> further information, i.e. the information that you requested. So, that is the information that I have requested and then sent through to our counsel."

Evidence on seizures

225. Mr Germaney did not rely on the blue folder documents in making his decision. He did rely on the intelligence briefing so far the relevant notes from the briefing were set out in his witness statement (except as regards an incident involving Limoncello which he had set out from the briefing notes but he did not in fact take into account). He was questioned about the seizures at some length.

226. On the first seizure in 2012 he was asked how he considered it relevant to his decision that there was evidence of re-use of six ARCs. He said:

> "The seizures had already happened, so I could not make any difference on the actual seizure itself, but the information that has been to me saying that [CW] was the consignee and that was their involvement with this."

227. He was asked if he meant that it was relevant only that CW were declared as the consignee. He said:

> "As far as I was concerned, with the information that was on here, these goods were destined for [CW] and as I see it, they would have ordered these goods, so they would have instigated this movement of goods and this movement has then been a point of abuse and misuse where there are six other ARCs being - well, evidence of re-use on six other ARC numbers, so six other movements of goods."

228. It was put to him that the only reason for his decision was because CW had bought the goods and therefore instigated a movement of goods. He replied that "this movement would not have happened if [CW] had not instigated it, so yes".

229. He was asked what CW could have done to have been aware of this alleged re-use of ARCs at the time. He said he "would have assumed they would have been aware of the movement of goods to them" but he was not sure what involvement they would have had with the other aspects of that fraud. It was put to him that he had no basis for thinking that if there was a re-use of ARCs, CW were involved in the fraud aspect of that. He said there was "no indication as to how involved they were with this, no".

230. He was asked if he made any enquiries at the time to get more information on the seizures. He said "yes" as he put it to CW in the warning letter and confirmed he did not take any further steps other than looking at the information CW presented. He was asked if he was saying that it was sufficient for CW to be considered a serious risk that they happened to be the purchaser of goods in a movement where there had been a seizure. He replied:

> "Yes. It takes certain different parties to be involved and create such a movement. As you are probably aware, you need a purchaser and sales, and a supplier, sorry, and a purchaser, and a haulier as well, and there are all different aspects to this one movement that creates that. It is not just one person does everything…"

231. He was asked again if there was anything that CW could have done to have been aware of the re-use of ARCs (if that was the case). He said that as soon as they were notified of the seizures he assumed CW would have made enquiries with the people who they were purchasing from and, if they were not involved, with the haulage. It was clarified to him that the question was what CW could do before the seizures and he said "no. No one would have been aware of any wrong-doing before the interception".

232. He was asked if the position was the same as regards the second seizure, namely, that it was relevant because CW was the consignee and the other information set out in the intelligence briefing was not relevant. He said that "obviously, it is all relevant, and I take that into consideration, but as you say, [CW] were the consignee on the paperwork and ……these notes, they suggest that is where the goods would have gone to." He was asked again what other information was relevant. He said these were the "full notes that I was provided with, so that is why they are there" but when pressed again said "Yes, it was [the] consignee point; yes."

233. He was asked essentially the same questions as regards the third seizure, as to whether it was just the consignee point or there was something else of relevance and he said, as this was the third time, he would have expected CW to make changes to avoid this:

> "Yes, the third point, a third seizure for the same taxpayer, I could not discount that, because it was a series, apparently, of inbound fraudulent movements of goods and I would have expected [CW] to have increased their due diligence or different aspects of their trading to be able to make sure that this did not happen again. Maybe change suppliers or discuss the issues with their suppliers and put in place proper procedures to make sure it did not happen again, but it has, so I could not discount that."

234. It was put to him that he did not take any steps to establish whether or not CW was at fault in relation to this seizure. He replied that it was "not about fault, it is about that these issues were attached to a reason, going to Corbelli as consignee, again, and it is concern that a pattern was emerging over three different ….times." It was put to him that he considered it to be irrelevant whether or not CW were at fault. He said "no" because he knew they would be given a chance to represent themselves before the decision was finalised. He could not remember what representations they had made on that.

235. He was asked repeatedly if he was assuming CW were at fault. He said:

> "seizures have been made, yes, and I cannot change the goods being seized and who was involved in those seizures and they were involved…..The liability aspect is a bit different, it is a bit more, there are different liabilities within - as I say, there are different people involved in the movement of those goods and it is not one person's fault or another. Everyone has a part to play, I believe……All I was stating here was that these seizures had happened. That was out of my control …..I am saying that these seizures - that [CW] had been involved with these seizures and that is what I was putting to them."

236. He continued that he would try to put that into context:

> "the fault is not necessarily the be-all and end-all of an aspect of this, because there are different parties that play different parts within it. So, that would then have to be considered with a representation as to how involved they were with it, because it is a matter of involvement rather than fault, really, I think. It would be wrong for me to say they were not at fault, because they clearly are. There have been three issues, movements of goods which have been intercepted. If they were not intercepted from what I can see, they would have arrived at [CW] and the issues would never have been unveiled, potentially."

237. It was noted that he had just said clearly CW were at fault so he seemed to be saying there was an element of fault. He said that "probably that is the best I could say, if that is sufficient." He was asked if the basis on which he concluded or assumed there was an element of fault was simply the fact that CW were the consignee. He said:

> "From the evidence I had been given here, yes, and then present that to them and for them to be able to respond to that…..I do not assume; I go from the information that is provided here [meaning in the notes from the intelligence briefing]."

238. It was put to him that if a business orders goods but could have no way of knowing whether the ARCs have been used multiple times before the seizure happened, it is irrelevant to the risk that business poses to the revenue that the seizure has happened because there is nothing they could have done or known in advance. He replied:

> "That is not quite right, no, sorry, from my experience when we have to deal with these things, with seizures…. there are different aspects to it. You have a person selling it and a person buying it and the haulier as well. So, there is never one person that can take blame from this and it is a question of a shared liability until they can disprove that, from my point of view. We have to consider everyone being involved in it as potentially liable."

239. It was put to him that there is a difference between liability as a matter of law, and whether the person is at fault or to blame or has caused the seizure and the relevant factor here was not whether CW happened to be the consignee but whether it was at fault or to blame or caused the seizure. He said:

> The relevant factor, really, is that the goods were seized and there was an issue with the goods that came in and the movement of goods, sorry. That is the real relevant factor.

240. He was asked if he asked CW whether they had changed anything to do with these supply chains. He said it was put to them in his letter. He was referred to their response that after the third seizure they changed haulier and it was noted that since then there had been no more seizures. He was asked why in such circumstances the three seizures were relevant to his current assessment of the current risk to the revenue. He said it made up part of his consideration:

> "The seizures still happened. They reacted after the third seizure, so it still played a part in my decision on their ability to be able to control their movement of goods….I was concerned that it took a pattern to do

> that, to be honest. I would expect that sort of thing to happen after the first seizure. Any company that has a slight inference of fraud being attached to them, I would have expected a strong reaction, like this, after the first seizure."

241. It was pointed out that CW's evidence was actually that they did change transport companies after the first seizure. They used an agency transportation company for a period of time, and that is when the second and third seizures happened, and that subsequent to the third seizure, they now have two transport companies upon whom they performed due diligence and they have not had a single seizure since. He asked whether, in those circumstances, he agreed that the historic three seizures were now an irrelevant factor. He disagreed:

> "They were not irrelevant, because they displayed how they reacted at the time, so they need to be put in. Again, I would have expected that after this, what they presented in the third - sorry, this last witness statement here…..I would have expected that to have happened after the first seizure. My concern was that it happened, that they discussed it with their supplier from what I understand, and they changed the transporter, and it happened again after that. There was clearly something going wrong with their supplier, which meant there was something wrong with their due diligence checks with their supplier and/or the arrangements that were being made…..that is one of the things that was not changed and it happened again. To me, that suggested that there was something more than just the transporter at fault here."

242. It was noted that he had said previously that he could not apportion blame but now he was blaming the supplier. He said he could not apportion blame initially but then this information was presented by CW afterwards (in response to his letter) as regards changing their haulier but "the actual other aspects of the supply had not been addressed and then, with it happening again, from the same supplier, I understand that could be a further issue to have looked at and addressed".

243. He was asked how he knew it was the same supplier. He said he assumed it was the same supplier because CW said it had changed the haulier but did not state any change of supplier as well. He said he was not saying it was specifically the supplier who was to blame "but there were aspects that had not been addressed. The only part they had addressed was the haulier, as they saw them as the problem. But then there was a second seizure, as it happened, so I assumed with the information that I had, that it was the same supplier……..that they certainly had not addressed any issues that the issues were not with the suppliers." He again said he assumed it was the same supplier because CW had not "presented any information to say it was anything other." He had not asked specifically but was "just reacting to the information that was presented to me. That was it. I did not follow anything else up from that".

244. He was asked again why in these circumstances the seizures were relevant. He said:

> "When I was making my decision, I have to take in all aspects of compliance issues that have happened in the past. These were seizures and evidence of tax losses that, in my mind, [CW] have been involved in. So, that could not be ignored and I provided them with that and

> they came back with evidence to say that it was not - they were not involved and it was not their fault, but from my mind, I think more could have been done after the first seizure, and the third seizure, I believe, is - granted there have been no seizures since then, so things have changed, but these have still happened and these are still part of their history, their tax history, as far as I am concerned, and as far as we are concerned as HMRC, that needs to be taken into consideration."

245. When asked the question again he said these were not the only issues; it was not just these seizures but also the issues of other goods being improperly imported. He then said that "whilst changes had been made with regard to the seizures, there were still issues ongoing with subsequent movements of goods into the UK, movement of their excise goods. So, I consider this to be a part of their history and demonstrating that tax issues are not just a one-off problem." He remained of the view that the seizures were not irrelevant:

> "From the information that was presented afterwards, I think a decision would have had to have then depended on anything else that was found, and that is what we look at. It is not one thing or another. It is not that is wrong or that is wrong; we look at it as a whole, and that is how we have to make our decision in that respect. So, we have to take these into consideration. If these were alone, on their own, then perhaps my decision may have been different."

246. He did not accept that the seizures were irrelevant if they were the only factor because:

> "it is a tax loss and we cannot ignore tax losses or indication of fraud or potential areas of fraudulently activity within a company, so we had to consider those…..it showed a pattern of risk throughout their trading. Sorry, the risk here that we are looking at now, in isolation, it was a risk a number of years ago now, but since then there have been other issues as well. So, to me this just demonstrates that it is not one or another; there are a number of things which change and the risk is there, and that demonstrates the risk previously and that the risk changes, and that is what we need to take into consideration. That is why I needed to put it in my refusal, to show that that is what I was looking at and that is one of the reasons that I considered the refusal."

247. It was put to him that surely the fact that CW recognised a potential issue and made a change should stand to its credit when he was assessing its credibility and risk to the revenue. He said he was not saying that CW had not made changes "but when there have been three seizures involved with their goods it shows that it is was not sufficient; it was not enough….I could not rule out what had actually happened. They tried to make some changes and it still was - there were still seizures, there were still issues with fraud, fraudulent diversion of goods coming into the country, and that cannot be ignored." He later said that the fact they had made changes was not "sufficient enough to take away the whole issue that they were still involved in those movements and still involved in the fraudulent movement of goods, albeit the consignee and the original purchaser of the goods".

248. It was put to him that he did not really care what CW said in response to his warning letter as regards the seizures. It did not matter what they told him about what

had changed. His decision had already been pre-determined and he was not interested in what CW had to say. He said he "could not change the outcome of the seizures, and that there were tax losses involved in that. I could not change that" and whilst there were changes which was a positive "there were still tax losses and I was required to put those in as part of the decision."

249. It was put to him that he had absolutely no basis for having the opinion that CW, on the basis of these seizures, continued to pose a significant risk to the revenue. He said that "at the time, I was concerned that it had happened before and the potential was for it to happen again". He said the fact he was interested in CW's representation on the seizures was demonstrated by the fact that he mentioned the change in haulier in his decision.

Movement of goods to SC

250. Mr Germaney confirmed that CW had told him the advice line was contacted as regards the movement to SC when he visited them (as set out in the notes of the visit set out above). He was asked whether, on that basis, he believed that CW honestly believed the movement was lawful. He said he believed that:

> "they had done something which was wrong and whether it was lawful or not, it was not my opinion to make at that time, because that needed to be dealt with by another officer. I was there for the [AWRS] decision. I had identified this as an issue and had to bring it to their attention so that it could be dealt with properly. I would not be dealing with any further instance from that, but I would have to take their actions into consideration."

251. He continued that it was not something that he asked them straight out "do you believe you could do it, because they clearly have done it, and that was for questions to be followed up with another officer who would be dealing with penalties". He issued the human rights sheet so that they did not need to say anything and if they did, then it was being dealt with properly. But he wanted to let them know that that was a serious issue and it was up to them how much information they presented. He noted that Mr Guiseppe Corbelli wanted to talk to his brother, who he said had got the information on that, and so he allowed them that opportunity to go away and be able to take and get as much information as possible so that they can present that: "So, I was not making a judgment there and then on that……My understanding is that they had done it, and so they clearly thought they could."

252. He was asked whether he considered and formed an opinion upon whether the applicants believed what they had done was lawful by the time of his decision. He said that by that time a lot more information had come to light and:

> "I believe that they had ignored certain information that was out there and they had gone ahead and done what they wanted to do, which was effectively circumvent the approval system and their own approval system, their duty suspended import of goods, as well as their holding of the goods within their warehouse and a misuse of the transport to the subsequent warehouse as well. All of those factors, if the goods ……they would have been liable to forfeiture, because they had not accounted for duty, so they were clearly serious matters."

253. When asked again, he said that the applicants had not presented anything to him which would have made him think that they did think it was lawful. On the basis of the information presented to him at that time (bearing in mind that another officer was considering penalties and other aspects of sanctions) for the AWRS decision, his interpretation was that:

> "they have gone around their systems. They have ignored a lot of information that is clearly out there and through ignoring that they have undertaken movements which were not legal."

254. It was put to him that if CW thought it was lawful then they were not attempting to circumvent anything. He said:

> "in ignorance maybe….I believe they have done it - I think the reasons for using that was to try and get around some of the restrictions. Whether that was lawful or otherwise is, I think, a different matter."

Movements to SC - calls to HMRC

255. It was put to him that it would have been relevant for him to investigate what the HMRC advice line had said. He said again they were "clearly trying to get around some restrictions and they are trying to put it as if they have done it lawfully". As regards the inquiries to the advice line, he did not know "what they asked or how that was put to them, and that would have been one of the things we would have wanted from them to present to us, saying what have you actually asked and what evidence can you provide for that. Then, we could follow that up with our advice line."

256. He was asked why he needed something more from CW to follow matters up with the advice line. He replied that "at the time, I did not have a date or time or whenever the contacts were made. Mr Giuseppe Corbelli, at the time of the visit, stated that he would get more information from his brother" and because there was an issue with the penalty, he "was not going to force the issue any further at the time of the visit".

257. He was taken to the letter from Mr Curley of 13 December 2017 in which he noted that CW said they took advice from HMRC and that no doubt Mr Germaney could obtain the transcripts of the calls. He was asked why he had not done so. He said he thought there was "an issue of what advice had been and the issue cannot be ignored really". When the question was put to him again he said:

> "I did not have any further information to go to the advice line with regard to the dates and times from this letter. I could not go to the advice line and say, "I want a transcript of all information." I would need to have dates and times of when that call took place, be able to get the transcript from the advice line."

258. It was put to him that he could have asked for the dates and times of the calls but he just thought: "No, I am not going to make any enquiries?" He said:

> "No, it was not just for me. Another officer was looking into it as well, dealing with that aspect…I had sent a reference to another officer in another team to be able to deal with this, because it needed follow-up work to get to the bottom of the actual issues behind it…It is officer Ranch who has followed that up."

259. He confirmed that Mr Ranch was dealing with this separately as regards potential penalties and again said that he had not made any further enquiries "because it was being dealt with under the separate penalty" he was looking at and he knew that the officer would be able to advise him if anything was found. He said he thought the calls to the advice line were not relevant:

> "I believe that we had sufficient evidence to show that the issue had already transpired. They had made their decisions. Why they made the decisions, on what information they presented with regards to the advice line, I did not believe to be particularly relevant to the issues that had actually happened, because it is clearly documented otherwise that they cannot perform what they have performed. So, I think any attempt of ringing the advice line would be to try and find out how they can get around those issues."

260. He was asked if he was saying that it was the fact of these allegedly unlawful movements that he was relying upon and it was irrelevant what basis CW thought they had for the movements. He said:

> "Sorry, the information was already out there and quite clear within the public notices, which are readily available to them. They had been operating the [RC scheme] for a very considerable amount of time and also the warehouse as well. This is something which they have never done before and I would expect them to have gone to their public information first and looked at - their knowledge of operating the scheme."

261. He was asked if he could see no difference between a trader who had done this allegedly unlawful movement on the basis of advice from HMRC's own advice line and a trader who had done this movement without any such advice in terms of the risk that person poses to the revenue. He replied: "No. For this circumstance, no."

Movements to SC - Transcripts of the calls to HMRC

262. Mr Germaney was then questioned about the fact that HRMC had disclosed transcripts of the calls which CW made to HMRC on 24 and 28 July 2014 but not the call made on 31 July 2014. He said that he believed there was no transcript of that call; that is what he was told by Mr Ranch. He continued that:

> "I cannot say anything other than that it is - it would have been easier for all parties obviously to be able to see it, but I understand there was a technical glitch with the system at that point. That is what I have been told by officer Ranch, who has been trying to get the information himself, because he needs to consider it obviously for part of his considerations for the penalty aspect of things as well……."

