be 9m long, 2.5m wide and 3m high), so the other two items had to be loaded the next day. The document stated that the three machines were all inside wood boxes that were "absolutely closed" so that the appellant could not see what was inside. Once loaded, the goods were secured and the curtains on the trailer were closed with a security cable and seal, which the appellant checked each morning on his journey, including on arrival at Calais where the French police made checks with dogs. The cable and seal had not been disturbed before arrival at Dover, when the seal was broken by Border Force officers. The appellant assisted the officers to open the top of the trailer, and was shocked when they found drugs and informed him that his vehicle was seized.

30. There is one clear inconsistency between the description in the "Story of the Facts" and the other evidence, namely the appellant's contention that the tanker was fully enclosed, in contrast to the Border Force evidence that it was surrounded by a wooden frame. We prefer the evidence of the Border Force on this point and find that the tanker was surrounded by a wooden frame through which it was partially visible. However, as discussed below this point was not relied upon in reaching the review decision.

Other documents considered in the review

31. In addition to the documents already described and correspondence between the parties, Mr Brenton considered an aerial view of the delivery address taken from Google Maps, x-ray images of the trailer (showing what appeared to be boxes inside a large tanker shaped object, in addition to two other items), copies of relevant entries in the Border Force officers' notebooks and the print out of record of travel referred to at [28] above. Mr Brenton also considered a document we did not see, namely a record of an interview with the appellant which was made in connection with the possible criminal prosecution which did not proceed. We should note that Mr Brenton's reliance on a document that was not available to the Tribunal is unfortunate: in principle the Tribunal should be able to review all the material that was available to the reviewing officer in order to conclude whether the decision was a reasonable one. However, in the event it appears that Mr Brenton only relied on one comment made by the appellant at the interview, and as discussed below that comment was picked up in the appellant's grounds of appeal and not disputed.

32. Mr Brenton's evidence was that the delivery address was remote farm buildings. We agree with Mr Brenton that the aerial image indicates that the site is rural and the relevant buildings appear to be in the nature of farm buildings surrounded by fields, with no indication of an industrial or warehouse site.

The review decision

33. Mr Brenton's review decision was made by a letter dated 19 May 2016, and concluded that the unit and trailer should not be restored. The letter summarises the Border Force policy in slightly different terms to the original decision, namely that the general policy was that vehicles used for the improper importation of prohibited drugs should "not normally be restored", but they might be at the discretion of the Border Force subject to such conditions as the Commissioners saw fit. It referred to the evidence supplied regarding ownership of the unit and trailer, namely that the appellant had extant lease agreements for both. It summarised the appellant's version of events and set out Mr Brenton's view that, although the National Crime Agency had decided that the evidence against the appellant was insufficient to bring criminal charges, applying a civil burden of proof the appellant had acted recklessly and was prepared to "turn a blind eye". Particular features referred to by Mr Brenton, as referred to in the review decision, were:

(1) the appellant was head hunted following a chance meeting with a driver at a service station;

(2) the terms of the contract appeared very favourable, with an upfront payment of €1,000 cash for "possible unforeseen circumstances" and a promise of payment for even "empty" return journeys;

(3) Mr del Pino's insistence on fitting a tracking device, which in Mr Brenton's opinion should have alerted the appellant to be vigilant;

(4) the fact that RM Multitrade was not based in Murcia (a Google street view check of the address appearing to show no company of that name operating there) but was instead registered in Malaga, with Mr del Pino not being recorded as an officer;

(5) Euro Auctions UK Ltd not having any address at the delivery point, and Mr Brenton's check with the company in Northern Ireland confirming that they had no facilities in Kent and that RM Multitrade never delivered machinery for them;

(6) the delivery address, to which two previous deliveries had been made by the appellant, was a farm building that had been leased to a Lithuanian individual; and

(7) the fact that the client had stated in interview that on the two previous deliveries which the appellant had made he had backed into the shed and been instructed to "take a walk" whilst unloading took place.

34. The review decision stated that the haulier had an obligation to make "basic reasonable checks" on the consignor and consignee, but in this case the appellant's culpability went far beyond that. The appellant had made deliveries to the same location on two previous occasions, and any reasonable haulier would have suspected that the deliveries were spurious due to the remote location and the probability that the persons who unloaded the trailer were Eastern European with no evidence that they were employees of the consignee or any evidence that the delivery location was a branch or facility belonging to the consignee. The decision went on to note that it was

probable that as a result of the appellant's actions around four tonnes of illicit drugs had been successfully smuggled into the UK and would cause significant harm. It concluded by saying that Mr Brenton had paid particular attention to the degree of hardship caused by loss of the vehicle, but stated that hardship would need to be exceptional for the vehicle to be restored.

Mr Brenton's evidence

35. Mr Brenton explained that he had had 44 years of experience as a Border Force officer, 28 of which was on front line duties and most recently as a reviewing officer.

