[2017] UKFTT 615 (TC)

TC06051

Appeal number: TC/2017/01690

EXCISE DUTY – appeal against HMRC's decision to refuse approval for registration as a wholesaler of alcohol on the basis that they were not satisfied that the appellants are fit and proper persons - s 88C (2) of the Alcoholic Liquor Duties Act 1979 - appeal allowed and a review ordered under s 16(4) of the Finance Act 1994 - application to bar HMRC from proceedings - refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

GIUSEPPE CORBELLI AND PIETRO CORBELLI T/A CORBELLI WINES **Appellants**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER ELIZABETH BRIDGE

Sitting in public at the Royal Courts of Justice, Strand, London on 31 May and 1, 2 and 20 June 2017

Mr Michael Firth, counsel for the Appellant

Mr James Puzey, instructed by the General Counsel and Solicitor to HM Revenue and Customs, counsel for the Respondents ("HMRC")

DECISION

1. The appeal was made against the decision of HMRC (the "**decision**") not to approve Mr Pietro Corbelli and Mr Guiseppe Corbelli (the "**applicants**"), who trade in partnership under the name Corbelli Wines ("**CW**"), for registration as a wholesaler of alcohol on the basis that HMRC were not satisfied that they are fit and proper persons to carry on that activity under s 88C (2) of the Alcoholic Liquor Duties Act 1979 ("**ALDA**"). The appeal was brought on the basis that the decision was not reasonably arrived at thereby entitling the tribunal to direct HRMC to review it (under s 16(4) of the Finance Act ("**s 16(4)**").

Background

2. The business was started by the applicants' father in 1965 and is operated by them currently in large part as a business for the wholesale in the UK of wine and spirits purchased from suppliers in the EU. CW has been registered for VAT purposes since 1976 and holds a number of excise duty registrations and approvals. These include approvals as a tax warehouse for producers of wine (the "**wine approval**") and to receive goods as a registered consignee (the "**RC approval**") under authorisations which were in place from 1 August 1993 and 14 May 1997 respectively. Under the registered consignee scheme (the "**RC scheme**") CW is able to "import" alcohol from other countries in the EU into their own premises in the UK under duty suspense on the basis that duty is accounted for upon receipt using a deferment account.

3. On the introduction of the registration regime in ALDA in early 2016, the applicants submitted an application to HMRC on 25 January 2016 for CW to be approved for registration. Following a visit and lengthy period of investigation, on 1 December 2016 Mr Geoffrey Germaney of HMRC issued a letter stating HMRC were considering refusing the application for the stated reasons (the "**warning letter**"). On 30 December 2016 he issued the letter refusing approval (the "**decision letter**").

4. The reasons given by HMRC for the refusal in the decision letter were, in outline, that:

> (1) There were three seizures of goods by Border Force ("**BF**") in 2012 and 2013 in relation to which CW was named as the consignee of the seized goods in the delivery documents.
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> (2) On three occasions in 2014 and 2015 CW moved wine, which they had imported under the RC approval, from their own warehouse to a warehouse operated by Safe Cellars ("**SC**") using the wine approval to do so, on the basis that the wine was in duty suspense (the "**movements to SC**"). HMRC asserted that under the RC scheme duty should have been paid on the goods on receipt in the usual way and that the onward movement was not lawful. It is not disputed that the correct amount of duty was paid on the wine when it left the warehouse operated by SC.
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> (3) CW applied for an approval pursuant to the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ("**WOWGR**" and the

"**WOWGR application**") which was turned down and CW did not appeal against this.

(4) CW has failed to satisfy HMRC that it has satisfactory administrative and due diligence procedures.

(5) Mr Guiseppe Corbelli is the sole director of a company, Castillo Cubano Castillo Ltd ("**Castillo**"), which went into liquidation with substantial debts owed to HMRC.

5. At the hearing HMRC accepted that the due diligence position was not a relevant factor to the decision and that points (3) and (4) were not sufficient in themselves to refuse the application. As regards the remaining points, it was a key part of CW's case that they were not involved in and had no knowledge of any wrong doing as regards the seizures and that the movements to SC were made in the belief they were lawful on the basis of advice from HMRC given on a telephone call made on 31 July 2014 which in effect was confirmed by Mr Rob Maskew of HMRC in visits he made to CW regarding the WOWGR application.