263. He said that the transcripts were provided and requested he thought a week or so ago – he could not remember when it was as "there have been so many bits of paper that have been asked for recently". He said he had not asked for them earlier as "I did not need to see them, really. My decision had already been made, so". It was put to him they were plainly relevant to CW's case. He said: "for the penalty, yes, but not in my mind for the [AWRS refusal]….. Yes, the actions had already taken place and so…" He was asked why last week he had changed his mind. He said: "For disclosure purposes, for the tribunal, just so you were aware of everything that had

happened…..I have not considered these transcripts and I have only just received them."

264. He was asked when he decided that the documents were relevant to the appeal. He said:

> "I assume when it was brought to light, when the solicitor was saying it was still required. It was not something I considered in my decision. It was not an issue and I was not following this up. It was another officer who had dealt with this aspect, so it was not at the forefront of my mind to put this in. I am not trying to mislead anyone at all. I apologise if that appears to be the case."

265. He confirmed that he was saying that the reason he decided they were relevant to the appeal was because the Solicitor's Office told him that they were relevant.

266. It was put to him that it ought to be have been obvious to him and it was obvious to him "from the get go, from any point during this inquiry, but particularly once you got the representations, that those phone calls were relevant to CW's case, were they not, and you knew that?" He said:

> "I cannot say that I did not know that, but it clearly was not part of my decision-making process, so I was not considering them as being relevant until I was told, obviously, aspects need to be put in there, and this was one of them."

267. It was put to him that he must be saying he did know they were relevant. He said:

> "Again, this was not relevant to the decision that I was making. So, whilst I agree I needed to submit everything, whether it was considered or not, relevant or not, that is why they are in here, from what I understand of the information that has been retrieved. So, we need to submit that, but it did not form any part of my decision-making process for the [AWRS] decision. So, it is not a matter of whether I was trying to keep things out or not, it is just something that was not - in my mind I did not think I needed. I had not really considered it is probably the best way of answering it."

268. It was put to him that he did know they were relevant but decided not to disclose them or seek any means of acquiring them before last week and that is why CW only got them at a very late stage. He said "I am sorry, that is not true."

Movements to SC – Maskew visit notes

269. It was put to Mr Germaney that CW's position was that, at the visit by Mr Maskew, which took place between the calls referred to above, the issue as regards the movement to SC was raised and Mr Maskew nodded along and did not disagree with CW. He agreed CW told him when he was dealing with the AWRS application that the issue was discussed with Mr Maskew. He followed up on that. Mr Maskew works in the same office, so it was easy for him to talk to him about that and get the information.

270. He was taken to the email from Mr Maskew of 26 September 2016 in which Mr Maskew sent him the case flow reference (as exhibited to his witness statement). He said that he then followed that up by looking at the case flow, the system which

contained the Maskew notes, and he had taken those notes into account. He said that he assumed officers attending a visit would make hand written notes of the visits but those notes are not scanned and added to the case flow: "We do not scan our notebooks as a rule. We generally write up the notes and this will be what was written up from their notes from the notebook."

271. He was asked again why he had not disclosed the Maskew visit notes earlier at the time when the email correspondence was disclosed. He said he had not printed it off and he could not see any relevant information in there:

> "I did view the report, but I did not make a print-off at the time I viewed it, but obviously I made reference to it in my decision. That is all there is to it, to be honest. I am not trying to hide anything. Hence it has been disclosed. The system is not particularly great when it comes to trying to extract information from it. There was not anything within that that positively helped the case. There was absolutely no information in there with regards to that from what I could see. So, I did not make a copy of what I looked at the time, and as I have not made a copy, that is why it ended up getting left off the disclosure, but it has been disclosed now and there was no intention to try and keep this out at all."

272. It was put to him that it is very difficult to believe that in compiling the exhibits to his witness statement, which included the email from Mr Maskew, that he did not realise at that time that he should have disclosed the Maskew notes. He repeated that he had not printed them out "so there was not a document there. It was someone else's report" which he had looked at. When pressed again he said:

> "because I had not printed it off…….. there was not anything there that was relevant to Mr Corbelli's account, almost in the negative, there was nothing there that suggested they had had that discussion. If there had been something there, then I would have been able to print that off and highlighted it and that would have shown what Mr Corbelli was saying was correct and we would be able to follow that up then."

273. It was put to him that if (which was not accepted) there is nothing in the case flow that supports CW's case, that would support HMRC's case. He agreed that was the case and he had taken that into account in making his decision.

274. He was asked whether, given he expected there to be handwritten notes of Mr Maskew's visit, he made any enquiries to obtain those notes. He said he had not because he had the typed up account of the visit. It was put to him that the typed notes show that the visit lasted over an hour but there are only three paragraphs of description, two of which are quite short and so it appeared that the typed notes were a highly compressed account. He agreed it appeared so.

275. It was put to him that as CW had said they had a discussion with Mr Maskew relating to the movements to SC it was highly relevant to go and look at the hand written notes of the meeting which would contain more detail. He said that the report included the aide memoire as well as the typed notes and he took it the typed notes were taken from the officer's notebook and all the other information was on the aide memoire. He concluded that he did not see any need to go and look at the notebook from which this summary was taken:

> "The information was there. I looked through all the information and officer Maskew had confirmed that there did not appear to be anything else there…..I just assume that any officer would put all the information down on their visit report and clearly, if there was an issue that had been raised during the visit, then that would have been in the report as well, or another report which officer Maskew could have disclosed to me, but that was not the case and officer Maskew clearly overlooked his notes as well in his communication to me and said there does not appear anything there and from his memory he could not remember anything either."

276. Mr Firth referred to the typed notes from which it was apparent that CW told Mr Maskew they needed the WOWGR as they were reaching the duty deferment limit and asked Mr Germaney why that does not support CW's case. He replied that the WOWGR application and movements to SC were two completely separate matters:

> "A WOWGR….would allow them to hold goods under duty suspended in a warehouse…..They have an account at [SC] which is where they would store their wine, there. That is what would allow them to store spirits there as well. They cannot at the moment, but with the extra statutory concession for wine, you do not need a WOWGR to store the wine under duty suspension at that warehouse. That is how I see this. They are trying to bring duty suspended spirits into [SC], to their account there, and hold the goods there and that is what this WOWGR would have allowed them to do. That is not the same as bringing goods into themselves under the [RC scheme], under duty suspension, not accounting for the duty and then using their own warehouse winery approval number to move it under duty suspension to another warehouse. They are completely separate."

277. He continued that CW did not state at the meeting with Mr Maskew, so far as he could see from the typed notes, that they had already made movements of wine to SC under their wine approval. He said he did not understand "why they would apply for a WOWGR for something that they were already doing and intended to do irrespective of having the WOWGR".

278. It was noted that CW's evidence was that the WOWGR application was made as regards spirits as the applicants thought they did not need an approval for wine and it was more cost effective to move spirits rather than wine. Mr Germaney said he understood that was what they were saying but he regarded these as "completely separate issues", meaning the WOWGR procedure and the movement to SC. He did not understand how the two could be mixed up.

279. Mr Germaney was asked why Mr Maskew was not before the tribunal. He said he did not see why there would be any need for him to attend but if there is an issue with the tribunal believing what he said, then maybe it would have been beneficial for him to attend but he had no control over who gets called.

280. It was put to him that the Maskew notes should have been disclosed sooner and the reasons why they were not was because they seemed strongly to support CW's case. He said:

> "I do not see it supports their case at all, sorry. I see completely the opposite. So, it would have been beneficial to me to disclose this as and when it was required, so there is no malice behind this at all."

281. It was noted that he referred in the decision letter to excise notice 163 which refers to the fact that a business is not allowed "to receive in duty-suspense wine not previously produced on your licensed premises in a ready state for sale". However, CW did not receive the goods under duty-suspense with their wine approval; they received them under their RC approval. The issue was that having received the goods initially under that approval, CW used its wine approval to move the goods under duty-suspense from their warehouse to the SC. That paragraph does not address the issue of whether wine can be moved to another warehouse under duty-suspense. Mr Germaney was also taken to paras 3.5 and 23.1 of the notice which it was asserted gave the impression wine would be moved under duty suspense.

282. Mr Germaney said the notice sets out clearly that a business cannot receive anyone else's goods in duty suspension under a wine approval and, therefore, if it is not authorised to receive them, it does not have authority to then send them out. As regards the fact they were received initially by CW under its RC approval he said "they were not entitled to even hold those goods…..You miss out an important part that they are not allowed to hold under duty-suspense the wine that they receive as a registered consignee." He continued:

> "But they did not complete the registered consignee conditions which is account for the duty. So, this should never have happened at all. The only way of them being able to receive these goods in the manner they did was by ignoring their obligations under the [RC scheme], which is account for the duty. As soon as those goods were received and were not accounted for, a duty point was created and those goods, no matter what else they find to fit the scenario that they have dealt with it under, would be liable to forfeiture. Even in a bonded warehouse they would have been liable to forfeiture, because they would have passed a duty point after the first obligation which would be to account for duty on those goods that had been imported under the [RC system] once that had been ignored."

283. He was asked whether he could see that irrespective of the correct legal position, it is plausible that someone, such as the HMRC advice line or Mr Maskew, could misconstrue what the law requires (if it is indeed misconstruing it) and conclude that what was happening was perfectly fine. He said:

> "I can see you have picked out specific circumstances which would suggest that, but you have had to go quite deeply into notices to get that. If that is the case, then I would have expected them to have done the same with the [RC approval] as well, and not ignore that."

284. As regards the WOWGR application Mr Germaney was asked if any of the comments set out in his letter were relevant factors in making his decision. He agreed that the WOWGR was rejected on the grounds that the due diligence was provided in Italian was not relevant nor was the fact that appellant did not challenge that decision. He mentioned the rejection of the WOWGR application as:

> "a build up to them dealing with, I believe, moving into the - or taking the decision to go into the movements without the proper approvals or abuse their approvals that they had, which is why I suggested it, and showed it as a build up to that."

Errors and due diligence

285. In cross examination Mr Germaney accepted that many of the administrative errors he had identified were no longer relevant or were not in fact main or even any factor relevant to the decision.

286. Whilst it would remain to be seen how credible the stock control system introduced by CW would be on future visits that was no longer a relevant item as regards his decision. He accepted that the errors were minor clerical errors which were sufficient to bring to light as potential concerns but from what he saw there was no loss of revenue. He confirmed he had only identified one occasion when an incorrect duty rate was recorded and on that occasion the error was in favour of HMRC. He had investigated the credit note he had taken away but had not received any response so that was also not part of his decision. A discrepancy in a manual spreadsheet compared with EMCS was also something to be monitored for the future rather than a reason for the refusal. He confirmed that as regards his comment that CW could not provide full payment details these had been provided subsequently.

287. As regards the currency converter issue he confirmed that the concern was that there was no specific invoice reference on the payment transfer. It is a matter of making sure the correct payments are referenced to the correct invoice. He agreed it was not on its own a reason to refuse an application. He was questioned about why he had said in his witness statement that there was a contradiction in the currency position. He said:

> "What I thought then, to complete that payment, you would have to put more money in. Obviously, their supplier is waiting for their money. I would assume that would need to be done within a timely manner. That takes away an element of the control of being able to purchase the right exchange rate for what they wanted. So, to top that up, they would have had to have accepted the exchange rate at that time, rather than them being in control of when they actually put the money in and what exchange rate they bought. So, in my mind, at that point, it just took an element of control out of it."

288. It was put to him that did not mean there was a contradiction. CW put in say £50,000 at which point it obtained a good exchange rate. CW may have to top up at whatever the prevailing rate happens to be, but CW still has the benefit of the exchange rate on the initial £50,000. He said:

> "Yes, but it was the top-up point……, it was put across as if they do that because they get the best rates and they said it is a better rate, regardless of when they actually buy it. So, at the end, I suppose that did not really matter, but that is what was my thought process at the time….. If they say that they always get a good rate no matter what, then that is what they get, but the way they were explaining it to me was that they use that to try and get their best rate possible and having to top up at a time that takes an element of choice out of it."

289. He was asked how that was relevant to his decision and he said "on its own, it is not relevant on its own". He did not accept it was completely irrelevant, however, as:

> "it builds up a picture of the trading practice and with regard to the payments and how payments are made……..It just demonstrates the way they trade and that is what I was putting in there…..it demonstrates the way they trade, which is the way they make their payments to their suppliers."

290. He agreed that HMRC were no longer seeking to rely on any due diligence issues.

Debts

291. Mr Germaney said that, as Mr Guiseppe Corbelli was the director of Castillo, "he is responsible for that company, so we consider all aspects of compliance and risk to the revenue for those people who are within the company". He noted that Mr Corbelli explained to him during the visit of 6 June 2016 that the company was being wound up, but he was still looking to maybe move on with the bar but try and do something different with it. It was later clarified that there was another company to take over the lease of the bar and Mr Corbelli was not going to carry on the same business.

292. He confirmed that the assertions that HMRC had not been able to speak to Mr Corbelli despite numerous attempts to contact him was taken from the notes/intelligence briefing. He did not know where the team that produced the notes got the information from other than that it would be from HMRC's systems.

293. He was asked why the debts were relevant to his decision. He said:

> "I have to consider all aspects of risk and potential risk to the revenue. This was clearly something which needed to be considered. One of the partners of the business, under another business, had run up debts and it appeared that the debts were difficult to get and be able to obtain, so I think it is a clear risk or potential risk for the future."

294. He was asked if he considered that CW had a fifty year track record of good payment. He said he only looked over six years but confirmed that the business itself appears to have, from what he looked at, a good payment history over that period.

295. He was asked if he considered the fact that Castillo was a different type of business from the appellant as a bar operating under a tenancy. He said:

> "Yes, it was a bar, but I knew [CW] supplied to that bar as well. It shows a connection between the businesses, but in reality the risk is still there, the potential risk for the partner who is running this business to run up debts elsewhere. That is the risk and that is why it has been brought to light."

296. It was put to him that it was fundamentally different kind of business to a wine importer. He said:

> "But it is still dealing with alcohol, so the same serious, I think, view should be taken of that. Any revenue risk cannot be ignored, irrespective of where that revenue risk may have been. We needed to

> see that. The fact it was a similar or not similar would not have really been relevant to that decision."

297. He was asked if he considered how the debt had arisen, whether it was a genuine business failure or something else. He said essentially it was just the fact the debt had arisen:

> "the consideration was about the fact that the debt had been accrued and not actually paid back. It was not paid back, and that is what I needed to consider. That was my remit….Mr Corbelli advised me at the time of the visit, so I understood the context, but it is still a risk to the revenue. The risk was still there….. How it happened did not make any difference, really."

298. It was put it to him that in the context of a business that apparently has an unblemished payment history, the fact that there may be a small debt in a related company should not override the unblemished long-standing payment history. He disagreed:

> "It does. Sorry, part of the remit of looking at the [AWRS] was to assess whether there was any potential for revenue risk in the future, and looking at any debts was part of that remit. So, yes, I did need to consider that. It was not me making it up. That is part of the purposes of all the [AWRS] ……The risk was still there, sorry. It is a potential risk to the revenue which happened on an occasion which had been identified, and we were not allowed to ignore it, which is probably a better way of phrasing it.

299. He was asked whether he considered how high or low the risk of the appellant running up debts was, based on that other debt. He said:

> "The factor here is that it is a risk, and it is a risk which someone who is controlling [CW] has raised in other areas of his business dealings. That, to me, suggests that that could happen in the future with [CW]." When asked whether he considered how likely it was it would happen with the appellant in the future he said that "was not really a consideration. It was just that that was the risk there. The likelihood of it was - I do not know how to explain it any better, really, than I have".

Proportionality

300. He was asked if he considered the proportionality between the reasons for his refusal and the private interest in being approved and being able to carry on that business. He said that of course he considered the effect of his decision and "it is a serious one" which he understood and was aware of right from the start. He said that it was taken into account (whether in the letter or not) but he believed he had set out that the risk to the revenue was clearly too great for approval. He said that this is one of the things that is looked at with senior managers and which was in the back of his and their minds throughout.

301. He was asked if his decision was taken on the basis that he had to balance the factors in favour of approval and those against and come to an overall conclusion. He said that there was not really a set balancing act of pros and cons:

> "If we found a risk that needed to be highlighted, it was addressed upon that……I believe the risks that have been found outweigh anything that may try and balance that out. It is the risks here that were found that have not been addressed properly to the satisfaction…..There is no specific balancing exercise that was undertaken, but it is always something that is considered. You look at the risk and how big that risk is, and there is risk to the revenue here and that outweighs anything, really, from our point of view".

302. It was put to him that even in relation to risk, there are factors in favour of a business being a risk and factors against so when deciding whether or what level of risk the business poses he would need to balance the factors for and against and these would need to be consciously identified. He said:

> "I believe that the factors against them outweighed anything that may have been - I will not say conscious, but at the back of my mind at all times, and hence pulling all of this together and all of the issues being noted…… The balancing factor would be that there were no risks found, but risks were found……..Like I say, there is no specific balancing exercise made. Like I have said before, the risks are identified and those risks outweighed any other aspects, really."

303. It was noted that the only factors identified were negative and there was no consideration of anything positive. He said:

> "I think we have acknowledged where they have made changes and improvement in their stock system and so on. We do make those noted. I do not think we are being unfair with it, to be honest…..With regard to the approval process, they are the issues, obviously, that we have to take into consideration, we look at, but when it comes to the decision we understand why we are making those decisions, and those decisions could potentially mean that a business has to close down. That is what we have to weigh up. Are these risks severe enough? In this instance we believed they were.

304. Mr Germaney said he had not considered the possibility of approval with restrictions or conditions as he believed "the risk was too high and I could not see any way that these risks that had been identified could be dealt with by conditions alone". It was put to him that the administrative errors could have been dealt with a condition relating to maintaining proper records and linking payments to invoices. He replied that maintaining proper records is something CW is required to do anyway. So, "as a condition that would be a moot point, really". He confirmed that he thought that the only possible conditions would have to be something over and above what his interpretation of the existing law required. He also did not consider HMRC's power to revoke an authorisation or a registration because he believed he had "identified there was sufficient and serious enough risk already".