36. Mr Brenton provided some amplification of the restoration policy. The general approach was not to restore vehicles used for smuggling of anything over around 2kg of illicit drugs. Restoration would however be considered on the application of a third party lessor in circumstances where the lease that was in place when the vehicle was seized had been shown to have been terminated, on the basis that in such a case the owner was an innocent third party. Restoration could also be considered where the person applying for it had made basic reasonable checks to identify the legitimacy of the load, and (if different from the applicant) similar checks on the driver. For other applicants who were not complicit in the smuggling, Mr Brenton would look at their level of culpability and whether a decision not to restore was reasonable and proportionate. Depending on the level of culpability it might be appropriate to restore on payment of a fee.

37. In this case the appellant had classified himself as an owner driver and there was also no evidence that the leases of the unit and trailer had been terminated. Mr Brenton had concluded that there was so many elements that should have alerted the appellant to there being something wrong that, in Mr Brenton's view, he must have been reckless. This was not simply a case of failure to make basic checks: in Mr Brenton's view there was a significant level of culpability. The particular warning signs that he emphasised in evidence were the inclusion of the tracking device, the beneficial terms of the contract involving advance payments and a promise of payment for empty return trips, the fact that the appellant knew from the previous deliveries that the destination was clearly an isolated area, the fact that checks on the named consignor and consignee indicated no links to the pick up or delivery addresses, and the fact that the appellant was asked to absent himself at the point of unloading. It was also out of the ordinary that the appellant obtained the contract through a chance meeting at a transport café. Whilst Mr Brenton had noted the apparent discrepancy between the Border Force's description of a wooden frame around the tanker and the appellant's claim that the object was entirely enclosed, he had not relied on that aspect in reaching his decision.

38. In Mr Brenton's view the installation of satellite trackers is commonplace for hauliers who employ drivers. An owner driver would not normally do it, because he would know where his own vehicle was. In Mr Brenton's experience he had never seen anyone ask for GPS to be installed by an owner driver when contracting for a load. Loads are usually insured, and there was a low risk of an owner driver disappearing with a load. In this case the relevant loading orders specifically referred

to the need for the carrier to hold goods insurance in order to receive payment. Mr Brenton also considered that the initial payment which the appellant requested and obtained prior to the first trip of €1,000, the advance of €950 before each trip and the promise of payment for empty return loads were very unusual. Hauliers would normally be paid in arrears and it would be up to them to arrange for a suitable return load if they could, if no load was available from the consignor.

39. Mr Brenton had done an internet check on Euro Auctions UK and had also telephoned them, and they had confirmed that they had no location at the delivery address in Kent as well as no record of the delivery. In Mr Brenton's view the delivery address was a classic location for unloading illicit goods. His information that the shed in question had been leased to a Lithuanian apparently came from prosecutors, who had also visited the site and had found it to be deserted.

40. Mr Brenton had also done an internet search on RM Multitrade but had not managed to speak to them on the phone. That search indicated that they were not based in Murcia but in Malaga, and his Google street view check on the Murcia address found that it was a small industrial estate with, so far as he could see, no indication of the company's presence (although he accepted that Google street view was not comprehensive). Mr Brenton commented that it was quite a common practice to hijack legitimate companies' names for smuggling purposes, and he thought that this had occurred here in relation to both the consignor and consignee.

41. In Mr Brenton's view the appellant should have watched the unloading. As an owner driver he should certainly have been concerned about his own unit and trailer. In addition Mr Brenton believed that CMR instructions require that a haulier should be present for unloading. He understood that this sometimes causes difficulties where the driver cannot readily watch unloading for health or safety reasons, in which case the standard practice is for the driver to remain in his cab and make a note of that fact.

Submissions

42. The appellant's grounds of appeal submitted that the review decision was based on mere suspicion and not on evidence. Mr Brenton had relied on (a) the appellant having "turned a blind eye" to the situation, (b) his having made two other journeys for the same company and therefore probably having delivered other consignments of illicit drugs, (c) a view that the appellant should have had suspicions because the contact addresses for the consignor and consignee were incorrect, (d) being told "to take a walk" when unloading, (e) the unloaders being Eastern Europeans, and (f) the installation of the tracker device. In response to these points it was submitted that (a) the contents were wrapped up in wooden boxes and sealed from loading to destination, (b) it was correct that two previous deliveries were made for RM Multitrade, but on one occasion the load was scanned by the Border Force with no issues raised, (c) whilst the Border Force could research the status of the consignor and consignee there was limited scope for the appellant to do that, and in any event the consignor was recommended by a colleague, (d) usually loading and unloading takes hours so the haulier does not remain, and in any event the contents were enclosed in boxes, (e) this was a racist reference and it was probably the case that

most loaders in the UK are foreigners, and (f) the appellant thought that the device in the truck was there to control him. The grounds of appeal also refer to the return trip not being an empty trip, to the fact that the appellant "has been refused charge" so that the seizure was illegal, and conclude by asking for the unit and trailer back so that the appellant could do his job and feed his family. We understand the reference to being "refused charge" as being to the decision not to bring criminal charges against the appellant.