Legislative framework

ALDA and appeal rights

6. The approval regime for the wholesale of alcohol ("**AWRS**") was introduced in a new Part 6A ALDA (by s 54 of the Finance Act 2015). Section 88C provides as follows:

> "88C Approval to carry on controlled activity
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> (1) A UK person may not carry on a controlled activity otherwise than in accordance with an approval given by the Commissioners under this section.
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> (2) The Commissioners may approve a person under this section to carry on a controlled activity only if they are satisfied that the person is a fit and proper person to carry on the activity.
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> (3) The Commissioners may approve a person under this section to carry on a controlled activity for such periods and subject to such conditions or restrictions as they may think fit or as they may by or under regulations made by them prescribe.
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> (4) The conditions or restrictions may include conditions or restrictions requiring the controlled activity to be carried on only at or from premises specified or approved by the Commissioners.
>
> (5) The Commissioners may at any time for reasonable cause revoke or vary the terms of an approval under this section.
>
> (6) In this Part "approved person" means a person approved under this section to carry on a controlled activity."

7. It is not disputed that CW are carrying on a controlled activity within the meaning of these provisions which encompasses: (a) selling controlled liquor wholesale, (b) offering or exposing controlled liquor for sale in circumstances in which the sale (if made) would be a wholesale sale, or (c) arranging in the course of a trade or business for controlled liquor to be sold wholesale, or offered or exposed for

sale in circumstances in which the sale (if made) would be a wholesale sale (under s 88A(8) ALDA). CW sells controlled liquor for this purpose on the basis that (a) it sells dutiable alcoholic liquor on which duty is charged under ALDA at a rate greater than nil, and (b) the excise duty point for the liquor falls at or before the time of the sale (under s 88A(2)).

8. HMRC are required to maintain an accessible register of persons approved under the scheme whereby HMRC "may make publicly available such information contained in the register as they consider necessary to enable those who deal with a person who carries on a controlled activity to determine whether the person in question is an approved person in relation to that activity" (s 88D (1) and (3)). A person "may not buy controlled liquor from a UK person unless the UK person is an approved person in relation to the sale" (under s 88F). Persons who act in contravention of these provisions (such as by selling alcohol when not authorise to do so or buying alcohol from an unauthorised person) may be liable to criminal offences (under s 88G).

9. If HMRC refuse an application for approval they must notify the person who made the application of that fact and give reasons for the refusal under regulation 4(4) of the Wholesaling of Controlled Liquor Regulations 2015 (issued by HMRC under s 88). The regulations also provide that in addition to any conditions or restrictions that HMRC may think fit to impose on an approved person under s 88C(3), the approval of a person is subject to such conditions and restrictions as HMRC may prescribe (regulation 7).

10. In a public notice explaining the AWRS and HMRC's approach to applications for approval (Excise Notice 2002: Alcohol Wholesalers Registration Scheme (as published on 27 March 2017)) HMRC state that existing traders may make an application for AWRS registration between 1 January and 31 March 2016 (under para 6.2). The notice sets out (at para 6.9) that the requirement that only applicants who can demonstrate that they are fit and proper to carry on a controlled activity will be granted approval means that:

> "HMRC must be satisfied the business is genuine and that all persons with an important role or interest in it are law abiding, responsible, and don't pose any significant threat in terms of potential revenue non-compliance or fraud."

11. The section goes on to list the factors HMRC will consider:

- there's no evidence of illicit trading indicating the business is a serious threat to the revenue, or that key persons involved in the business have been previously involved in significant revenue non-compliance, or fraud, either within excise or other regimes, some examples of evidence HMRC would consider are:
    - assessments for duty unpaid stock or for other under-declarations of tax that suggest there's a significant risk that the business would be prepared to trade in duty unpaid alcohol
    - seizures of duty unpaid products
    - penalties for wrongdoing or other civil penalties which suggest a business doesn't have a responsible outlook on its tax obligations

- trading with unapproved persons
- previous occasions where approvals have been revoked or refused for this or other regimes (including liquor licensing etc)
- previous confiscation orders and recovery proceedings under the Proceeds of Crime Act
- key persons have been disqualified as a director under company law