Discussion and conclusion

Whether the decision was reasonably arrived at - caselaw

305. The issue before the tribunal is whether HMRC's decision not to approve CW for registration under AWRS, on the basis that they are not fit and proper persons to carry on the activity, was one that was not reasonably arrived at under s 16(4).

306. In *CC&C v HMRC* [2015] 1 WLR 4043 at [15] and [16], Underhill LJ noted that the fact that the criterion for the tribunal's intervention is formulated in terms of unreasonableness "reflects the fact that the management of the excise system is a matter for the administrative discretion of HMRC". In his view that is because decisions such as whether a registered owner remains a fit and proper person to trade in duty-suspended goods (being the particular scenario in issue in that case) are ones which HMRC "are peculiarly well-fitted to judge, since it requires what is necessarily to some extent a subjective – albeit evidence-based – assessment of such matters as the attitude of the trader and its principal employees to due diligence issues and their sensitivity to the risk of becoming involved, albeit unintentionally, in unlawful activities." He continued that "this careful calibration of the powers" of the tribunal under s 16(4) "plainly represents a deliberate balance between the HMRC's need to take effective management decisions in relation to excise matters and the interests of those affected by such decisions."

307. How to apply this test has been considered by the courts in a number of different contexts which are also dealt with under s 16(4), in particular, as regards decisions on whether to restore seized goods. The courts have also applied a similar test in VAT cases where there is a right of appeal against decisions made in exercise of HMRC's discretion (such as a decision to require a party to give security where HMRC consider a person to be a risk to the revenue). The parties were largely agreed as to the correct approach to be taken to this balancing exercise under this case law.

308. As set out in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] 2 WLR 753 at 663, in relation to a review of a restoration decision, under s 16(4), the questions we must address are:

(1) Did the officer reach a decision which no reasonable officer could have reached?

(2) Does the decision betray an error of law material to the decision?

(3) Did the officer take into account all relevant considerations?

(4) Did the officer leave out of account all irrelevant considerations?

309. The parties were agreed that a decision may be unreasonable if inappropriate and unjustified weight is given to particular factors, such that no reasonable decision-maker could have acted in such a fashion (*MOTO Transport SP Z OO v. Director of Border Revenue* [2016] UKFTT 719 (TC) at [42]).

310. There is authority that the tribunal may assess whether a decision has been reasonably arrived at on the basis of its findings on the primary facts, where relevant, taking into account new evidence presented even though it was not before the decision-maker. This is based on the decision in *Balbir Singh Gora v C&E Comms* [2003] EWCA Civ 525. In that case Pill LJ considered the approach HMRC thought should be taken by the tribunal under s 16(4) where the taxpayer argued that HMRC's decision not to restore goods was unreasonable because they had applied an unreasonable policy because it did not take into account blameworthiness. HMRC accepted that, if the tribunal decided that such a policy was not one that could reasonably be adopted, the matter would be remitted to HMRC for them to re-take the decision. It was noted (at [38]) that HMRC's view was that, if in any later appeal

against a further decision, an issue arose as to whether the appellants were blameworthy, subject to the proviso referred to below, the tribunal's role would be as the tribunal had held in *Gora*:

> "[The Tribunal] satisfies itself that the primary facts upon which the Commissioners have based their decision are correct. The rules of the tribunal and procedures are designed to enable it to make a comprehensive fact-finding exercise in all appeals."

311. Lord Justice Pill continued to record that HMRC said that "strictly speaking", it appeared that under s 16(4) the tribunal would be limited to considering whether there was sufficient evidence to support HMRC's finding of blameworthiness. However, "in practice, given the power of the tribunal to carry out a fact-finding exercise, the tribunal could decide for itself this primary fact. The Tribunal should then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable." He noted that HMRC said that they would not challenge such an approach and would conduct a further review in accordance with the findings of the tribunal.

312. Lord Justice Pill commented at [39] that he accepted HMRC's view of the jurisdiction of the tribunal "subject to doubting whether, its fact-finding jurisdiction having been accepted, it should be limited even on the "strictly speaking" basis mentioned" by HMRC although that difference was not of practical importance because of what HMRC said about their practice. He, therefore, appeared to accept that it is legitimate for the tribunal to make its assessment on the basis of its findings of fact taking into account any new evidence presented. It was on the basis of this decision that HMRC considered that the blue folder documents were relevant and CW did not object to that (other than objecting to the lateness of the production).

313. The parties also appeared to be agreed that s 16(4) does not require the tribunal to order a further review if HMRC reach a decision on an unreasonable basis but the decision would have been the same on valid grounds. We note that corresponds with administrative law principles. For example, in *R v Broadcasting Complaints Commission ex p Owen* [1985] QB 1153 May LJ said:

> "…the grant of what may be the appropriate remedies in an application for judicial review is a matter for the discretion of this court. Where one is satisfied that although a reason relied on by a statutory body may not properly be described as insubstantial, nevertheless even without it the statutory body would have been bound to come to precisely the same conclusion on valid grounds, then it would be wrong for this court to exercise its discretion to strike down, in one way or another, that body's conclusion."

314. In the tribunal, a similar approach has been taken in circumstances in which the tribunal exercises a supervisory jurisdiction by reference to the Court of Appeal decision in *John Dee Ltd v CCE* [1995] STC 941. In that case, which concerned an appeal against a decision for the taxpayer to be required to provide security for VAT purposes, the tribunal had concluded that HMRC had failed to have regard to additional material relating to the appellant's financial information. Neil LJ (with whom the other Lords Justices agreed) held that counsel for the taxpayer company had been right to concede that (at 953):

> "where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a tribunal can dismiss an appeal."

315. CW argued that this decision means that where the tribunal determines that the decision-maker did not take into account all relevant considerations and/or took into account irrelevant considerations, the appeal must be allowed unless there is no possibility that the decision would have been different. On that basis as HMRC accept that an irrelevant consideration was taken into account (the due diligence) the appeal must be allowed unless it is shown that the decision would inevitably have been the same. HMRC countered that in their view the decision would inevitably have been the same due to the position as regards the seizures, the movements to SC and the debt issue. We have commented on this in our conclusions below.

316. CW argued that it is for the tribunal to determine what were and were not relevant considerations on the basis of *OWD Limited v HMRC* [2017] UKFTT 411 (TC), at [26] and *Teinaz v Wandsworth LBC* [2002] EWCA Civ 1040, at [36]. HMRC pointed out that the *Teinaz* case is concerned with the different situation but if it has any application it should be read with [37].

317. In outline, that case concerned an appeal against a decision of the employment tribunal where the tribunal had refused the appellant's application for an adjournment on medical grounds. The relevant discussion related to the extent to which an appellate court can intervene in the exercise by the tribunal of its case management powers. Lady Justice Arden noted, at [35], that one situation in which the appellate tribunal can intervene, is where the inferior tribunal took into account some irrelevant consideration or, alternatively, left out of account some relevant consideration. She continued, at [36], that two points flow from this:

> "First, it is for the appellate tribunal to determine what considerations are relevant to the question at issue. It does not defer to the inferior tribunal in the selection or identification of these considerations. Second, unless permission is given for fresh evidence to be adduced on appeal, the appellate tribunal makes this determination on the factual material before the inferior tribunal. If the appellate tribunal finds that an irrelevant consideration has been taken into account or that a relevant consideration has been left out of account, the appellate tribunal must conclude that the exercise of discretion by the inferior tribunal is invalidated, unless it can be satisfied that the consideration did not play any significant role in the exercise of the discretion and thus constituted a harmless error involving no prejudice to the appellant.

318. At [37] she continued as follows:

> "It is to be noted that the standard of review as respects the exercise of discretion involves the grant of considerable deference to the inferior tribunal. In particular, where several factors going either way have to be balanced by the inferior tribunal, the appellate tribunal does not interfere with the balancing exercise performed by the inferior tribunal unless its conclusion was clearly wrong."

319. We note that this decision relates to a different issue although the approach adopted reflects that we are required to adopt here. However, in any event we consider this must be the right approach in this context also. We do not see how the tribunal could form a view as to whether HMRC has taken into account relevant or irrelevant considerations without forming a view on what is and is not relevant. It is inherent in the very exercise required.

Procedural fairness

320. Mr Firth submitted that the following principles, which have been held to be applicable in a judicial review context, also apply here.

(1) A decision-maker must take reasonable steps to acquaint himself with the relevant information to enable him to exercise his discretion. He cited *Secretary of State for Education and Science v Tameside MBC* [1976] UKHL 6 [1977] AC 1014 at 1065 where it was said that the question was did the decision-maker "ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly". He also referred to *Naraynsingh v Commissioner of Police (Trinidad and Tobago)* [2003] UKPC 20 where, at [23], it was held that it would not always be necessary for the decision-maker to ascertain more about the circumstances (as to which he was inclined to revoke a licence in that case) but "where, as here, further information obviously was available and there are a number of puzzling features of the case….then a fair procedure demanded that further inquiries be made...".

(2) A decision-maker who gives the person the opportunity to make representations must properly consider those representations and engage with them. This was on the basis of *Mackenzie, R (on the application of) v Secretary of State for Justice* [2009] EWCA Civ 669 where, at [34], the decision-maker was criticised because he did not consider an argument put forward by the affected person such that he "thus failed to engage with the case being put forward…..in a significant respect". It was also noted that while this point was not essential to the court's conclusion, the decision-maker's failure to engage "may undermine his assessment of risk in other respects."

(3) An exercise of discretion is improper if it has been influenced by an oblique motive of hurrying in order to be able to move on to some other matter on the basis of *R v Wellingborough Magistrates Court, ex parte Francois* (1994) JP 813 where it was held that:

> "The real question here, in the light of the authorities, is whether what she did was a proper exercise of discretion. It seems to me that she clearly had an oblique motive, brought about by being in a hurry to finish this case and go on to another case. In my judgment that oblique motive was her real reason, and it was an improper exercise of discretion."

321. As the approach required under s 16(4) is akin to the approach in judicial review proceedings, it seems to us that that these principles are equally applicable here. The wording of the statutory test, in looking at whether a decision has been "reasonably

arrived at" is broad enough to encompass considerations such as whether the decision-maker has taken reasonable steps to obtain and acquaint himself with relevant information and whether he was properly applying himself to the decision making process.

322. We accept CW's submissions essentially that there are a number of factors indicating that Mr Germaney did not engage properly in the decision making process, he was uninterested in what explanations CW might have for his grounds of refusal and he was influenced by an oblique motive as he had moved jobs and was in a hurry to complete the decision-making process. It is no answer to the failings that, as HMRC argued, he carried out an extensive investigation beforehand. We have considered this further below.

323. CW also argued that the decision-maker is required to identify all relevant factors pointing both in favour of and against the person being fit and proper and actually to carry out an overall balancing exercise. They referred to the case of *R v Secretary of State for the Home Department, ex p. Ajayi v Anor* [1994] EWHC 5 (Admin) where Laws J said: "Although I have accepted that the Secretary of State had her status present to his mind, there is nothing in the papers to show that he undertook any such balancing exercise. It seems to me that he was obliged to do that." HMRC responded that the quote from *Ajayi* does not suggest that a form of ledger exercise is required, as in their view CW was suggesting, but in any event that case concerned a completely different decision in a different statutory context from which no general principle can be derived. They asserted that it sufficed that Mr Germaney was clear that he was engaged in a risk assessment process.

324. Our view is that it is inherent in the exercise required that the decision-maker must weigh up all considerations in deciding whether a particular factor or factors justifies a conclusion that a person is not fit and proper. Inevitably that involves balancing considerations pointing one way or the other. Simply identifying a list of supposed risks as Mr Germaney appeared to do without any assessment of the level of the risk or indeed the nature of the risk is not a proper approach. We have considered this further below.

Right to be heard

325. In a similar vein, Mr Firth submitted that it was material to whether the decision was reasonably arrived at that, as he argued, CW's right to be heard under EU law was infringed. He referred to the decision of the Court of Justice of the European Union ("**CJEU**") in *Kamino International Logistics BV* C-129/13, as establishing that it is a fundamental principle of EU law that a person has a right to be heard before national authorities adopt a measure which will adversely affect that person. In that case, the issue was the application of rights of defence in the context of a demand for customs duty where the taxpayer had no prior right to make representations. The court held that "observance of the rights of the defence is a fundamental principle of European Union law, in which the right to be heard in all proceedings is inherent", that member states are subject to that obligation when they take decisions within the scope of EU law, even though the legislation applicable does not expressly provide for such a procedural requirement and that "interested parties must be able to rely on them directly before the national courts" (see [28] to [34]).

326. Mr Firth noted that the court went on to say, at [55], that "in the context of an appeal lodged against an adverse decision, a subsequent hearing may, under certain conditions, be able to ensure observance of the right to be heard" but concluded, at [73], that:

> "…….the right of every person to be heard before the adoption of an adverse individual measure must be interpreted as meaning that, where the addressee of a demand for payment adopted in a procedure for the post-clearance recovery of customs duties on imports, under the Customs Code, has not been heard by the authorities before the adoption of the decision, his rights of defence are infringed even though he can express his views during a subsequent administrative objection stage, if *national legislation* does not allow the addressees of such demands, in the absence of a prior hearing, to obtain suspension of their implementation until their possible amendment" (emphasis added).

327. Mr Firth asserted that the key part of this passage is "if national legislation does not allow" because, whilst CW has appeal rights against the decision, the UK legislation does not provide for the suspension of a refusal, or the consequences of a refusal to approve CW under AWRS. The right to be heard in this appeal or any other proceedings does not, therefore, satisfy this requirement. In his view it is plain that CW was not afforded a proper opportunity to be heard in this case prior to the decision.

328. We do not agree that this is the correct interpretation of *Kamino*. As Mr Puzey submitted, the CJEU recognised in *Kamino* at [71] that a suspension granted pursuant to a ministerial circular (as was the case there) may be effective as a suspension measure but it is for the national court to determine that question. It is not the case, therefore, that suspension is regarded as effective for this purpose only if enshrined in legislation. It may well be effective where the suspension is made as a result of a decision of the court, such as in this case, in judicial review proceedings. On that basis CW's right to be heard may be effective as a result of the right to make representations in these appeal proceedings, in which case any failure by HMRC to give CW an effective right to be heard before the decision was made is not relevant. We note, however, that, as at the date of the hearing, it was not clear whether ultimately CW had a right of suspension pending the outcome of the proceedings in the Court of Appeal (and subject to any further appeal).

329. If CW has an effective right to be heard only if an adequate opportunity is given before the decision was made, we consider that, as Mr Firth argued, HMRC may well have failed to give effect to that EU right. Mr Germaney appeared to have a closed mind at the point he issued the warning letter. It is completely inexplicable that he did not answer CW's query on what his concern was as regards due diligence until it was too late for them to respond prior to him making his decision (see [195] to [204]). He gave no real reason as to why he could not extend the deadline for a response to the warning letter (see [186] to [195]). The only reason appeared to be that he was sticking to internal guidance but with no consideration of this particular case and he was in a hurry as he had limited time because he had moved jobs. He gave minimal information in the letter as regards the seizures which was the first time this had been raised with CW; he did not even provide the information he had obtained from the

intelligence briefing/notes. He did not appear to take any notice in any meaningful way of many of the representations made in response to the warning letter.

330. Mr Puzey asserted that whether or not Mr Germaney answered the query on the due diligence aspect does not affect the issue before the tribunal. There is no statutory requirement to provide such a letter, or obligation in EU or common law. Therefore, whether the officer failed to answer any questions that were asked in response to that letter is irrelevant. We disagree. Whether there is a statutory obligation or not, having offered CW the opportunity to provide information, as set out above, a failure to engage properly with that process is pertinent to the issue of whether a decision is reasonably arrived at. Whilst the due diligence issue has fallen away, Mr Germaney's failure to deal with the query undermines his credibility as a decision-maker. A decision-maker properly engaging in the process would not simply ignore a request for clarification of one of the issues raised until it was too late for a response to be taken into account. In any event, if we are wrong on that, the considerations outlined below in our view demonstrate of themselves that the decision was not reasonably arrived at.

Fit and proper test

331. On the natural meaning of the terms, we interpret the fit and proper test to require, broadly, that persons are adequately equipped, both in terms of their personal qualities and business skills, to operate a wholesale alcohol business lawfully and in all material respects properly thereby ensuring there is no material risk of loss of excise duty as a result of their involvement in that business. More specifically, the term "fit" appears to be directed at a person's knowledge of what is needed and, ability, willingness and sensitivity to the need to take steps to ensure, compliance with all applicable excise rules and procedures and "proper" at the person's personal qualities in terms of honest and truthful behaviour.

332. In line with that, HMRC's guidance on what factors they consider to be relevant to the test focuses on whether the relevant persons pose a serious threat to the revenue as a result of matters evidencing wrong doing, dishonest, careless or improper behaviour (see [11]). The concern is not only whether persons pose a direct threat but also an indirect threat in the sense that careless or improper practices may facilitate wrong doing by others albeit unwittingly.

Conclusion on whether the decision was reasonably arrived at

333. For the reasons set out in full below, we consider that Mr Germaney failed correctly to apply the fit and proper test in such a way that, applying the principles set out in the cases referred to above, his decision was not reasonably arrived at on the basis of the materials he considered and his approach at the relevant time. Testing that decision (as *Gora* sets out we may) by reference to our factual findings based on evidence presented at the hearing (which was not taken into account by Mr Germaney), we reach the same conclusion.

334. We note that it was accepted at the hearing that the administrative failings, due diligence issue, and the failure to challenge the WOWGR application set out in the decision letter were not in fact relevant to the decision. The fact that matters now conceded to be irrelevant were taken into account of itself renders Mr Germaney's

decision unreasonable unless the tribunal considers the decision would inevitably have been the same leaving those matters out of account. In our view, that is not the case.