43. Mr Rainsbury for the respondents submitted that there was a compelling case that the appellant had not discharged the burden of proof to show that no reasonable decision maker could have arrived at the decision not to restore the unit and trailer. The policy applied by Mr Brenton was a reasonable one which was deliberately designed to be robust, in pursuance of a legitimate aim. Mr Brenton had not proceeded on the basis that the appellant was complicit in the smuggling, but on the basis that he acted recklessly and turned a blind eye to a number of "red flags", namely the manner in which the appellant was approached, the contractual arrangements, the tracking device, the suspicious destination which would have been seen on previous trips, and being asked to "take a walk" during unloading. There was also no sign that the appellant had undertaken any further checks on the companies or sites.

Discussion

44. As previously noted, the Tribunal's powers are limited. We must dismiss the appeal unless we are satisfied that the decision not to restore the unit and trailer could not reasonably have been arrived at. The burden of proof is on the appellant. In our view the appellant has not demonstrated that the decision was unreasonable in the relevant sense.

45. The restoration policy applied by Mr Brenton (described at [36] above) is not an unreasonable one. It clearly pursues a legitimate aim. Drug smuggling is a major problem and it seems to us to be reasonable that restoration can be refused, or permitted only on payment of a fee, in cases where the person seeking it is not knowingly involved in smuggling but has some level of culpability. Whether refusal to restore is proportionate in any individual case will obviously depend on the extent of that culpability. But it is certainly not the case, for example, that the fact that the National Crime Agency chose not to bring criminal charges against the appellant means that his vehicle should now be restored.

46. We consider that Mr Brenton's conclusion that the appellant had effectively turned a blind eye was a reasonable one for him to have reached in the circumstances. Overall, we also consider that he took into account all relevant considerations and did not take into account irrelevant considerations, and that the refusal to restore was proportionate. Whilst, if we had been reaching the decision ourselves, we might have placed less weight on certain factors than Mr Brenton appears to have done, that is not the test we must apply. In our view Mr Brenton was entitled to have regard to the factors he did and his decision was well within the bounds of reasonable decision making.

47. In a little more detail, in our view it was of particular significance that the appellant had made two previous trips to the same delivery point, which is quite clearly in a remote rural location. A delivery of heavy industrial machinery to such a location, with a definite promise of a return trip from the same place (see [25] above- "UK trips always involve a return leg of freight loaded at the destination itself…") is extremely suspicious. Similarly, the appellant being asked to absent himself during unloading (a point which Mr Brenton appeared to have derived from the interview notes that we did not see, but was clearly not disputed by the appellant since it is reflected in the grounds of appeal). We do not accept the appellant's contention that a haulier, particularly an owner driver, usually does not remain during unloading. This point is particularly marked in circumstances where, at least on the first trip, the appellant would presumably have known nothing about the delivery point or the individuals handling the unloading. We also regard the appellant's initial request for an upfront payment of €1,000 as very suspicious, and accept Mr Brenton's evidence that the upfront deposits of €950 and the promise of payment for empty return trips were out of the ordinary.

48. The appellant's grounds of appeal objected to the reference in the review decision to the persons who unloaded the trailer probably being Eastern European. In our view this was not intended to be a racist reference but rather to Mr Brenton's view that there would have been no evidence that those unloading the trailer on previous deliveries had any connection to the consignee named on the CMR. In the context of Mr Brenton's view that there was no evidence that the delivery location was a branch or facility belonging to the consignee, this was not an unreasonable comment.

49. The appellant also argued in the grounds of appeal that he thought that the tracking device was there to control him. However, we think that Mr Brenton was entitled to conclude that the requirement to fit a tracking device was unusual. We note that this is particularly so in this case given the nature of the loads being carried as far as the appellant was concerned, namely heavy machinery (rather than, for example, alcohol or other small items of high value).

50. The appellant also objected to Mr Brenton's reliance on the contact addresses for the consignor and consignee being incorrect, claiming that unlike the Border Force he had limited scope to research their status, and in any event the consignor was recommended by a colleague. Whilst we would not necessarily have placed as much emphasis as Mr Brenton did on the appellant's apparent failure to run any checks on the consignor and consignee we do think that it was a factor that Mr Brenton was entitled to take into account. The appellant also gave no indication that the "colleague" who put the appellant in contact with Mr del Pino was someone he knew sufficiently to be able reasonably to rely on his recommendation, as opposed to someone he met by chance as surmised by Mr Brenton.

Disposition

51. The appeal is accordingly dismissed.

52. 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 rules. 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.

53. Alternatively, since the appellant was not present at the hearing, a party may apply to have the decision set aside under the Tribunal rules. The Tribunal would have a discretion to set aside the decision if it concluded that it was in the interests of justice to do so. A party wishing to apply for the decision to be set aside must apply in writing to the Tribunal within 28 days of the date of release of this decision.

SARAH FALK

TRIBUNAL JUDGE
RELEASE DATE: 4 MAY 2017