- there are no connections between the businesses, or key persons involved in the business, with other known non-compliant or fraudulent businesses
- key persons involved in the business have no criminal convictions which are relevant for example, offences involving any dishonesty or links to organised criminal activity - HMRC will normally disregard convictions that are spent provided there are no wider indications that the person in question continues to pose a serious threat to the revenue (an 'unspent' conviction is one that has not expired under the terms of the Rehabilitation of Offenders Act 1974)
- the application is accurate and complete and there has been no attempt to deceive
- there haven't been persistent or negligent failures to comply with any HMRC record-keeping requirements, for example poor record keeping in spite of warnings or absence of key business records
- the applicant, or key persons in the business, have not previously attempted to avoid being approved and traded unapproved
- the business has provided sufficient evidence of its commercial viability and/or credibility - HMRC won't approve applicants where they find that they cannot substantiate that there's a genuine plan to legitimately trade from the proposed date of approval
- there are no outstanding, unmanaged HMRC debts or a history of poor payment
- the business has in place satisfactory due diligence procedures covering its dealings with customers and suppliers to protect it from trading in illicit supply-chains, see section 12 for more information about due diligence

The list above isn't exhaustive. HMRC may refuse to approve you for reasons other than those listed, if they have justifiable concerns about your suitability to be approved for AWRS."

12. The notice also provides (with force of law) that approved wholesalers are obliged to keep certain records (under section 11) and that it is a condition of approval that wholesalers carry out reasonable due diligence checks on their supply chains (with details of the conditions and guidance on its proper application) (under section 12).

13. As regards refusal it is stated (at para 9.1) that HMRC will refuse your application "if they have reasonable cause and there's a potential threat to the tax revenue. You won't be permitted to carry on a controlled activity. HMRC will advise you if the application is refused, giving the reasons for refusal". It is also

noted that refusal of an AWRS approval may also lead HMRC to review "whether you're fit and proper in relation to any other approvals held."

14. A business which is refused registration on the basis it is not fit and proper has rights of review and appeal under the Finance Act 1994 on the basis that a decision to refuse an application for approval is as to an ancillary matter which is dealt with under s 16(4). This provides that the tribunal has a supervisory jurisdiction in relation to decisions as to ancillary matters as follows:

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

Summary of decision

15. The burden of proof in an appeal under the section is on the appellant (under s 16(4) of the Finance Act 1994). For the appeal to succeed CW had to prove that, on the balance of probabilities, the decision was one which no reasonable officer could have arrived as is the case if, for example, relevant considerations were left out of account and/or irrelevant considerations were taken into account. In summary, for all the reasons set out below we decided that this test was met such that the appeal is allowed. We have accordingly directed that the decision shall immediately cease to have effect on the basis that HMRC shall conduct a review of the decision as set out in [404] below.

Disclosure issues and applications

16. There were a number of issues raised at the hearing centring around the late disclosure by HMRC of documents or, as CW asserted, the failure to disclose documents which ought to have been disclosed. A summary of the applications made at the hearing and the background to them is set out below and the full discussion is set out at [407] onwards.

17. Following CW's submission of its notice of appeal and original grounds of appeal on 27 January 2017, the tribunal issued directions on 13 March 2017 which included the following as regards the provision of documents by the parties (the "**direction**"):

> "The Respondents shall send or deliver to the Tribunal and the Appellants a list of all documents which were considered by the Respondents' officer when reaching the decision at issue in this appeal, together with any other documents on which the Respondents intend to rely in connection with this appeal."

18. In requiring HMRC to produce a list of documents which the decision-maker considered, the direction was broader than that often included in the case management directions for this type of case, which is categorised as standard by the tribunal. For standard and complex cases, rule 27 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (S.I. 2009/273 (L.1) (the "**Rules**") provides that, subject to any direction to the contrary, each party must send or deliver to the tribunal and to each other party a list of documents of which that party has possession, the right to possession, or the right to take copies and which that party intends to rely upon or produce in the proceedings (and must allow each other party to inspect or take copies of the documents on the list (except any documents which are privileged)). Whilst this type of direction is often used in standard cases, as the opening wording of rule 27 indicates, it is open to the tribunal to make alternative directions.

19. There is no further explanation in the Rules of the meaning of reliance or production in the proceedings. This may be taken to mean rely on or produce as evidence supporting the relevant party's case at the hearing. The purpose of the rule seems to be to make sure that each side has sufficient notice and disclosure of the documentary evidence the other party intends to rely on in that sense. There is otherwise no general disclosure requirement but the tribunal has power (on its own initiative or on an application from a party) to permit or direct the parties or other persons to provide documents, information or submissions to the tribunal (under rules 5 and 6).