335. On the remaining factors in issue (the seizures, the movements to SC and the debt in Castillo), Mr Firth submitted that Mr Germaney failed to apply the statutory test properly. He failed to take into account relevant considerations, he took into account irrelevant considerations, he failed to make enquiries to establish the relevant facts (in particular as regards the seizures and whether CW took advice regarding the movements to SC), he failed properly to consider the case put forward by CW (including failing to carry out a balancing exercise) and to reach any conclusion on the actual risk the factors he identified indicated CW posed to the revenue.

336. HMRC responded that the focus is upon the decision and the grounds for the decision on the basis of all the evidence, not just that which was considered by Mr Germaney. In their view, in any event Mr Germaney had legitimate concerns with CW sufficient to justify his decision (leaving aside the matters he had, in their view, fairly accepted were not relevant). CW has failed to dispel the legitimate and proper concerns uncovered during this investigation as bolstered by the evidence produced at the hearing. CW did not dispute that the further evidence could be taken into account by the tribunal (other than on the basis it should not have been admitted in the first place at the late stage it was produced) but, in their view, it provides no further justification for the decision.

337. Mr Firth asserted it was unreasonable for Mr Germaney to have pursed for so long the issues which are now conceded to be irrelevant. Further he said that Mr Germaney made a fundamental error in relation to the due diligence position which was not understandable given that the reports, delivered to HMRC on 11 October 2016, specifically addressed who carried out the visits (as we accept is borne out by the visit reports produced to the tribunal). This further undermines the credibility of the decision. HMRC responded that Mr Germaney, as an honest and sincere witness, fairly and appropriately accepted that these matters were not in themselves reasons to refuse the application. In their view, these sensible concessions do not undermine his decision but rather serve to increase confidence in the judgments he made on the other issues. They noted that Mr Germaney made clear that he had carefully considered the seriousness of the decision and consulted his superiors upon that.

338. We do not agree that the fact Mr Germaney eventually conceded these points adds any confidence in his judgment on the other factors. The fact that these matters were pursued for so long, together with Mr Germaney's other failures to apply a proper process, adds up to a picture of a person entrusted with decision making powers who was not properly engaging with those powers.

339. As noted, it is inexplicable that Mr Germaney did not reply to the repeated queries for clarification on what his concern was with the due diligence position until it was too late for CW to respond before his decision was made. As is clear from the evidence set out at [186] to [204], he had no good reason for that or for refusing to give further time for CW to respond to the warning letter. His said in effect that he did not have time to extend the time limit for a response or to deal with the query on due diligence because he was moving jobs. He appeared to pay no real attention to

the information provided in response to the warning letter. For example, he did nothing in response to the assertions that CW were not involved in any wrong doing as regards the seizures (such as obtaining further information on the seizures from BF) or the points made about the WOWGR refusal. He took no action to obtain readily available materials regarding the seizures. He had no good reason for failing to try to obtain the transcripts of the calls to HMRC.

340. Whilst some of these failures do not impact on the decision in the sense that the due diligence issue has fallen away and it appears there is no transcript of the relevant call to HMRC, they undermine the credibility of Mr Germaney's exercise of his judgment. In that context we note also the inappropriate comments made by Mr Germany on his visit to CW in June 2016 (see [42] and [47]) which can only further add to the concern. We cannot see that, as HMRC submitted, it is any answer to these concerns that there was a lengthy period of investigation involving a seven hour visit to CW prior to issuing the warning letter and that Mr Germaney acknowledged some of the points made by CW in the letter. That does not shed any more light on the failings. A reasonable officer would not have acted in this way and formed a decision that CW not fit and proper on the basis that Mr Germaney did.

341. As regards the basis for Mr Germaney's decision, we largely agree with Mr Firth's submissions at [335]. The overall problem is that, whilst it may well be appropriate to approach the fit and proper test as a form of risk identification exercise, Mr Germaney did so simply by identifying a list of failings which he asserted meant CW posed a risk for excise duty purposes. At the hearing, as regards the key areas of the seizures, the movements to SC and the outstanding debts, he was unable to explain the precise nature or level of any risk he thought the failings gave rise to. The picture as to whether or to what extent he thought the risk related to the proper aspect of the test (in terms of CW's honesty) or the fit aspect (in terms of CW's adequacy) was confused. It does not appear that, in making that assessment, he considered and weighed up any positive factors, where relevant. When questioned about carrying out a balancing exercise he said essentially that the only balancing factor would be if there were no risks. He drew no distinction between cases of inadvertent failings or knowing breach as regards the movements to SC or innocent or knowing involvement in the seizures. This resulted in him taking into account irrelevant matters and failing to take into account relevant considerations (as set out in detail below) such that his decision was one which no reasonable officer would have reached.

Decision on seizures

342. The seizures were each of goods for which, according to the documents with the seized loads, CW were apparently the consignee. Each of the seizures occurred because the ARC numbers on the documents accompanying the seized load had already been used. As set out above, an ARC is a unique reference number for use with a single load of excise goods to track its movement from the supplier to the buyer. The ARC is generated on the EU wide ECMS system by the supplier entering the details of the ordered load. It is entered on the documents accompanying the load. The buyer receives notification of the number through the EMCS system and is supposed to close the number down on the system once the goods with that number are received. It is readily apparent, therefore, that any misuse of ARC numbers could occur in a variety of ways. It could occur, for example, through the supplier and the

buyer together conniving to use an ARC for more than one load of goods or it could be through mis-use of the ARC solely by the supplier or the transporters or through third parties who somehow obtains access to an ARC.

343. For the purposes of his decision, Mr Germaney considered only the notes from the intelligence briefing as regards the seizures. From his evidence at the hearing (see [225] to [233]) he concluded from that information that the seizures were a relevant consideration in refusing the AWRS approval based on the fact that CW had ordered the goods and therefore instigated the movement. He accepted he had no information to suggest that CW was involved in the re-use of ARCs and that there was nothing CW could have done to have been aware of any wrong doing before the seizure. He did not make any enquiries within HMRC or BF to find out more about the seizures. He was unclear as to whether the fact that CW were the consignee gave him a concern that they were somehow involved in wrong doing in these incidents or that their responses and procedures were inadequate to prevent the risk of further incidents as regards wrong doing by others.

344. His answers on whether fault was relevant to his decision were confused (see [234] to [239]). He said initially it was "not about fault, it is about that these issues were attached to a reason, going to [CW] as consignee, again, and it is concern that a pattern was emerging over three different ….times". He said he was not saying fault was irrelevant, however, because CW would have a chance to represent themselves. He later said "the fault is not necessarily the be-all and end-all of an aspect of this, because there are different parties that play different parts within it. So, that would then have to be considered with a representation as to how involved they were with it, because it is a matter of involvement rather than fault, really" but that "it would be wrong for him to say they were not at fault, because they clearly are". He said he did not assume CW were at fault, it was from the information (meaning the notes/intelligence briefing) and that there is never one person that can take the blame and "it is a shared liability until they can disprove that, from my point of view. We have to consider everyone being involved in it as potentially liable." He concluded the "relevant factor, really, is that the goods were seized and there was an issue with the goods that came in and the movement of goods, sorry. That is the real relevant factor". Overall we consider from this that to the extent Mr Germaney considered fault was relevant (which is not at all clear), he simply assumed CW were at fault because they were the consignee of the goods.

345. His evidence also was not clear on the relevance of the fact that CW changed hauliers following which there were no subsequent seizures (see [240] to [249]). At one point he suggested that his concern was that CW should have done more to protect against the risk of further seizures. When it was noted to him that in fact they had changed transporters, first to using an agency pending finding a permanent transporter and, after the third seizure, to using a new transporter and that there have been no incidents since, he had no credible answer as to why that was not relevant. He then suggested that his concern was that CW had not changed supplier seemingly assuming that the supplier was the same as regards all of the relevant consignments of goods involved in the seizures (which is not the case). He made this assumption because CW had told him they had changed hauliers but they had not mentioned a change of suppliers. He then said there were other factors for refusing the application

as well but was unable to provide an answer as to why, in these circumstances, looking at the seizures in isolation (leaving aside the other factors) they were relevant. We note that to the extent there is a concern that the suppliers were at fault, it is accepted that CW now has satisfactory due diligence procedures as regards suppliers.

346. In our view, it is not reasonable to arrive at a conclusion that a person somehow fails to meet an aspect of the fit and proper test simply because a person is a consignee in relation to seizures of goods, in particular, having regard to the fact that the incidents took place several years ago with no repeat since. We do not accept HMRC's submission that it was not for Mr Germaney to identify how CW were involved in excise irregularities or to demonstrate the extent of CW's knowledge of or involvement in such irregularities. They argued that once he had found out that there were three seizures of goods in relation to which CW was the consignee it was for CW to "provide a cogent explanation" which in their view they had not done. In their view, the fact that there were three seizures within six months, where CW were the consignee, demonstrates "an obvious risk to the revenue to which CW was connected".

347. Such an approach would mean that, where an applicant is a consignee of seized goods, the onus is entirely on the applicant somehow to prove, to the satisfaction of HMRC, a negative, that they were not involved in/had no knowledge of any wrong doing as regards the relevant seizures. That is particularly difficult where, as here, the point is raised some years after the event. We cannot see that is how the test is intended to operate in this particular context.

348. We note that HMRC have to be "satisfied" as to a person being fit and proper. Whilst that may carry an implication that, at least to some extent, it is for the applicant to satisfy HMRC to that effect, in our view there must at least be a minimum onus on HMRC in the first instance to provide substantiation that they have a real concern as to which they need to be satisfied. That a person is merely the named consignee where goods have been seized on three occasions (but there have been no incidents before or since) does not of itself provide such substantiation. Without more it is mere speculation and conjecture that there is an issue which needs to be addressed. Whether the concern is that the applicants were knowingly involved in wrong doing or failed to have satisfactory procedures in place to prevent wrong doing by others, the applicants need to have some idea of what the concern is to attempt to provide satisfaction on that score. Moreover, in that context, it is reasonable to expect HMRC to carry out reasonable and proportionate investigations of the materials available to them or which can readily be obtained and, if they conclude there is a risk, to give the applicant an opportunity to respond on the basis of what they have found. None of that happened in this case notwithstanding that the blue folder documents could readily have been obtained. Mr Germaney did not even set out in the warning letter the information he was relying on in the notes/intelligence briefing. He made no attempt to find further information on the seizures before issuing the warning letter or in response to CW's representations on the warning letter.

349. We consider this is supported by the comments of Underhill LJ in *CC&C*. As set out above, he said that the tribunal has supervisory jurisdiction only in a case such as this is an acknowledgment that the management of the excise system is a matter for the administrative discretion of HMRC because they are "peculiarly well-fitted" to

make what are to some extent necessarily subjective assessments required. However, whilst he said those assessments are subjective, he said they are "evidence-based". We can see from this that it may well be the case that, in exercising their subjective judgment, HMRC do not necessarily have to gather sufficient information as would suffice in a court of law to prove that the relevant concern is made out such as, in the context of seizures, that the applicants were involved in wrong doing. However, we consider they must surely have to have some evidence based justification that there is cause for such a concern in the first place.

350. It is clear, therefore, that Mr Germaney's decision, so far as it relied on CW being named as consignee as regards the three seizures, is unsafe.

Seizures – evidence presented at the hearing

351. As noted, further evidence was presented at the hearing in the form of the blue folder documents, which we decided to admit as evidence, and on which HMRC cross-examined the applicants. We considered it fair and just to allow HMRC the opportunity to present evidence on the seizures given they are a key element of the decision (see [422] to [430]). However, there is then a further question as to the weight to be attached to them in all the circumstances. Whilst we do not consider that there was any deliberate ambush or deliberate attempt to suppress material as CW argued, we are concerned that the lateness of the production, the haste with which the materials were put together and the necessary lack, given the lateness, of any opportunity for CW to review the materials with a view to asking for any further disclosure, means that we cannot be certain that the blue folder contained all relevant materials. Therefore, the weight to be attached to them, as a complete set of the documents of relevance, is necessarily limited.

352. In any event, our view is that the new evidence does not provide any further substantiation for the view that CW were knowingly involved in wrong doing as regards the re-use of ARC numbers (if that was what HMRC were suggesting). There is, however, some evidence that CW's practices at the time of the seizures may be relevant to the "fit" test, in the sense of whether they were adequate satisfactorily to guard against CW becoming unwittingly involved in wrong doing by others. However, any such concern does not, on the evidence presented at the hearing, suffice to demonstrate that HRMC's decision would inevitably be the same leaving out of account irrelevant matters. They are matters to consider (along with similar issues in relation to the movements to SC) in the review of the decision we have directed HMRC to carry out.

353. HMRC argued that the evidence demonstrates there are real concerns that CW should be entrusted with excise goods. They seemed to suggest that we should draw an adverse inference from the fact that Mr Guiseppe Corbelli made various comments in his witness statement that he had no control over the goods or involvement with the seizures but in fact he made detailed representations to BF in relation to the first seizure and CW clearly ordered the goods seized in the second seizure. This was, Mr Puzey said, an attempt by CW to distance themselves from the seizures.

354. HMRC asserted that CW's close involvement in the first seizure is also demonstrated by the fact that the CMR was addressed to CW, the haulier was engaged and instructed by CW and the original loading instructions were provided to Berteletti

by CW. They noted that there are discrepancies in that (a) the CMR recorded a delivery from Cepagatti but Mr Guiseppe Corbelli said the goods had in fact come from Berteletti and (b) the delivery documents record the delivery address as CW's premises but the driver said he was delivering to Capper Transport. Mr Corbelli said that CW would have given the instruction to deliver to Capper Transport as that is where goods ordered by CW are sometimes taken temporarily. However, a registered consignee is not permitted to have goods consigned to another address other than his own registered address without being approved by HMRC for direct delivery to a customer, which Capper Transport were not (see paragraph 5.1 and 8.11 of Notice 203a).

355. HMRC noted that there are no written instructions to the warehouse or Matthews as would be expected of a transparent and careful excise dealer. Mr Powell had no real response to the question as to whether a single ARC number could cover the transport of goods to a warehouse in Italy and their deposit there for a period of days and then their onward transport. They doubted the plausibility of Mr Corbelli's explanation of what he thought had happened.

356. As regards the second seizure, HMRC pointed to a number of, as they asserted, contradictory statements and facts, as again showing that the applicants were trying to distance themselves from the seizures. They noted that Mr Guiseppe Corbelli said in his witness statement that CW had not ordered the seized goods and they were not CW's property (and Mr Pietro Corbelli did not mention this seizure at all) but at the hearing Mr Pietro Corbelli confirmed that in fact the seized goods were ordered by CW.

357. They noted Mr Corbelli had written to BF seeking recovery of the goods but Mr Curley later wrote to BF stating that the goods did not belong to CW and that they were withdrawing their claims. Mr Corbelli said that why that letter was sent was a question for Mr Curley, he did not recall seeing it but, if he had, he may have worded it slightly differently. He said the claims as regards the seized goods were not pursued as the costs of going to court exceeded their value. On the other hand Mr Guiseppe Corbelli said CW had been told by BF that they could not seek restoration or challenge the seizure because they were not the owner of the goods at the time of the seizure; they were not the owner until they received them and paid for them. He referred to the seizure letter as supporting that but that is not what the letter actually said. HMRC noted that no evidence on the advice from Mr Curley was disclosed and he was not recalled by CW to address this point.

358. As regards the third seizure, HMRC noted that the documents show that there was a prolonged period of 17 days between the dispatch date and the seizure (in which period the vehicle had made repeated trips across the channel). Mr Powell agreed that such a long journey from Italy to the UK gives rise to a risk that the ARC number could be used multiple times. Again CW gave notice of a claim against the seizure. Mr Guiseppe Corbelli said he did not know whether the challenge to seizure was pursued but, if not, that was because of the advice received about the difficulty of doing so by persons who are not the owner of the goods. That is clearly inconsistent with the fact that Mr Curley had initially made a claim.

359. In HMRC's view the fact that CW changed the haulier does not evidence that they tackled this issue effectively. The evidence was not that the haulier had completed the EMCS entries nor that it was responsible for what goods were loaded but that CW changed its haulier because its drivers would not check what goods had been loaded. The issues CW should have addressed were with the dispatching warehouse but there is no evidence they did so.

360. CW responded that HMRC's assertions of wrongdoing by CW are unsubstantiated speculation. It is immaterial whether CW was the owner of the goods. The relevant facts are that CW was not involved in any wrongdoing and could not have done anything to be aware of the wrongdoing, CW took reasonable steps in relation to the seizures and there have been no further incidents since those steps were taken. Mr Firth noted that in any event the law on ownership is complex and not a matter on which it is productive to cross examine witnesses of fact. The law as to whether proof of ownership is required to seek restoration has fluctuated (see *Coulter v HMRC* [2017] UKFTT 377 (TC) at [23] to [28]).

361. Mr Firth said that, as regards the difference in starting point and destination in relation to the first seizure, Mr Powell confirmed that a movement of goods may have more than one leg. Therefore, that a particular leg did not start at the original source or end at the final destination proves nothing. It was not appropriate for HMRC to challenge in their submissions the validity or reasonableness of CW's response to the seizures in changing the transporter. They should have done this during the cross examination of the witnesses. Finally he said that, as the issue of the advice given by Mr Curley only came up after Mr Curley gave evidence and the witnesses were cross examined on the blue folder documents, he could hardly be criticised for not dealing with the point in his evidence. HMRC could have asked for him to be recalled but they did not.