20. On 24 April 2017 HMRC made an application to vary the direction essentially to confine it to the more usual direction for them to be required to list only documents on which they intended to rely in connection with the appeal. At the same time they served a list of documents on which they intended to rely but did not comply with the remainder of the direction, as regards producing a list of documents the decision-maker considered, pending the determination of their application. In the application HMRC made a number of points on the direction including the following:

> (1) It appears to require disclosure of documents which have no material value to the decision under appeal, such as documents considered by the decision-maker but not relied on by him in making the decision, and it is difficult to see why HMRC should disclose documents which are properly to be regarded as irrelevant to the decision.
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> (2) It appears to require disclosure of documents which are adverse to the appellant's case but which were not taken into account by the officer in reaching his decision.
>
> (3) The direction does not take into account whether or not documents are in HMRC's possession or control.
>
> (4) The direction results in the parties not being treated equally.

(5) HMRC confirmed that, for the avoidance of doubt, they considered they are under a duty, independent of any direction, to ensure that any document which undermines their case or which assists the appellant's case is supplied to the appellant.

21. On 2 May 2017 witness statements were exchanged. The tribunal also wrote to the parties stating that HMRC's application to vary the direction would be dealt with after a case management hearing relating to similar applications in other appeals had been held.

22. On 15 May 2017 a decision was released by Judge Sinfield, following the case management hearing referred to above, in which he refused HMRC's similar application in the relevant appeals (*OWD Limited trading as Birmingham Cash & Carry and others v HMRC* [2017] UKFTT 0411 (TC)).

(1) Judge Sinfield said, at [24], that in appeals such as this, applicants should be provided with materials considered by the decision-maker as otherwise they would not know if they have a basis for challenging the decision on the grounds that there were relevant matters which the decision-maker did not take into account:

> "In most appeals before the FTT, the appellant taxpayer might be expected to hold or, at least, be aware of the existence of all relevant materials. In these appeals, however, HMRC are likely to have material that they have gathered from various sources which is not available to the applicant for approval under the AWRS and of which the appellant has no knowledge. An unsuccessful applicant can only form a view as to whether to challenge the decision on grounds of unreasonableness if the applicant knows what matters were considered by the decision-maker. If the unsuccessful applicant only knows about materials that were considered and are relied on by HMRC in support of the decision then the applicant cannot plead, with any particularity, that any other documents, information and other matters considered but not relied on should have been taken into account."

(2) He continued that, if the tribunal is to determine the question of whether the relevant decision was reasonable fairly and justly, the tribunal must know not only the decision arrived at and the reasons relied on to justify it but what matters were and were not taken into account by the decision-maker.

(3) He rejected, at [26], the submission that HMRC should not be required to include in the list of documents any documents that the decision-maker had considered but concluded were irrelevant:

> "If accepted, it would allow the HMRC officer whose decision is being challenged to determine what materials the FTT should consider when reviewing that decision. That is not the role of the decision-maker and it would risk preventing the FTT from carrying out its role properly. Mr Hays' submission was necessarily limited to cases in which the decision-maker

> "ultimately (and correctly) concludes that it is irrelevant" but, if the document is not disclosed, how could the correctness of the officer's opinion ever be tested?"

(4) He noted, at [28] that, in some cases, there may be some material that is considered but ultimately not relied on because to do so would reveal confidential information and said that HMRC should not necessarily be required to produce it:

> "If material contains intelligence or other genuinely confidential material that could have an impact on HMRC's operations then, in my opinion, HMRC should not be required to produce it or, at least, not in unredacted form. As it was part of the material that was considered by the decision maker and, given its nature, it is very likely to have influenced the decision, I consider that it should be included in the list of documents described in general terms, if necessary, but marked as confidential. HMRC could apply, on a case-by-case basis, to exclude such material from further disclosure or production."

23. HMRC subsequently appealed against this decision and permission was given to appeal to the Upper Tribunal.

24. On 19 May 2017 the parties were notified that the hearing would take place on 31 May to 2 June 2017.

25. On 25 May 2017 Mr Shaw of the Solicitor's Office wrote to CW noting that HMRC had applied to stay the other appeals of this nature pending the outcome of the appeal against Judge Sinfield's decision. He said that, however, HMRC proposed that this appeal, which was more advanced than the others, could go ahead if CW would agree not to require any further disclosure on the basis that all material which Mr Germaney had relied on in making his decision had been disclosed. CW did not reply to this letter in advance of the hearing.