Conclusion on the evidence on the seizures

362. We do not consider that there is any basis to conclude from all the evidence that CW were involved in or had any knowledge of any wrong doing in relation to the seizures as regards the mis-use of ARC numbers and avoidance of excise duty. We found the applicants to be credible witnesses and we accept their explanations as set out in detail in their evidence as to the circumstances surrounding the seizures, so far as they knew from the investigations they made. We also consider that they took reasonable actions to avoid a recurrence of the problem (and indeed there have been no further occurrences).

363. We do not see any basis for drawing some sort of adverse inference on the basis that, as HMRC asserted, CW were trying to distance themselves from the seizures. As regards the first and second seizures, the applicants were involved at the time in quite extensive representations in relation to what happened. It is clear that Mr Guiseppe Corbelli's comments in his witness statement as regards the first seizure were not, when read in context, aimed at denying any knowledge of the surrounding circumstances at all (see [88]). He was saying simply that he had no involvement in the re-use of ARC numbers that lead to the seizures or any wrong doing relating to the seizures. The lack of control over the goods, for example, was merely a reference to direct control whilst the goods were in transit. We accept his evidence on that.

364. As HMRC pointed out, there are some inconsistencies in the evidence as regards the other seizure. The position as regards why claims against the seizures were not pursued is confused. It is not clear why Mr Guiseppe Corbelli said in his witness statement that CW did not order or own the relevant goods when his brother then accepted at the hearing that CW had in fact ordered the goods (as was shown by the documentary evidence). The seizure letter produced in support of the assertion that claims were not pursued because BF said CW could not claim because they were not the owner of the goods until they received and paid for them, does not fully support that. BF did state that a person cannot make such claims if he is not the owner of the goods but noted that, as CW had advised that they had not ordered the goods, they were not the owner. BF did not address the point about a person only becoming the owner on receipt/making payment.

365. However, we note that we are dealing with historic events and the blue folder documents were produced at the last minute. CW were trying to make sense of what had happened several years previously having only had the blue folder documents shortly before the hearing. Overall we considered the applicants were both doing their best to remember what had happened and these inconsistencies in this respect do not invalidate the entirety of their other evidence on the seizures. Moreover, in our view it would be speculation and conjecture to conclude that CW must have been involved in some wrong doing because it is not clear why they decided not to pursue the relevant claims.

366. As regards the other issues HMRC identified, the fact CW was named in the delivery documents and arranged the transport, amounts to no more than speculation that CW were somehow involved in wrong doing because they were the consignee. As regards the discrepancies HMRC identified in relation to the first seizure, we accept the applicants' explanation that goods were delivered from a warehouse, Berteletti, rather than the stated supplier, on the basis that CW used Berteletti as a hub and that CW sometimes asked the transporter to deliver goods to a different UK warehouse, Capper Transport, due to temporary storage problems at CW's own warehouse.

367. We were not presented with detailed submissions on whether the fact that CW routed goods ordered from Italy through a warehouse, which effectively acts as hub for the consolidation of loads, is in breach of CW's obligations under the RC scheme or means that other parties involved were acting wrongly for excise duty purposes. HMRC suggested that using a warehouse in Italy involved two movements of goods for excise purposes such that there should have been a separate ARC number for the second movement from the warehouse to CW. Mr Powell disputed this on the basis that this situation was "outside the universe of movements", it appears, because a movement contemplates goods moving from a tax warehouse to another tax warehouse without stops along the way. We can see that as a practical matter it is unrealistic to expect that there will in all cases be no interim stops where goods are transported from one European country to another. As regards storing goods at Capper Transport, HMRC asserted that storing goods in that way is not permitted. Under the RC scheme CW could only arrange delivery direct to the owner if specifically authorised to do so and Capper Transport is not the owner. CW asserted

that the warehouse was not accepting the goods for final delivery and, therefore, this was not prohibited.

368. Given we accept CW's reasons as to why they adopted these practices, they do not, in our view, support any contention CW were knowingly involved in any wrong doing as regards the mis-use of ARC numbers and/or avoidance of excise duty. Nor does it appear that, if these practices are not in accordance with excise duty rules and regulations, CW were knowingly acting in contravention of those rules. There is an issue as to whether these practices (whether or not they are in breach of excise duty rules/regulations) are in accordance with what may be expected of a responsible importer of alcohol for wholesale. On the information and submissions made at the hearing, however, we cannot see that such practises of themselves inevitably lead to the conclusion CW are not fit and proper. This is an area which should be dealt with in the review of HMRC's decision.

369. We note HMRC's concern as to the delay in the delivery of goods as regards the third seizure and the overall lack of a paper trail as regards the instructions given to the haulier and to the warehouses. Again we do not consider that of itself suffices to demonstrate that on the balance of probabilities CW had any knowing involvement in wrong-doing. We note, however, that it may be relevant to the adequacy of CW's procedures at the relevant time and that Mr Powell accepted that there is an excise duty risk where goods are not delivered promptly.

370. Finally, we consider that the fact that CW changed its haulier on the basis they did not check loads must be a relevant factor in particular as, following that, there were no further seizures. We note that as regards two of the seizures the hauliers were issued with excise duty assessments and penalties in respect of the seized loads. We also note that as regards the first seizure one of the problems according to CW's evidence was that the driver had not checked the relevant load against the paperwork. In such circumstances it is reasonable to suppose that changing the hauliers may suffice to end the problem (and it appears that is the case).

371. We note HMRC's comments that CW should have challenged the warehouses. However, there is no particular reason to suppose that it was the warehouse which was at fault. It seems to us that the level of checks CW should carry out as regards overseas warehouses used as hubs is a question as to what, if any, level of due diligence checks CW should be carrying out as regards such persons. That, together with the other issues highlighted above, is a matter which should be addressed on the review of HMRC's decision.

WOGR and movements to SC

372. It was not disputed that on three occasions in 2014 and 2015 CW imported wine in duty suspension on its duty deferment account pursuant to its RC approval and, without first accounting for duty under the RC scheme, moved the relevant goods to the premises of SC using its wine approval making an EMCS declaration for each movement. Duty was accounted for on these goods only when they eventually left the premises of SC. The movements to SC were entered by CW on the EMCS system on the basis that they were covered by a movement guarantee for the duty but they were not so covered.

373. HMRC asserted that the wine approval does not permit the intra UK movement of imported duty suspended goods received as a registered consignee. The wine approval was misused and the goods were moved without a movement guarantee and in breach of the terms of CW's status as a registered consignee. HMRC noted that Mr Firth sought to rely on regulation 37 of the relevant rules when re-examining Mr Pietro Corbelli. That regulation however, deals with duty suspended movements of alcohol within the UK. That does not somehow apply to prevent the obligation arising for CW to account for duty under the RC scheme.

374. CW seemed to suggest that this analysis may not be correct but, in their view, the correct legal position does not need to be determined. Their case is that CW genuinely believed that the movements to SC were lawful. They acted on advice from HMRC on a call to the EMCS helpline. They explained the situation to Mr Maskew when he visited them regarding the WOWGR application. He did not disagree thereby confirming the previous advice. Mr Firth submitted that it is clear from the Maskew notes that the movements to SC were discussed. The typed notes of his visit record that the reasons why CW applied for a WOWGR were clearly explained to Mr Maskew and the notes in the aide memoir referred to the fact CW had an account with SC. Mr Firth noted that Mr Germaney appeared to accept that the applicants honestly thought that what they had done was permitted. He noted also that excise notice 163 indicates that CW were entitled to carry out the movements it carried out from tax warehouse to tax warehouse (see para 3.5 and 23).

375. Mr Firth asserted that, in any event, the tribunal should draw an adverse inference from HMRC's failures to produce the transcript of the call on 31 July 2014, to call Mr Maskew as a witness and to produce the handwritten notes of his visit to CW (see *Prest v Petrodel Resources Limited* [2013] UKSC 34 at [44] and [45]). The inference is that in the absence of any credible explanation as to why any of these were not produced (the only reason being they support CW's case), CW's version of the relevant events is correct. Mr Firth noted there is conflicting evidence as to why there was no transcript of the call on 31 July 2014. Mr Ranch of HMRC said calls to the EMCS helpdesk were not recorded (see [76]) but Mr Germaney said at the hearing that Mr Ranch told him there was a technical glitch in relation to this call (see [262]).

376. Mr Firth submitted that Mr Germaney again failed to apply the statutory test properly. He could apparently see no difference in terms of risk to the revenue between a trader who had done such a movement on the basis of advice from HMRC and one who did so without any such advice. He was not interested in checking whether what CW told him about the advice line was true. To the extent that he believed this factor did indicate CW was a serious risk to the revenue that was an irrational conclusion. There is no reason for the tribunal to form a different view on the basis of the further evidence presented at the hearing.

377. HMRC countered that it was for CW to ensure it acted in accordance with the law and to take all necessary steps to do so. Calling the HMRC advice line does not take away that responsibility. HMRC said that it is surprising that on such an important topic advice was not sought in writing if the applicants were unsure of the correct legal position. They noted that Mr Pietro Corbelli accepted that he had not asked HMRC whether he could use a Marine Cargo insurance policy as a guarantee but simply assumed that he could. The meetings with Mr Maskew did not take place

until after the first two movements to SC and, in their view, nothing in the Maskew notes supports the conclusion that Mr Maskew assented to the movements to SC without CW paying duty and without a movement guarantee.

378. HMRC noted that notice 163 is concerned with wine produced by the licensed producer, not wine imported under the RC scheme. This is clear from Part 3 of Notice 163 when read as a whole. Having approval as a wine producer is not a means of importing ready for sale products into the UK and moving them around in duty suspension. Moreover, the applicants accepted they had not read the registered consignee public notice 203a. Neither of the applicants were aware or troubled to make themselves aware of the publicly available guidance on the very subject of their business.

379. Mr Firth responded that some parts of notice 163 refer specifically to self-produced wine but not the part he had referred to. When the notice refers to self-produced wine, it says so. It does not refer to self-produced wine as regards the duty-suspended movements from one warehouse to the other, which is exactly what happened.

380. As regards the drawing of adverse inferences, HMRC noted that in *Prest* the Supreme Court cautioned against drawing inferences without a reasonable basis for a hypothesis. That case was not like the present one in that there was no explanation provided; there is a credible explanation in this case.

381. HMRC argued that in fact there is no inconsistency in the evidence regarding the missing transcript for the call of 31 July 2014. CW called HMRC on each occasion on the general advice line. Mr Ranch's comment in the correspondence with Mr Curley related to a different line, the EMCS helpline. There is no evidence to doubt the account that the transcript of the 31 July call is not available due to technical issues. As regards the lateness in producing the Maskew notes and that the hand written notes were not available, they noted that Mr Pietro Corbelli's account of this meeting was received by HMRC in his witness statement on 2 May 2017. Mr Puzey said that he asked for the Maskew notes to be served when he became involved and he had not seen any handwritten notes. If a specific request had been made to him before the cross-examination of Mr Germaney, he would have sought to obtain them.

382. Mr Firth responded that in fact Mr Pietro Corbelli's evidence was that he spoke to the EMCS helpline on 31 July 2014. He initially called the general line but was then put through to the EMCS helpline. He noted that CW told Mr Germaney, during the course of the investigations, that they had a discussion about this issue with Mr Maskew and he followed that up by asking for the case flow which he received on 26 September 2016. HMRC have known full well this was an issue for a long time. There can be no suggestion that HMRC were not aware that Mr Maskew was a person who had potentially relevant evidence for the tribunal.

383. HMRC noted that the movements to SC have been considered independently of this case by Mr Sandip Ranch who has indicated in a penalty explanation letter that HMRC intend to charge a penalty for what he has concluded was deliberate wrongdoing. CW countered that this is merely a different part of HMRC supporting their own decision. Any such penalty will be appealed.

Conclusion on movements to SC

384. It is not clear to what extent Mr Germaney considered the movements to SC were relevant purely because they were made, as HMRC assert, in breach of excise duty rules, or whether because he thought the applicants were knowingly breaching the rules. He was told at the time that CW had been advised by HMRC that they could make the movements lawfully and that CW considered Mr Maskew had also confirmed this.

385. He followed up with Mr Maskew to some extent by obtaining the Maskew notes although he did not seek out any handwritten notes of the visits. We do not consider that it was unreasonable to rely only on the Maskew notes for the reasons he gave. It is not the action of a reasonable officer, however, not to follow up on the calls. He had no convincing reason for his failure to do so. As set out at [250] to [266] he sought to justify this on the basis that CW were "clearly trying to get around some restrictions and they are trying to put it as if they have done it lawfully", he did not know what they asked and it was for CW to provide evidence on that and, he did not have a date or time for the calls (but he did not ask for one) and another officer was making enquiries (Mr Ranch, as regards the penalty position). He also said he thought it was not relevant because it is clearly documented otherwise that they cannot perform what they have performed so "any attempt of ringing the advice line would be to try and find out how they can get around those issues." He said he would have expected them to look at the public information available (meaning in particular the registered consignee notice).

386. When asked the express question he said he could see no difference, in terms of the risk that person poses to the revenue for AWRS approval purposes, between a trader who had done an allegedly unlawful movement on the basis of advice from HMRC's own advice line and a trader who did so without any such advice. Overall we consider that it is likely Mr Germaney did not take into account whether the alleged breaches were undertaken knowingly or not, which must be relevant to the "proper" test as we interpret it in looking at a person's honesty or knowing wrong-doing. If he did conclude CW were acting dishonestly or knowingly, it seems he formed that view simply because he assumed that was the case from the fact the breach occurred. We consider such a conclusion not to be founded as set out below.

387. As noted we found the applicants overall to be credible witnesses. We accept the evidence set out at [141] to [146] and [151] to [166] above. Accordingly we accept that Mr Pietro Corbelli spoke to the ECMS helpline as regards the movements to SC and obtained some advice from them. That he called and spoke to HMRC for over 19 minutes on 31 July 2014, being the day he made the first movement to SC, is not disputed. We accept that having called the general line initially he was transferred to the ECMS helpline. Given the timing it seems highly likely that the call was about the movements, as the call was on the same day as the first movement took place. We accept his evidence that on that call he explained what he proposed to do and believed that the advice he received meant that he could lawfully move the goods to the SC warehouse. We accept that he did not raise the question of what was required as a movement guarantee because he considered that CW's Marine Cargo insurance policy sufficed for that purpose.

388. We note that there is no documentary evidence in support of what Mr Pietro Corbelli discussed with the ECMS helpline. However, his account is supported by the fact that his brother raised this as the explanation at the first meeting with Mr Germaney, Mr Curley later pointed out to Mr Germaney that he could presumably get hold of a transcript of the call and this was also raised with Mr Ranch as regards the potential penalty position. It would be very odd to press for the transcript of the call if there was no genuine belief that the transcript would support what was asserted as to what happened. Therefore, we do not find it necessary to rely on drawing any adverse inference as a result of there being no transcript available.

389. We also accept CW's account that they explained that the movements to SC had taken place to Mr Maskew and he did not query it. This is supported by the typed notes of his visits which record that CW said they were applying for the WOWGR due to a concern about their duty deferment limit, Mr Maskew advised that a WOWGR was not needed for wine but CW already knew that, CW were not at that time making any wine but intended to do so (in memory of their late father) and CW imported wine under an RC approval. The aide memoire records that CW had an account with SC to which wine was moved (see [148] to [150]). It is reasonable to suppose from all of this that Mr Maskew was aware that CW had moved wine, which was not covered by their wine approval, to SC under duty suspense without having first accounted for duty. He did not raise any issue with this as regards the WOWGR application. Again we do not find it necessary, therefore, to rely on drawing any adverse inference as regards the failure to produce the handwritten notes of the meeting or to produce Mr Maskew as a witness.

390. This is further evidence that CW were acting in an honest (albeit mistaken) and open way. That is also apparent from the fact that the entries to effect the movements were made on the electronic system, ECMS, CW clearly did telephone HRMC on the topic and they discussed that they had made the SC movements with Mr Germaney at the visit on 6 June 2016. We conclude, therefore, that overall on the evidence, the applicants honestly believed that what they were doing was lawfully permitted, having explained to HMRC what they were doing and why they were doing it (except as regards the insurance policy which they did not mention because they thought it sufficed). On that basis, the movements to SC are not relevant to the "proper" test to the extent that test looks to the honesty and integrity of the applicants.

391. Some of Mr Germaney's comments suggest he was concerned with the "fit" aspect of the test as he suggested CW had not consulted all of the available publicly available information which would have, in his view, informed them that the movements to SC were unlawful. The applicants accepted that they had not read (or at any rate not recently) public notice 203 on the RC scheme. There was some suggestion that CW had looked at other materials but it was not clear if that included notice 163. In any event, as regards the movements to SC, it is difficult to see that if CW did not consult or misunderstood all of the relevant materials that they were careless or negligent given that, as we accept, they sought and obtained advice from HMRC. That is the case except as regards the assumption that the insurance policy sufficed as a movement guarantee, which was not raised with HMRC. There is also perhaps a wider point as to whether the applicants' approach to and knowledge of applicable excise rules is satisfactory in a more general sense. These issues may be

relevant to the "fit" aspect of the test but in our view they are not of themselves or together with the other relevant matters sufficient for us to conclude that the decision would inevitably have been the same disregarding the irrelevant matters. They are matters to be considered on a review of the original decision.

392. Finally we note that, whilst it appears that the movements were made in breach of excise duty rules, the level of seriousness and consequences of the breach must also be a relevant consideration. That does not seem to have featured in Mr Germaney's consideration. The breach did not result in the avoidance of any duty but merely a delay in the payment of duty to the point when the goods left the SC warehouse. There was no actual loss of revenue. In the interim the goods were held in an approved warehouse; they moved from one approved area to another.

Debts

393. We agree with Mr Firth's argument that Mr Germaney did not apply the correct tests as regards the debts owed by Castillo. As is clear from the evidence at [291] to [299], he did not consider how the debt arose (whether as a result of genuine business failure or deliberate non-compliance), he considered it to be irrelevant how likely a debt was to arise in CW and he failed to weigh the debt in Castillo against the history of CW's record of goods payments. He failed to reach any conclusion on the actual risk this factor indicated CW posed to the revenue. Moreover, prior to the hearing Mr Guiseppe Corbelli had agreed to pay the relevant debts which must also be a relevant consideration.

394. HMRC emphasised that Mr Guiseppe Corbelli, as the sole director of this business, was directly responsible for ensuring that the company paid its tax but he let the company go into liquidation with very large outstanding debts. They question why he did not settle the debts earlier and only offered to do so just before the claim was made for interim relief in the judicial review proceedings which they described as timing which is plainly not coincidental. They noted that when asked why he did not pay the debt to HMRC when it arose he maintained that it was in "a separate company". They argued he relies, therefore, upon the separate corporate personality of a company that has defaulted in paying over large sums of tax. HMRC said that Mr Germaney had properly considered the test; it was not the likelihood of a debt arising that CW was concerned with, it was the risk.

395. We do not consider the precise timing of the offer to pay the debt to be a relevant factor. We note Mr Guiseppe Corbelli's evidence that he did not settle the taxes owed to HMRC earlier as the liquidation had not been concluded and he felt a moral obligation to pay (and see his evidence at [178] to [183]). The fact is that whatever the motivation (although we have no reason to doubt the explanation) he has agreed to pay the debt. HMRC seemed to suggest Mr Corbelli acted improperly in not keeping the company afloat with his own money. However, no evidence was put forward that Mr Corbelli acted improperly as a director of Castillo. We do not understand the suggestion that Mr Germaney was rightly concerned with risk of debts arising in CW rather than the likelihood of the risk. The likelihood of a debt occurring must surely be integral to assessing the risk.

Order for review

Terms of review – case law

396. CW submitted that, if the tribunal directs that there should be a review of the decision, the tribunal may give directions as to what HMRC should and should not take into account when carrying out the review on the authority of *R (oao Ace Drinks Limited) v. HMRC* [2016] UKUT 124 (TCC) at [17]). In their view this can include directing HMRC that certain matters are irrelevant considerations.

397. In that case Warren J was considering whether to grant permission for judicial review as regards a decision to refuse a WOWGR application but as part of that he considered the extent of the powers of the tribunal under s 16(4) when directing HMRC to carry out a further review. He noted, at [12], that the structure of the relevant provisions is designed to ensure the proper collection of excise duty and to avoid, in particular, fraudulent evasion of such duty and that the same could be said in relation to any of the ancillary matters dealt with under s 16(4). He said it is "important that these, essentially regulatory, functions of HMRC are conducted on the basis of the fullest available information both for the protection of the taxpayer and of HMRC". In his view, this leads to a principled conclusion that the tribunal is able to require HMRC to carry out a review "in the light of all the circumstances as they stand at the time when the review is carried out".

398. He continued that the tribunal is entitled not only to require a review to be carried out "on the basis of material, or factors, not taken into account at the time of a decision……even though the information could have been made available or been discovered at the time", but also taking account of "new material, or factors, which have only arisen in the intervening period". For example, if in the interim a taxpayer had been caught committing an excise offence, "that is something which is at least capable of being taken into account" although he was leaving open the argument that the tribunal could, by making directions within the meaning of s 16(4), preclude the admission, on the review, of new material or factors."

399. He said, at [15] that once this was accepted, there is no principled reason why entirely unconnected matters should not be taken into account such as for example dishonesty which comes to light by the time of any review whether or not it pre-dated the original decision. However, at [16], he thought that this conclusion needed to be qualified in the light of the tribunal's power under section 16(4) to make directions. He concluded on this point, at [17], as follows:

> "In my judgment, it is open to the Tribunal not only to direct HMRC to carry out a review on the basis of findings of fact made by the Tribunal or on the basis that they should ignore certain factors which it considered to be irrelevant but also to limit the additional material which HMRC should be entitled to take into account. Nonetheless, the Tribunal ought, in my view, to have a good reason for restricting material which would otherwise be relevant, for instance to prevent a disproportionate exercise under which HMRC might otherwise require a taxpayer to produce a wealth of documentation which they had not asked for when making the original decision. And, in directing a review restricted in such a way, the Tribunal ought to explain in its decision why it is imposing the restriction."

400. At [18] he noted that this left open what is to happen, where a restricted review is directed, if important material comes to light which could have been made available when the original decision was made, or if important material, or factors, come into being after the date of the original decision (such as acts of dishonesty on the part of the taxpayer after that date). Depending on the precise directions made by the tribunal, it may be possible for HMRC (or for that matter the taxpayer if the material is in his favour) to bring the matter back for the directions to be varied, failing which, HMRC might in a case such as the present decide that they would revoke any certification or registration as soon as it is made.

401. We agree that, as Mr Firth submitted, this means that the tribunal can direct HRMC to carry out their review on the basis of the facts found by the tribunal, the tribunal can tell HMRC what are relevant and irrelevant considerations and limit additional material without deciding whether it is irrelevant or relevant (thereby limiting the point in time or the amount that can be taken into account) but, in that case, provided there is a good reason for doing so. HMRC seemed to suggest that the tribunal's powers may be more limited. They considered that Warren J was not restricting his comment that the tribunal needed to have good reason for restricting material which would otherwise be relevant only to additional material that had not previously been considered. Mr Puzey said it would otherwise be odd because how would the tribunal know what additional material was available or not, or what might become available. If HMRC were suggesting that the tribunal cannot direct the review to be conducted in accordance with their view of what is relevant or not, we do not consider that can be correct. It would be a pointless exercise if HMRC were to take into account matters which the tribunal has determined were irrelevant or to fail to take into account factors the tribunal considers relevant.

402. Mr Firth concluded that the tribunal should order HRMC to carry out a review of its decision on the basis that (a) the only information to be taken into account is the information put before the tribunal (b) the seizures, the movements to SC and the outstanding debts owed by Castillo are not relevant factors pointing to CW representing a significant risk to the revenue and there are no other relevant factors pointing to that and (c) and the only reasonable conclusion in the circumstances of this case is that CW is a fit and proper person to be registered under AWRS.

403. HMRC said, that if a review is to be ordered, HMRC should not be placed in a straitjacket of CW's choosing. If further information becomes available to the officer, it should be considered. The seizures, the movements to SC and the debts are all relevant considerations. It should be noted that HMRC are required by law to take these decisions, because they have the experience and the expertise to do so. The tribunal's jurisdiction under s 16(4) does not extend to substituting a decision but, if it were to make the indication CW requests, that would be coming close to being tantamount to doing so.

Review

404. We direct that the decision shall cease to have effect immediately and HMRC shall conduct a full review of the decision taking into account the findings made by the tribunal as set out above including, in particular, the following:

(1) As regards the three seizures which took place in 2012 and 2013:

(a) The seizures are not relevant purely because CW was the consignee of the goods.

(b) It is relevant that CW were not knowingly involved in any wrong doing as regards the mis-use of ARC numbers and avoidance of excise duty, CW took reasonable action to avoid further occurrences in changing hauliers in response to the seizures, following which, there have been no seizures involving CW and CW has been found currently to have satisfactory due diligence procedures in place.

(c) It is relevant that CW were not knowingly involved in any wrong-doing as regards any breach (if there is any such breach, as to which we have formed no conclusion) of any excise duty requirements as a result of the fact that, in relation to the first seizure, goods were routed through a warehouse in Italy as a hub and temporarily stored at a warehouse in the UK.

(d) The practices in (c) may be relevant to the "fit" aspect of the test as may be CW's practices at the time in relation to instructing transporters and dealing with warehouses as are CW's current practices in those respects.

(2) As regards the movements to SC:

(a) It is relevant that CW did not make the movements to SC with any knowing intent to circumvent excise duty rules or knowledge of any breach; they acted openly and honestly.

(b) The nature of the breach is relevant. It lead to duty being deferred only. Duty was duly paid when the goods left the SC warehouse, such that there was no loss to the revenue, and, in the interim, the goods were held within an approved tax warehouse.

(c) It is relevant that, whilst it is reasonable to suppose CW took advice from HMRC on the basis that it was explained that the movements were of wine imported under the RC scheme, CW did not consider or raise with HMRC the question of a movement guarantee but merely assumed (wrongly, albeit unknowingly) that their Marine Cargo insurance policy sufficed.

(d) There is a wider point as to whether the applicants' approach to and knowledge of applicable excise rules is satisfactory in a more general sense given the incorrect assumption as to the movement guarantee and that they did not have a recent awareness of notice 203 on the RC scheme, although that has to be considered in the context of the fact that CW has a good compliance and tax payment record over many years (see below).

(3) As regards the debts:

(a) It is relevant that the debts arose in Castillo as a result of an unsuccessful business venture, that venture (as a bar) was a completely different business to that of CW, Mr Guiseppe Corbelli does not intend to revive the failed business in another vehicle and he has agreed to pay personally the full taxes owing (notwithstanding there is no legal obligation to do so).

(b) It is relevant that CW has a good payment record over a long period of operation and there is no suggestion the applicants have any history of poor payment as regards their own personal tax liabilities.

(c) It is not relevant that Mr Guiseppe Corbelli did not immediately pay the tax debts due on the basis they arose in a company and he was awaiting the outcome of the liquidation process or that the business went into liquidation, given there is no suggestion Mr Corbelli acted in any way improperly as a director of Castillo.

(4) The due diligence issues, the asserted administrative failings and fact the applicants did not appeal against the WOWGR refusal are, as is now accepted by HMRC, irrelevant.

(5) It is relevant that CW has a good compliance and tax payment record over a lengthy period of operation of the business.

405. The tribunal further directs that:

(1) The review should be carried out by a different officer and concluded within six weeks of the date of the release of this decision.

(2) The review should be made only on the basis of information and evidence already presented to or available to HMRC in their investigation and the further information and evidence presented at the hearing (taking into account the factual findings made by the tribunal at the hearing), except as regards any further information required on the basis it is relevant to the matters highlighted above, such as regards CW's current practices regarding utilisation of overseas warehouses as a hub and temporary UK storage.

406. We note that HMRC had the opportunity to carry out an investigation over a prolonged period in 2016 and, at the hearing, to present all further evidence they considered relevant to the decision (which we admitted notwithstanding its late production). On that basis it is reasonable to suppose that there is currently no additional relevant material except as regards the matters which may require further investigation as set out above. Should further relevant material come to light in the future, HMRC could address that by carrying out a further investigation at that time as they have power to revoke an authorisation or, if there is any issue of immediate concern which arises within the six week review period, HMRC may apply for the above directions to be varied.

Applications

Application to vary the direction

407. We now turn to the various applications made during the hearing. We have set out the submissions made in detail as Mr Firth made serious allegations that HMRC and its representatives misled the tribunal and CW in part through what was said at the hearing.

408. As regards HMRC's application to vary the direction, at the start of the hearing on 31 May 2017, Mr Puzey noted that Judge Sinfield had issued a decision (see [22]) in a number of other appeals refusing HMRC's application to vary the similar direction in a number of other appeals "to restrict disclosure to the documents on which the Commissioners intended to rely". He said that HMRC intended to appeal against that decision and to apply to stay the relevant appeals pending the outcome of the appeal. He explained that on this appeal, however, HMRC proposed to CW in an email of 25 May 2017 that:

> "we proceed with this appeal on the basis that the appellant does not require disclosure of material considered but not relied upon. We have not had an answer to that proposal, so I do not know what the appellant's response to that is."

409. The email Mr Puzey referred to was produced to the tribunal and included the following:

> "Paragraph 2.2 of the Directions released by the tribunal on 13 March 2017 requires HMRC to disclose all documents which were considered by Mr Germaney in making the disputed decision. With our list of documents dated 24 April 2017 we disclosed all relevant documents which Mr Germaney took into account in making his decision and we applied to vary the disclosure direction, recognising that "considered" would include material of which Mr Germaney was aware but did not take into account. In the light of Judge Sinfield's decision, we have considered a small number of further documents that were available to Mr Germany, some of which only after he had made the decision, but which were not relied upon him in making that decision. Having reviewed this material, my view is that it is either irrelevant or confidential in the terms referred to by Judge Sinfield at paragraph 28 of his decision and, in any event, that none of it either undermines HMRC's case or assists the appellant's case."

410. Mr Firth said that this proposal was not accepted. He noted the appeal was being heard in an expedited manner because of the effect on the business. A trial window was identified which both parties were available for but then HMRC decided they could not do that as apparently Mr Puzey was not available. They applied to change the trial window, CW objected and Judge Sinfield decided the listing should go ahead in the initially agreed period. Mr Puzey then became available. In his view, essentially HMRC were saying in the proposal of 25 May 2017 "either give up your right to disclosure which the tribunal has recognised, or give up your right to an expedited tribunal appeal, and we just do not see why we should have to make that choice. It is trying to force us to do something against our will for no good reason". He said:

> "We do not accept that HMRC should not make disclosure. We have an order…….HMRC have decided they are not going to comply with it. That is their problem. We reserve all our rights in relation to that and at the moment there is a procedural breach which, as I said, will be relevant potentially in due course….In terms of staying the case further, we are all here, it is not going to happen…..the position on the ground is that HMRC's application has been dismissed. I do not [know] if they are going to appeal it. It is up to them. It does not affect this case. They still have an obligation to make disclosure and, in our submissions, there should be absolutely no chance this appeal does not go ahead today."

411. Mr Puzey responded that he did not understand whether CW were applying for the direction to be enforced (which would cut up against HMRC's intention to appeal Judge Sinfield's decision and apply for other cases to be stayed behind it) or if he was saying that the proceedings should not proceed until HMRC "have disclosed documents which were considered but they do not intend to rely on, if that is the application, then we need to deal with it now". He continued that if Mr Firth was saying he wished to proceed in any event but he was reserving his position – he did not know what that means:

> "…this is plainly an issue that needs to be sorted out now, one way or the other. There is a live issue as to whether that direction is correct in law. And to force the Commissioners to make disclosure of documents that they do not rely on, when they say that the direction doing so is in error and the time for appeal has not yet expired would in my submission be oppressive.
>
> There is very little material that we are talking about here. My instructions are that the officer considered a handful of documents, which he has not exhibited. One of those documents is a document that would not normally be disclosed in any event because it is not of a nature that would be disclosed. That would require…..an adjudication by you… on that document because of its sensitive nature…. Because we need to know, before we embark on this hearing, where we stand in relation to the documents. And until my learned friend got up we did not know despite making our position clear last week."

412. On being asked to clarify CW's position Mr Firth said it was clear "we have a direction in our favour and HMRC should comply with directions. If they choose not to, then we reserve our rights in response to that. There are a number of applications we can make after the hearing if we want to". He said what CW wanted "first and foremost" was for the hearing to be dealt with quickly because of the effect on the business - "that is up there at the top". He described the issue of document disclosure as a subsidiary one but noted that there is an order requiring disclosure of these matters. HMRC's application to get that amended was rejected after a full hearing before Judge Sinfield. The fact that HMRC are still not complying with it is a procedural breach. It does not stop this hearing going ahead. In his view it just means CW can make applications after the hearing, for example, unreasonable behaviour costs.

413. Mr Puzey responded that he would not like to be in a position where there was a "cast iron ground of appeal" because Mr Firth said CW did not get the documents they entitled to because they did not actually press the matter or the matter was not resolved before the hearing went ahead. He made various comments about it being necessary for the issue to be sorted out straight away. He said that HMRC had made the previous proposal to CW because the decision on the direction as regards the other appeals will be appealed and "if the position is that we are required to comply with it by this tribunal hearing now, then we do apply for this matter to be stayed in order for the matter of disclosure to be resolved". Mr Puzey then referred the tribunal to the letter from the tribunal dated 2 May 2017 stating that the application to vary the direction would be considered after the case management hearing on the other appeals.

414. Mr Firth said that was not "the relevant communication". He made various comments relating to the fact that any stay application would be resisted vehemently. He said, amongst other things, that Judge Sinfield had heard all the arguments on disclosure and rejected them. There could be no application to vary the direction. The only question was whether the appeal should be stayed because HMRC were in breach of the direction but that would be rewarding non-compliant parties. The position should be that the hearing should go ahead, "HMRC are in breach of the directions, and we rely on all of our rights after the hearing in terms of procedural irregularities and costs".

415. Mr Puzey said the point of the letter of 2 May 2017 was that HMRC's application to vary the direction in this case was in effect stayed pending the case management decision by Judge Sinfield and so remained to be adjudicated upon.

416. Mr Firth responded that:

> "the clear and only sensible reading of what was happening was that Judge Sinfield would be determining all these applications… There is no sensible basis for Mr Puzey to suggest maybe you should take a different view to Judge Sinfield…What was the point in us waiting for Judge Sinfield? What was the point in making this direction? The suggestion that there may be a technical failure to actually rule on the direction lacks any merit. If there has been, then this tribunal should rule now "based on what Judge Sinfield has said, there is no reason for us to vary the direction".

417. The tribunal asked to see Judge Sinfield's decision and took some time to read it. Mr Puzey raised a point which he said was not raised with Judge Sinfield but perhaps should have been. He noted that the direction is far wider than required in either a criminal case or one dealt with under the Civil Procedure Rules ("**CPR**"), where it is for the party undertaking the disclosure exercise to determine the relevance of documents and whether they assist the case of the other party or undermine the party's own case. He noted that in the appeals under consideration by Judge Sinfield the parties were to agree a time by which the disclosure was to be made. In this case HMRC were told by the tribunal that the application would be dealt with after the hearing on the other appeals "but we have received nothing further" and, if the application were refused, HMRC would have no time allocated in which to comply.