26. On 26 May 2017, HMRC disclosed to CW transcripts of two calls CW had with HMRC on 24 and 28 July 2014 but not of the call on 31 July 2014 in which CW assert they were advised they could lawfully make the movements to SC. At the hearing HMRC said there was no transcript of that call but there is conflicting evidence as to why that is the case.

27. On 30 May 2017 HMRC disclosed to CW a "case flow" containing typed notes of the visits Mr Maskew made to CW regarding the WOWGR application and an aide memoire as regards information obtained from CW on those visits relating to the application (the "**Maskew notes**").

28. On the first day of the hearing on 31 May 2017:

(1) HMRC applied for documents relating to the seizures, as contained in a blue folder (the "**blue folder documents**"), to be admitted as evidence in the proceedings. The tribunal decided to admit these documents for the reasons set out below.

(2) Mr Puzey also raised that the application to vary the direction had not been dealt with and needed to be determined by the tribunal. He explained

that, if the tribunal refused HMRC's application, thereby retaining the requirement for HMRC to disclose documents Mr Germaney had considered (as set out in [17]), there was an issue relating to the disclosure of a document (the "**intelligence briefing**") which he described as being of a sensitive nature.

29. The tribunal decided on 1 June 2017 to refuse HMRC's application for the direction to be varied with the effect that HMRC were required to disclose documents which Mr Germaney had considered. HMRC then applied for the intelligence briefing not to be disclosed due to its confidential and sensitive nature.

30. On 2 June 2017, following the conclusion of the witness evidence, CW made an application for HMRC to be barred from taking any further part in proceedings on the basis that HMRC has failed to co-operate with the tribunal to such an extent that the tribunal could not deal with the proceedings fairly and justly and for the appeal to be determined summarily (under rule 8(3)(b), 8(7) and 8(8) of the Rules). The application was made on the basis that HMRC and their representatives had deliberately misled the tribunal and CW in a number of respects, in summary, as follows:

(1) They misled the tribunal that the intelligence briefing was a document that Mr Germany had not taken into account in his decision but in fact he had done so.

(2) The production of the blue folder documents at this late stage was a deliberate ambush and the reason given for the late production was misleading.

(3) HMRC deliberately kept back the Maskew notes and the transcripts of the two calls made CW to HMRC, which were disclosed at a late stage as set out above, and suppressed the production of the transcript of the phone call of 31 July 2017 and the handwritten notes the relevant officers made of Mr Maskew's visits to CW. It was asserted that production was delayed or suppressed because the relevant documents support CW's case.

31. The hearing was adjourned following the making of the application to bar HMRC as it was not possible to conclude matters within the time initially allotted. The tribunal subsequently notified the parties that the barring application was refused and a further hearing was arranged for 20 June 2017 for the conclusion of the proceedings. At this hearing the issue of the disclosure of the intelligence briefing was also considered but ultimately CW decided not to proceed with requiring that document to be disclosed.

Evidence

32. We have based our decision on the documents presented to the tribunal and the witness evidence, for HMRC, of Mr Nathan Franklin and Mr Germaney and for CW, of Mr Guiseppe Corbelli, Mr Pietro Corbelli, Mr Vincent Curley, Mr Mark Curley and Mr Alan Powell.

33. As noted Mr Germaney is the HMRC officer who made the decision. Mr Franklin assisted in Mr Germany's investigation prior to the making of the decision. Mr Franklin's evidence on his involvement in the investigation into CW as part of the

AWRS approval process was uncontested. Mr Germaney was cross-examined by Mr Firth.

34. Mr Vincent Curley of Vicent Curley & Co is CW's representative in this matter. His evidence, which largely confirmed what happened in the correspondence with HMRC as set out below, was not contested by HMRC. Mr Mark Curley is a director of Due Diligence Exchange Services Ltd ("**DDE**"), which provides CW with due diligence services as regards its suppliers. His evidence was not contested by HMRC. Mr Guiseppe Corbelli and Mr Pietro Corbelli were cross examined by Mr Puzey.

35. Mr Alan Powell is a specialist excise duties consultant with many years experience in this area (including from employment at HMRC as a higher executive office in their headquarters excise policy unit). He advises a range of businesses including members of the Federation of Wholesale Distributors regarding measures to tackle alcohol fraud. He is an honorary advisor to the UK Warehousing Association, founder and co-ordinator of the British Distillers' Alliance and sits on the Joint Alcohol and Tobacco Consultative and the Joint Alcohol Anti-fraud Task Force.

36. HMRC objected to Mr Alan Powell's evidence on the basis that it was in all material respects expressions of opinion which only expert witnesses can give, whereas Mr Powell was presented as a witness of fact, and that it was in any event irrelevant. Mr Firth acknowledged that Mr Powell's statement contained opinion. However, he said that Mr Powell has unparalleled practical experience of the types of issues under consideration surrounding the seizures and operation of the excise duty regime on which he could give factual evidence.

37. We decided that the statements made by Mr Powell in his witness statement were largely inadmissible opinion and/or irrelevant but that it was in the interests of justice and fairness for Mr Powell's evidence to be admitted so far as it was of a factual nature which could only be judged upon hearing his oral evidence. Mr Puzey was concerned that he had not had advance notice of the relevant factual matters as it seemed these were not included in Mr Powell's witness statement. We decided this could be addressed by the tribunal hearing Mr Powell's examination in chief as to the relevant factual matters but allowing Mr Puzey time, if necessary, having heard the matters covered, to prepare to cross examine him. In the event Mr Puzey felt able to proceed with the cross examination immediately. Some of Mr Powell's oral evidence was also opinion evidence which we do not consider admissible in these circumstances but we have set out below the limited arguably factual matters of relevance he gave evidence on and on which the parties made submissions.

HMRC's investigation

38. Mr Germaney received the application on 1 March 2016. In his witness statement Mr Germaney said that he looked at the notes produced by the central processing team dealing with such applications, which identified a number of risks. In his oral evidence it became clear that these notes were not appended to Mr Germaney's witness statement and were contained within the intelligence briefing which HMRC asserted should not be disclosed. In outline, the relevant information taken from the notes, as set out in the witness statement, was as follows:

(1) Castillo, of which the sole director was Mr Guiseppe Corbelli, had debts owing to HMRC as at 9 February 2016 comprising (a) £7,880 of corporation tax (b) £5,404.46 due under PAYE and (c)14,149.48 of VAT.

(a) As regards the outstanding corporation tax various warning letters were issued. The last contact was on 5 January 2017 when a phone message was left for Mr Corbelli to respond to HMRC regarding this debt.

(b) The PAYE debt resulted from missed payments for several months in 2014/15 and no payments for the year 2015/16. A time to pay arrangement had been agreed with HMRC on 30 July 2015 for the repayment of £500 a month. The most recent payment of £500 was made by debit card on 1 February 2016. Several monthly payments had been missed. The caller who contacted HMRC to pay £500 by debit card was not identified in the notes. She was asked when the debt would be paid but she was unable to advise when but said only that she had been told to pay £500. The HMRC officer on the call explained that months 7 to 9 were not paid in full such that the appellant was in default.

(c) The VAT debt arose as VAT due was not being paid in full. The debt also included four default surcharges, the last three of which were charged at the rate of 15%. Despite various letters and calls to the trader, there was no contact received from the trader.

(2) The notes also referred to customs duty demand letters for a debt of £178 on 14 January 2016 and 19 January 2016. Mr Guiseppe Corbelli said that he had no knowledge of this debt.

(3) There had been three seizures of goods involving CW.

(a) On 17 September 2012 BF intercepted and searched a Renault Tractor unit registration AV12 CWG which contained a full load of mixed beer and wine (the "**first seizure**"). The goods were seized due to the re-use of 6 ARCs. A vehicle using the same ARCs had already travelled to the UK on 14 September 2012. The driver admitted to BF that he had not collected from the address on the delivery document (the "**CMR**") and that he would not deliver to the address on the CMR. The intercepted goods did not, save as regards one product, tally with the accompanying paperwork. The owner of the goods was declared as CW. An excise duty assessment and wrongdoing penalty was issued to Matthews International Transport Ltd ("**Matthews**") for £38,866 on 15 May 2013.

(b) On 16 December 2012 there was a seizure of a full load of mixed wine, beer and spirits (the "**second seizure**"). There were discrepancies with the documents accompanying the load

that were provided by CW. The intercepted goods did not match the declaration on the Excise Movement Control System ("**EMCS**"). CW's agent, Mr Curley, stated that the seized goods did not belong to CW and that the seized goods were not intended for delivery to CW. An excise duty assessment for £37,716 was issued to Morgan Transport & Distribution Ltd.