418. Mr Firth said "it is plain abuse of process what is going on here" and that much time was bring wasted on this. He said that "the facts are both parties understood Judge Sinfield would determine whether or not the direction would be amended. Judge Sinfield said "no" on the basis of the arguments presented which are identical to the ones in this case". In his view HMRC had had their chance on this with Judge Sinfield and should not "get a second bite of the cherry" by raising new arguments. The tribunal noted that this case was not actually part of the other proceedings Judge Sinfield had dealt with. Mr Firth said it was clearly envisaged that it would be determined by those proceedings and "it is an abuse of process for HMRC to come along and try to re-argue it before you. It is wasting so much time".

419. Mr Firth suggested the tribunal should decide on the point the following morning. Mr Puzey said that whilst he saw the merit in that proposal "it is pretty fundamental that the parties know what documents are before the tribunal before we start".

420. We later said we would decide on the correct approach to the disclosure issue the following morning, on 1 June 2017.

Application to admit further evidence

421. The tribunal then moved on to the application for further evidence to be admitted. Mr Puzey noted the tight timetable due to the expedited nature of the appeals and that further witness statements had been submitted (although there was no provision for that), including for Mr Guiseppe Corbelli, at 5.00pm on 25 May 2017 (being the Friday before a bank holiday). He gave a number of examples where the second witness statements referred to the seizures and asserted that the blue folder documents were relevant to those statements. He said the documents were plainly relevant and that HMRC were "doing their best to respond to what is a key issue in this case by putting relevant evidence before the tribunal and that the "situation has arisen largely because of the compressed timetable". He stated that the documents were not considered by Mr Germaney. He only had the summaries of the events relating to the seizures as set out in his witness statement but when CW then said "we have no knowledge of these; these are not even our goods", HMRC must be permitted to respond.

422. Mr Puzey noted that the tribunal would be well aware of the principle (as set out by Lightman J in *Mobile 365*) that all relevant evidence should be before the tribunal. He noted that CW was able to continue to wholesale alcohol as a result of the judicial review proceedings that have taken place. So CW's position is preserved but this is HMRC's chance to put before the tribunal the circumstances which justify the decision.

423. Mr Firth said CW was only registered as an approved person until the outcome of the Court of Appeal hearing which took place a couple of weeks ago and noted that the decision could be released at any time. He asserted that it was not only when HMRC received the second witness statement that they realised that getting further documentary evidence relating to the seizures would be a good idea. He considered that apparent from the fact that the first witness statements also contained various denials in relation to the seizures and that correspondence in the bundles demonstrated that HMRC had asked for the seizure documents in March 2017 (see [224]).

424. Mr Firth noted that HMRC had also served other documents late being the "supposed" transcripts of the two telephone calls and the Maskew notes both of which he said had been requested previously (see [26] and [27]). He said "the idea that HMRC are in some sort of burden position here is untrue. They have been producing things that they must have had for quite some time or at least been looking for quite some …We did not object to them. We are going to let them in because we have had time to consider them."

425. Mr Firth continued he had only received the blue folder documents just before the hearing, CW's witnesses had had no time to read them, it was apparent from the documents that HMRC knew from at least March 2017 that these would be relevant documents and "in the absence of a witness saying well it was only today at 11.45, that we got them from storage, it is an ambush. It really is."

426. Mr Puzey responded that the statement that the relevant goods were not the property of CW was not in the first set of witness statements. He acknowledged that there was reference to obtaining the seizure documentation in March but that information was not in the bundles. The only means of testing CW's account is within the blue folder documents – there is no other way of challenging the accounts given in the statements. He said it was a matter of simple fairness that all relevant documentation should be before the tribunal noting again that the timescale has been dramatically compressed from what it would normally be. He said HMRC should be in a position to be able to put their case to the witnesses particularly if they have supplemented their evidence at a very late stage.

427. We note that in considering whether to admit late evidence, the tribunal must (as with the exercise of all its powers) seek to give effect to the overriding objective of the Rules, of dealing with matters fairly and justly (under rule 2(3)). That includes (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties, (b) avoiding unnecessary formality and seeking flexibility in the proceedings, (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings, (d) using any special expertise of the tribunal effectively and (e) avoiding delay, so far as compatible with proper consideration of the issues. The parties must (a) help the tribunal to further the overriding objective and (b) co-operate with the tribunal generally (under rule 2(4)).

428. We decided on 31 May 2017 that it was in the interests of fairness and justice for the documents in the blue folder to be admitted in the proceedings on the basis that they were potentially highly relevant to one of the key issues, the seizures. It was clearly not ideal that they were produced so late and we do not accept that the late production is justified by the applicants producing second witness statements also at a late stage. Whilst they contained some further comments in relation to the seizures, including as regards the second seizure that the goods were not owned by CW, HMRC had clearly been aware that the seizure documents were potentially relevant for some time (see [224]). However, we considered that the inefficiencies in production was outweighed by the potential relevance provided that prejudice to CW in having to deal with this evidence at a late stage could be avoided. We considered this was possible by ensuring that the relevant witnesses were not required to give

evidence until they had had sufficient opportunity to review the documents and ensuring their counsel had time to prepare.

429. We decided, therefore, that we would proceed with another of CW's witnesses, Mr Vince Curley, and finish early to allow time for the other witnesses who needed to review the blue folder documents to do so and to commence early the following day in order to make up the time. In fact there were no questions for Mr Curley. Mr Firth then chose to proceed to call Mr Pietro Corbelli notwithstanding that he was informed by Mr Puzey that he intended to ask him questions concerning the seizures on the basis of the blue folder documents.

Decision on application to vary the direction

430. The following morning, on 1 June 2017, we notified the parties that we considered it was clear that HMRC's application for the direction to be varied was outstanding and had to be dealt with. It was clearly no part of the proceedings before Judge Sinfield. Having given the parties an opportunity to provide any further representations we decided, on the same basis as set out in the decision of Judge Sinfield (see [22] above), that the direction should remain in place as it was originally issued. This meant that HRMC were required to disclose documents which Mr Germaney had considered, whether or not he had relied on them in making his decision and, whether or not HMRC intend to rely on them as evidence in the proceedings.

431. Our view is that it is in the interests of justice and fairness for the tribunal to require such disclosure as it can only really be determined whether and to what extent the decision-maker has taken into account relevant considerations and not irrelevant ones, as required to assess whether the decision was reasonably arrived at, if the full range of materials the officer looked at are available. We consider that it potentially undermines the tribunal's ability to apply this test properly if HMRC are able to withhold materials which were considered (whether relied on by the officer or not) on the basis they do not wish to rely on the materials as evidence in the proceedings except where, as Judge Sinfield indicated, there are legitimate concerns on the adverse effect on the public interest of disclosure of confidential materials.

432. Mr Puzey then made an application for there to be a hearing in private, without CW present, in relation to HMRC's position that they should not be required to disclose the intelligence briefing due to its sensitivity. CW objected and a number of submissions were made about the ability of the tribunal to deal with this in this way.

433. The tribunal asked Mr Puzey if the intelligence briefing was the only document which would need to be disclosed. He replied that there was this document and two or three embedded documents within it. He said he could not say anything more about the document or the risk but noted that:

> "There are three visit reports within the briefing document which are not sensitive and which we are quite happy to disclose…The reason they were not disclosed is because of the objection that we took, which had not been resolved until now, because they were not relied on by the officer."

434. Mr Firth said that he could show the tribunal the letters where the appellant asked for all the reports in the last six years. Mr Puzey said no visit reports had been asked for:

> "[HMRC's] approach was that [they] are required to disclose that which they relied upon unless of course it materially undermined their case. These are entirely neutral. The officer did not rely on them. We were not required to disclose them unless and until the tribunal ruled that we were. I am actually trying to be helpful."

435. It was agreed that HMRC would provide CW with copies of the visit reports during the next break. The tribunal decided that we would decide on the issue of how to deal with the potential disclosure of the intelligence briefing after giving the parties an opportunity to make further submissions. We then proceeded to hear the further witness evidence. In fact the tribunal did not have sufficient time to conclude the hearing in the initially scheduled period from 31 May to 2 June 2017. A further hearing day was arranged for 20 June 2017 and it was on that day that this application was considered further as set out below.

Application to bar HMRC

436. On 2 June 2017, following the conclusion of the witness evidence, CW made an application to bar HMRC from taking any further part in the appeal proceedings under rule 8 of the Rules.

437. Under rule 8(3)(b) of the Rules the tribunal may strike out the whole or a part of the proceedings "if the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly". This rule applies to HMRC as it applies to an appellant except that a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings (under rule 8(7)). In deciding whether to bar HMRC under this rule the tribunal must act in accordance with the overriding objective (as set out at [427]).

438. If HMRC has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the tribunal need not consider any response or other submissions made by them, and may summarily determine any or all issues against them (under rule 8(8)). CW further requested that, if the tribunal were to bar HMRC, the tribunal should determine the appeal summarily in their favour, on the basis that there are no relevant considerations pointing against approval under Part VIA ALDA with a short deadline for the review (as that would all that would be necessary).

439. Mr Firth submitted that:

> (1) This case falls squarely within the description of when HMRC "should normally be barred" under rule 8(3)(b) set out by Judge Mosedale in *First Class Communications Ltd v Revenue and Customs Commissioners* [2013] UKFTT 090 (TC) at [52] being:
>
> > "…..where the appellant has already been so prejudiced by HMRC's conduct in a manner which cannot be remedied and … therefore the proceedings cannot be fair and just".

(2) If that is not accepted it falls within the second situation identified by Judge Mosedale where "it might be appropriate to bar HMRC" where:

> "there has been a course of conduct by HMRC which, while it has not yet meant it is not possible to deal with the appeal fairly and justly, nevertheless is part of a pattern of conduct which, if it continues, will mean that the appeal cannot be dealt with fairly and justly".

440. He asserted that the relevant pattern of conduct in this case is that of misleading the tribunal and CW in a number of respects, the late disclosure of documents as a deliberate ambush and the late disclosure and suppressions of materials which potentially assist CW's case.

441. He referred to the decision in *Nutro UK Ltd v HMRC* [2014] UKFTT 971 (TC), at [54] to [58], where Judge Berner decided to strike out an appeal under rule 8(3)(b) in part due to the "reprehensible attempts" by the appellant in that case "to mislead" the tribunal. He described such attempts, at [55], as "a matter which goes to the core of cooperation with the Tribunal". He said it is:

> "fundamental to the operation of the system of administration of justice, and enabling the tribunal to deal with cases fairly and justly, that the Tribunal, and other parties to the proceedings, are able to rely on the truth of witness statements. That is as applicable to the conduct of case management as it is to the substantive appeals themselves. To attempt to obtain or resist a direction of the Tribunal by making false statements undermines the system of justice which the Tribunal embodies."

442. Mr Firth submitted that in the circumstances (as set out in further detail below), there can be no confidence that this case can be handled justly. There can be no confidence that documents provided by HMRC represent everything which should have been provided in so far as they assist CW's case or in the explanations given by HMRC for these various matters, whether from the representatives or the witnesses themselves. HMRC's conduct is particularly egregious, an outrageous abuse of power, given that CW's fifty year old business will be destroyed if the decision is upheld. The point of the AWRS scheme is to make sure only fit and proper people are approved but if the people handling the decisions and the appeals against those decisions are not fit and proper to be handling those matters, the whole system falls down. The tribunal should take a very dim view and needs to send a strong message, even if the tribunal considers HMRC are only reckless (which is not accepted). Debarring is an exceptional remedy but this is an exceptional case.

443. Mr Puzey countered that there was simply no conspiracy or attempt deliberately to stymie CW's case. This is an important case which HMRC accept had to be expedited, but there is a lot of material, and, whilst arguably there may have been some inefficiencies, they were doing the best they could to deal with it within the timeframe. It is a very rare case where no documents are put forward after the beginning of the hearing. It is entirely to be expected in a case with such a compressed timescale that documents are identified and served at the last minute, or even during the hearing. That does not mean to say that HMRC are attempting to undermine the process. The parties' further submissions are set out below.

444. In summary, we decided to refuse the application on the basis that we did not consider that HMRC and/or their representatives had deliberately misled the tribunal or engaged in any other conduct such that CW has been or was likely to be so prejudiced that the proceedings could not be fair and justly conducted. Whilst there had clearly been inefficiencies in HMRC's preparation for this hearing, they were not of such a kind that the appeal could not be dealt with fairly and justly.

Discussion and decision on application to bar HMRC

Intelligence briefing and notes

445. Mr Firth submitted that HMRC and Mr Puzey mislead the tribunal and CW that the intelligence briefing was not a document which Mr Germaney relied on in making his decision when in fact it was, as only came out when Mr Germaney was cross examined.

(1) There was no mention in HMRC's objection to the direction of issues relating to the disclosure of documents which were in fact relied on by the decision-maker but which it is argued are confidential.

(2) In the email of 25 May 2017 Mr Shaw explicitly said that HMRC had disclosed all matters which Mr Germaney relied on in making the decision and, on that basis, asked CW to waive any right to disclosure of matters considered but not relied upon (see [409]). This is plainly incorrect and Mr Shaw/HMRC must have known that.

(3) At the hearing on 31 May 2017, Mr Puzey started his submissions on the application to vary the direction by reference to that proposal which he described as "that we proceed with this appeal on the basis that the appellant does not require disclosure of material *considered but not relied upon*" and he noted that HMRC had not received an answer to that. In that context, when he then said that, if the application was refused, there was a document, the intelligence briefing, which it was claimed was confidential such that it should not be disclosed, he was clearly deliberately creating the impression that document was one considered but not relied on by Mr Germaney.

(4) He compounded this impression by his later comments (see [433] and [434]) such as, on 1 June 2017, when referring to the intelligence briefing, he said that HMRC's approach was that they are "required to disclose that which they relied upon, unless of course it materially undermined their case. These are entirely neutral. The officer did not rely on them."

(5) He interjected, when Mr Germaney later gave evidence, that the notes referred to in his witness statement came from the intelligence briefing, to say that the information he had provided was that a document "that had been relied upon was not going to be disclosed because it was sensitive" (see [217] and [218]). In fact the information he had provided was quite the opposite as illustrated by the above.

446. As regards the email of 25 May 2017, Mr Puzey said that Mr Shaw did not know that Mr Germaney had relied on the intelligence briefing in making his decision when he sent the email. Mr Shaw received the intelligence briefing (and seizure

documents) from Mr Germaney on that day but there was no reference in the covering e-mail as to whether the document was relied upon in Mr Germany's witness statement or to when it was received. This came to light only when Mr Shaw and Mr Germany attended a conference with Mr Puzey on 26 May 2017. That was the first time they had a conference with counsel as regards this appeal and Mr Puzey was instructed only around two and a half weeks prior to the hearing. Mr Firth responded that if that were true, CW would have been informed that the information in the email of 25 May was incorrect as soon as this came to light and Mr Puzey would have flagged this up at the start of the hearing.

447. We accept Mr Puzey's explanation as to why the email of 25 May 2017 was incorrect. We have no reason to doubt it. We do not consider that the fact that the change in position was not expressly raised at the start is sufficient to indicate that the explanation provided is not correct or that there was any deliberate intent to mislead, whether on the part of Mr Shaw, HMRC or Mr Puzey, taking into account all the factors set out below.

448. In that regard we note the following:

(1) Mr Puzey said that, prior to the tribunal making a decision on HMRC's application to vary the direction, HMRC were acting, in accordance with the stance taken, that they only had to produce documents which they intended to rely on as evidence in the proceedings. They did not intend to rely on the intelligence briefing. It was only once the tribunal refused HMRC's application at the hearing that it became a live issue that HMRC were potentially obliged to disclose it, subject to the confidentiality issue. We accept that was not an unreasonable stance to take. It is unfortunate that the application was not dealt with prior to the hearing.

(2) HMRC, through Mr Puzey, flagged up at the start of the hearing that the application to vary the direction needed to be dealt with and that there was a sensitive document the disclosure of which would be in issue if the tribunal refused the application. Indeed Mr Puzey was insistent that the issue needed to be resolved at the outset. HMRC were not in any sense trying to avoid the issue but quite to the contrary were seeking for it to be resolved. They were seeking to bring it to the forefront of the tribunal's attention

(3) There was no concealment in that Mr Germaney had referred to the document in his witness statement (see [38]), albeit it was described differently (as central team processing notes) to how Mr Puzey described it (as an intelligence briefing). When questioned at the hearing as to where the notes he referred to were Mr Germaney simply answered that the notes were from the sensitive document (see [217] and [218]).

(4) When the tribunal refused HMRC's application to vary the direction, HMRC immediately made an application for the question of disclosure of the document to be made in private. Whilst their view is that the sensitive nature of the document is such that it is not to be disclosed, they were doing nothing other than seeking to get the disclosure issue resolved.

449. As regards Mr Puzey's comments at the hearing, we can see that there is some scope for misunderstanding. He referred initially to the proposal of 25 May, being that no further disclosure would be required on the basis that HMRC had disclosed all documents relied on by Mr Germaney in making his decision. Given that reference, there is scope for assuming that in his subsequent comments, when he raised the issue of the disclosure of the intelligence briefing, he meant that the intelligence briefing was a document which had not been relied on by Mr Germaney. However, whilst it could perhaps have been clarified at an earlier stage, we cannot see that, to the extent any such impression was created, there is any basis for regarding it as anything but unintentional.

450. We do not consider that any adverse implication can be drawn, as Mr Firth asserted, from the failure explicitly to say from the start that the document was one which Mr Germaney had to some extent relied on, when looking at this in the context of the overall debate (as set out in full at [408] to [435]). As noted, Mr Puzey was keen to flag up the issue at the outset. Whether the intelligence briefing was a document which Mr Germaney relied on or not in making his decision was not the focus of much of the subsequent debate. Rather the focus was on (a) as HMRC asserted, that the application to vary the direction and the disclosure issue needed to be determined at the outset or (b) as CW argued, the application in effect had already been determined by Judge Sinfield such that HMRC were in breach of the direction and there could be no question of a stay in proceedings.

451. Mr Puzey was insistent on a number of occasions that he did not understand what Mr Firth meant by CW reserving their rights as this was an issue which needed to be determined at the outset. In that context he said that to force HMRC "to make disclosure of documents that *they do not rely on*, when they say that the direction doing so is in error and the time for appeal has not yet expired would in my submission be oppressive". He said that his instructions were that the officer considered a handful of documents which he has not exhibited and "one of those documents is a document that would not normally be disclosed in any event because it is not of a nature that would be disclosed. That would require…..an adjudication by you… on that document because of its sensitive nature." He again referred to the need to know "before we embark on this hearing, where we stand in relation to the documents."

452. On the second day of the hearing, following the tribunal's decision to refuse HMRC's application to vary the direction, Mr Puzey straight away made an application for the disclosure of the intelligence briefing to be considered in private. The tribunal asked Mr Puzey if the intelligence briefing was the only document which would need to be disclosed. It was then he explained that there were visit reports within it which had not been disclosed before as they were not relied on by the officer. Mr Puzey continued that HMRC's approach was that they were "*required to disclose that which they relied* upon unless of course it materially undermined their case. These are entirely neutral". The officer did not rely on the visit reports and he noted that "we were not required to disclose them unless and until the tribunal ruled that we were".

453. It was later that day when Mr Germaney gave evidence that it transpired that the notes he had referred to in his witness statement (but which were not appended to

the statement) came from the intelligence briefing and Mr Germaney had relied on those notes in making his decision. Mr Puzey stepped in to clarify that the document referred to was the intelligence briefing and said that "the information he had provided was that it was a document *which was considered and relied on* by the officer" (see [217] and [218]).

454. We note, in particular, again that it was Mr Puzey, acting on behalf of HMRC, who was bringing the matter to the tribunal's attention and pressing for the application to vary the direction and related disclosure issues, if the application was refused, to be decided straight away. We accept that, as Mr Puzey's said, he thought he was flagging the disclosure issue up whilst making clear this was not a document that HMRC wished to *rely on as evidence in the proceedings*. Many of his comments as to reliance were intended to be made on that basis and were not comments on whether Mr Germaney had relied on the document or not in making his decision.

455. We note that Mr Puzey did not at any time represent that the intelligence briefing was one which Mr Germaney considered but had not relied upon. His comments on the visit reports, as ones Mr Germaney did not rely on, were clearly confined to those particular documents. As regards his comment, "the information he had provided was that it was a document which was considered and relied on by the officer", having spent some time re-reading the transcript we do not consider that information had clearly been provided. However, we can see that, at that point in time, without the benefit of going back through everything said, Mr Puzey may well have thought he had explained the position with sufficient clarity.

Blue folder documents

456. Mr Firth said that the tribunal were misled that the reason the blue folder documents were produced so late was because they were a response to the applicants' further comments on the seizures in their second witness statements of 26 May. The issues as regards the seizures were flagged up in their first witness statements produced on 2 May. Moreover the documents were deliberately withheld as Mr Germaney and the Solicitor's Office had in fact known since March 2017 that these are important documents relevant to the appeal which they intended to rely upon as is shown by the email correspondence at that time. There is nothing in the list of documents provided in April 2017 to suggest this documentation exists or that it was being sought and would be relied upon. Even if the documents were only received on 30 May 2017 (which is not accepted), in any event HMRC/their representatives knew the documents were coming and had been requested. They knew they intended to rely upon them. It was a planned ambush.

457. Mr Puzey said that HMRC could perhaps be criticised for inefficiency but there was no planned ambush. It was a very significant effort for HMRC to put everything together within what was a very compressed timetable; the documents had simply not been obtained when HMRC produced their list of documents in April. He said that he asked to see the reports of the seizures when he became involved in the case which, as noted, was only around two and a half weeks before the hearing. The reports with the indices were received on 24 May 2017. He took instructions on those on 26 May 2017, and as a result, on 30 May 2017, working from the indices, he advised what documents should be obtained. He thought they were e-mailed to him between 5.30pm and 7pm on that evening. They were put together by Mr Puzey

personally in the morning of 31 May 2017. He took instructions on them in the conference before the start of the hearing on 31 May 2017 and they were then given to CW.

458. Mr Firth did not accept that the documents were received on 30 March 2017 (which he noted was remarkably good timing). He said:

> (1) The question arises as to why CW was not informed of the documents on that day. HMRC provided the Maskew notes on that day but there was no mention of a bundle of documents on seizures at that time.
>
> (2) It was very clear that counsel for HMRC had had time to prepare his cross-examination on these bundles; he knew the bundle inside out when he started cross-examining Mr Pietro Corbelli.
>
> (3) The question arises of what were HMRC going to cross-examine on, if not these documents, given 70% or 80% of the cross examination related to the documents.

459. Mr Firth also asserted that the blue folder is incomplete as demonstrated by the numbering and that CW has produced the seizure letter relating to the first seizure which is not included in the folder but is clearly a highly material document given HMRC's focus in their cross examination on who was the owner of the seized goods. Mr Germany was very unclear how this folder was put together (see [220] to [224]). He claimed he was looking for things in both parties' favour but the failure to include the letter now produced by CW proves that is not correct. It was not at all clear how this folder had been put together, but it is clear that it is incomplete which fits in with the general theme that has emerged of not disclosing things that HMRC know they should be disclosing.

460. Mr Puzey said he was grateful for the compliment but in fact he had not had a great deal of time to prepare for the cross-examination. He was "doing it on the hoof". As regards the assertion that the blue file is incomplete, Mr Puzey said that working from the indices he had identified what he thought were the relevant documents (he did not have all the documents). He was working within the space of a day to get those documents put together ready for this hearing. He said he had not seen the letter CW produced relating to the seizures before it was given to him by Mr Firth at the hearing.

461. Clearly there have been inefficiencies in the way HMRC has handled the preparation for this case. However, we cannot see any basis for assuming simply from the fact that the correspondence shows HMRC thought back in March 2017 that they wanted to produce the documents, but they were then not produced until the last minute, that this was a planned ambush. The question arises as to why HMRC would deliberately delay producing documents they wished to rely on as evidence in the proceedings thereby risking the ability to produce them at all. When documents are produced late an application has to be made to the tribunal for them to be admitted and the onus is on the applicant to demonstrate why they should be admitted late. As it happens in this case we decided to admit the documents but HMRC could hardly be certain in advance that would be the outcome albeit they thought they could justify

their late admission. With that in mind, it seems to us much more likely that HMRC were simply inefficient.

462. We agree that Mr Germaney was unclear about how the blue folder was put together (see [220] to [224]). However, in his role within HMRC, as officer who made the decision, we would not expect it to be his primary responsibility to prepare documents for litigation. Moreover we can see that he was not particularly focussed on these documents as he had not looked at them for the purposes of his decision. (As set out above, we see his failure to obtain these documents for the purposes of his decision as a failure to engage with the decision making process but that is a separate issue). Overall we see the failure by HRMC to produce these documents at an earlier stage as a collective failure in co-ordination between HMRC and the Solicitor's Office.

463. It appears that it was only when Mr Puzey became involved, two weeks or so before the hearing, that proper attention was paid to what was required for the hearing. We accept Mr Puzey's explanation that he personally put the bundle together as best he could within the limited timeframe. Whilst we have no reason to suppose that HMRC deliberately withheld material as regards the seizure documents, there is a concern that, purely due to the haste with which this exercise was carried out, the documents may not be complete. We note that CW produced the seizure letter relating to the seizure which is not included in the bundle and which it was asserted assists their case (although we do not consider that to be the case). Mr Puzey said he had not seen that letter before and we do not see any basis for assuming he was deliberately excluding relevant items.

464. We have no reason to suppose Mr Puzey had the documents for longer than he says. We cannot simply assume that to be the case because he was able to cross examine by reference to the bundle. It is hardly uncommon for counsel to be required to deal with matters at the last minute and to be able to do that effectively.

465. We do not consider that the tribunal was misled as regards the reasons given as to why the documents should be admitted late. As set out above, we do not consider that the late production was justified on the basis that HMRC must be allowed to respond to the applicants' second witness statements. We accept, however, that the fact that there was a statement that CW did not in fact order or own the goods seized in relation to one of the seizures, when the blue folder documents contained evidence to the contrary, may have meant that HMRC viewed the presentation of that evidence as more important or that it increased their focus on that. That was the point we understood Mr Puzey to be making. Indeed a substantial portion of the subsequent cross examination on those documents related to that.

Late production of the Maskew notes and failure to produce hand written notes

466. Mr Firth said that HMRC deliberately also kept back the Maskew notes which were only disclosed on 30 May 2017. He said it is implausible that in putting together the exhibits to Mr Germaney's witness statement, which include the email from Mr Maskew of 26 September 2014 with the case flow reference, it was merely overlooked that the underlying documents should be disclosed. Mr Germaney had no viable explanation as to why these were not been disclosed earlier and production was so late. The only explanation is that they were not disclosed because they assist CW's

case, in that for example they mention the main reason CW applied for a WOWGR is that they have reached their duty deferment limit.

467. Mr Firth noted that Mr Germaney accepted that the relevant officers would have made handwritten notes and CW gave evidence that two officers were making handwritten notes at the meeting. The typed notes record a visit of over an hour but there is relatively little narrative of what occurred. The hand written notes could be expected to be more detailed. The implication is that the hand written notes were not looked for or, if they were looked for, they were not disclosed, because there was no interest in providing documents that helped or might help CW.

468. Again clearly there have been inefficiencies and HMRC and the Solicitor's Office can be criticised for not dealing with this earlier but we do not see there was any deliberate intent to delay the production of the Maskew notes to prejudice CW's case. As Mr Puzey said, although Mr Germany could perhaps be criticised for not realising that the notes should be disclosed sooner, from his evidence there was no deliberate intention to keep the notes back. He said that he did not consider that the Maskew notes needed to be disclosed, because he had not printed them off and in his view they did not assist CW (see [280]). We accept Mr Puzey's explanation that they were disclosed on 30 May 2017 simply because Mr Puzey had identified, looking at the applicants' witness statements, that the meeting with Mr Maskew was a matter that they were relying upon and concluded the notes should be obtained. It is his job to identify documents which either assist or undermine or which, for any other reason, should be provided to the tribunal. Again it was only once Mr Puzey became involved that steps were taken to check that all that should be provided had in fact been provided and any omissions were dealt with. The fact is the Maskew notes were disclosed albeit late.

469. As regards the hand written notes, as Mr Puzey noted, HMRC are not required to disclose these under the direction as they are not documents which were considered by Mr Germaney in his decision or which HMRC wish to rely on as evidence. Whilst Mr Germaney can again perhaps be criticised for having failed to investigate thoroughly by obtaining the notes, it does not appear he was deliberately seeking to stymie CW's case. His evidence was essentially that he thought the typed notes did not contain anything supporting CW's case and that the hand written notes would not add anything (see [275]). We note that CW expressed surprise in their witness statements of 26 May 2017 that HMRC had not sought to provide these. Their team did not, however, make any request to HMRC for the notes at that stage. Again, we cannot simply assume that the reason why they were not produced is because they may contain material which supports CW's case (which in any event is a matter of speculation). HMRC were not obliged to produce these. CW could have requested these notes but they did not do so.

Telephone transcripts

470. Mr Firth asserted that Mr Germaney knew the transcripts of these calls were relevant but delayed disclosing them until 26 May 2017. There is no valid explanation as to why they were not produced before. Moreover HMRC has deliberately suppressed written evidence of the third phone call on 31 July 2014. He asserted that there is conflicting evidence of why there is no transcript in that Mr

Ranch told Mr Curley that calls to the EMCS helpline were not recorded whereas Mr Germaney said he had told him there was a technical glitch with the recording. He said that is simply too convenient the transcript is not available.

471. Mr Puzey explained that he had asked for the transcripts when he became involved in the case. As before, he had identified that there was an issue as to what was said in the telephone conversations and decided that the transcripts should be obtained. As regards the missing transcript, he said that there was no inconsistency in the evidence. CW made the calls on the general advice line, not the EMCS line, to which Mr Ranch had referred. There is therefore no reason to doubt that there was a technical glitch with the different line, the general advice line. Mr Firth responded that it was the EMCS help desk who CW spoke to on 31 July 2014 having been put through by the advice line.

472. Again Mr Germaney can be criticised for not trying to obtain these transcripts for the purposes of his decision. He had no good reason as to why he did not pursue this avenue of information having been informed of the calls (see [255] to [261]). However, again we consider that Mr Germaney's failings in this respect were an issue to be explored in the proceedings as regards their impact on whether the decision was reasonably arrived at. We do not regard it as part of a deliberate attempt by HMRC to stymie the appeal process. We accept Mr Puzey's explanation that it was only once he was on board that the documents were identified.

473. As regards the missing transcript, as set out above, we accept that CW spoke to the EMCS helpline on 31 July 2014 and that there is, therefore, a discrepancy in the evidence as regards why the transcript of that call is not available (as set out in the letter from Mr Ranch at [76] and Mr Germaney's evidence at [262] to [268]). Overall, however, we do not consider that this of itself undermines the credibility of Mr Germaney as a witness to such an extent that the tribunal would not be able to deal with matters fairly and justly.

Disclosure of intelligence briefing

474. Finally, once proceedings resumed on 20 June 2017, HMRC argued that the intelligence briefing should not be disclosed on the grounds of confidentiality. They noted that it was not a document which they wished to rely on as evidence in the proceedings. They referred to Judge Sinfield's decision where he said that material considered but *ultimately not relied* on which contains intelligence or other genuinely confidential material that could have an impact on HMRC's operations, then "HMRC should not be required to produce it, or at least not in unredacted form." They submitted this supports their position that reliance means production of the document as an item of evidence rather than as a reference in a witness statement to some of the information contained in the document.

475. HMRC said that in any event the intelligence briefing falls within the category of material that is protected from disclosure under the principle of public interest immunity ("**PII**"). HMRC said they would make an application for the document not to be disclosed on that basis if the tribunal considered that there was material in the document which otherwise should be disclosed (other than that referred to in Mr Germaney's witness statement which HMRC would disclose). PII is not dealt with in the tribunal rules but HMRC thought the tribunal should follow the procedure for

dealing with a claim that PII applies set out in the CPR. They noted that in order to make such a claim they would need internal approval at a high level which could take some time to obtain. HMRC suggested the tribunal could proceed by examining the document and taking a preliminary view on whether it contained matters of relevance.

476. CW submitted that the document should be disclosed as Mr Germaney had relied on it and it is extensively referred to in his witness statement. HMRC cannot claim they are not relying on the content of a document by simply copying parts of it into a witness statement but not appending the document itself. No explanation has been given as to why the document is sensitive. HMRC misled the tribunal and CW about whether the document was relied on by the officer and about what HRMC could disclose about the nature and content of the document when attempting to resist disclosure. In that context, CW made many of the same points as made in relation to the document in respect of the application to bar HRMC as did HMRC in response. CW argued that, as regards a claim for PII, the CPR requirements were not satisfied as HMRC had not produced any evidence of the alleged sensitivity.

477. We decided that the best way forward was for the tribunal initially to examine the document in private to assess whether the document was of relevance to the issues in the proceedings such that it ought to be disclosed. CW were against this on the basis they would not have the opportunity to make submissions on the relevance of the document. However, we could not see there was an alternative as, if the document were to be revealed to CW, if it transpired there was a valid PII concern that prevented disclosure, that principle would necessarily be breached automatically. We considered that although PII is not specifically referenced in the Rules, we could see no reason why such a principle should not apply to proceedings in the tribunal in the same way as to proceedings in other forums and that it would be sensible to follow the procedure set out in the CPR. We noted CW's point on the evidence as to sensitivity of the document but again considered that could only be dealt with by the tribunal examining the document in private.

478. Having examined the document we considered that it did contain material which was potentially of relevance and, on the face of it, we could not see that the document was covered by PII (at any rate with suitable redactions) but that further questions would need to be raised with HMRC, necessarily in private, to establish whether that was the case. HMRC said that given our initial indication they would proceed to make a PII claim. Given that would require a further hearing and potential delay due to HMRC's authorisation process, CW decided that they no longer wished to pursue the matter and did not require disclosure.

479. We note that this was not an entirely satisfactory outcome. We do not accept that, as HMRC appeared to suggest, a document which is extensively referenced in a witness statement produced by a party's witness is not relied on as evidence by that party in the proceedings. We note that HMRC were prepared to disclose the portion of the document which Mr Germaney expressly referred to in his witness statement but not the remainder of the document. However, as this was a document which it appeared Mr Germaney reviewed in its entirety and, which on our examination contained other items of some potential relevance, we consider it should have been disclosed subject to any valid PII issue. In line with our decision on the direction, in our view it potentially undermines the tribunal's ability to assess whether the decision

was reasonably arrived at, if the whole of such a potentially relevant document is not disclosed. Otherwise there is no way of testing whether the officer did in fact take into account any other matters stated in the document and, if so, whether those are relevant or irrelevant. We note, however, that the issue as regards the direction has been appealed as regards Judge Sinfield's decision to the Upper Tribunal.

480. Our view is that should HMRC wish to rely on bringing a claim that a document of relevance to an expedited appeal such as this is subject to PII, depending on the precise time scale, it is reasonable to expect HMRC to have obtained or at least to have taken steps to obtain the necessary internal approvals in advance of the hearing. We accept, however, that the difficulty in this case is that the application to vary the direction was not dealt with until the hearing took place. Overall, given the outcome on the basis of the evidence before the tribunal, we do not consider there is any prejudice to CW in the non-disclosure of this document.

Conclusion

481. For all the reasons set out above, the appeal is allowed and a review of HMRC's decision is ordered as set out above.

482. 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.

HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 07 AUGUST 2017