(c) On 13 February 2013 there was a seizure of 14,062 litres of wine by BF (the "**third seizure**"). There was evidence to suggest that the vehicle transporting the seized load had travelled 5 times and the trailer twice in the life of an ARC. The documents accompanying the load such as the CMR may have been falsified. The consignee was shown as CW.

39. As explained by Mr Pietro Corbelli in giving evidence EMCS is the EU wide electronic system whereby movements of alcohol are tracked. An ARC is the administrative reference number which is the unique reference for a particular load of alcohol. This is generated by the EU consignor of the goods by entering details of the order on the EMCS system. The ARC number has to be entered on the delivery documents which travel with the load for delivery to the UK. The UK consignee can access the ARC on ECMS and is required to close the number down on the system on receipt of the goods so that the number cannot then be used again.

40. Mr Germany then contacted HMRC officers with recent and current cases involving CW including, Mr Maskew, who had dealt with the WOWGR application. Mr Maskew visited CW as regards this application on 5 February 2015, 27 February 2015 and 27 May 2015.

41. Mr Germaney decided that, due to the risks identified in the notes, a visit to CW was necessary to obtain further information. By prior arrangement he and Mr Nathan Franklin then visited CW's business premises on 9 June 2016 with Mr Guiseppe Corbelli in attendance (Mr Pietro Corbelli was out of the country at the time). The visit lasted about seven hours and Mr Germaney spent three hours or so checking business records and VAT and duty calculations.

42. Mr Corbelli stated in his witness statement that he found Mr Germaney to be rude, sarcastic and intimidating. Due to this he did not feel he could disagree with anything Mr Germaney said because the purpose of the visit was to decide whether the very existence of the family business could continue. Mr Corbelli was anxious that the business would be extinguished if Mr Germaney made an adverse decision. Throughout the visit he felt he needed to be polite and as helpful as possible, not just because he had always acted like this in his dealings with HMRC, but also because of the seriousness of the potential consequences of the visit. He did not raise any issues at the visit and did not make a complaint afterwards as, having discussed Mr Germaney's attitude, he and his brother felt they were in too vulnerable a position to complain. They may wish to complain about his conduct in the future.

43. Mr Germaney set out the following in his witness statement as regards what information was obtained on the visit (as recorded in his and Mr Franklin's notes of the visit).

(1) The business had started as a wine making business and the sale of wine making kits but diversified into importing wines when that initial business declined. The business had started to produce its own wine again the previous year but only on a small scale.

(2) CW buys from five suppliers (manufacturers or bottlers) as regards around 80% to 90% of its total purchases. Around 70% of the goods they supply are exclusive to CW. There are no written contracts or credit terms. Payments are made through arrangements with currency converter companies which Mr Germaney described as not easy to follow (further details of these arrangements are set out below). His concern appeared to be that the arrangements made it hard to trace any one payment to any one invoice. Mr Corbelli advised that CW had had some issues with their converter so had changed providers in April 2016.

(3) Purchases are from Italian suppliers, as regards the wine, or Bulgarian suppliers, as regards spirits. The goods are brought into the UK under the RC approval. Mr Corbelli said that he and his brother check all the calculations for the RC returns.

(4) CW sells to wholesalers and restaurants/bars including Mr Corbelli's bar, the Exchange Vaults. There are no contracts with customers and only some credit is given to existing customers. No discounts are offered generally but CW may negotiate on price with wholesalers. Payments are made by cash, cheques and bank transfers. CW does not sell goods out of the UK.

(5) There are no stock records. CW carries out a weekly visual stock check but no record is kept of it. Mr Corbelli could not provide any information about the computerised recording system and said he would have to ask the secretary. All paper documentation is held on site.

(6) CW stores on site and also uses a third party bonded storage facility at SC. Mr Germaney recorded further discussions as regards the movements to SC and the WOWGR application.

44. Mr Franklin's hand written notes of the visit record the following as regards the WOWGR application and movements to SC.

> "NF asked if GC had applied for any other excise approvals and GC confirmed that they had applied for a WOWGR to cover imported goods when reaching REDS limit [the deferment guarantee limit]. This was rejected on the grounds that the due diligence supplied was in Italian. GC advised that they decided not to pursue the WOWGR application following this but would increase their level of duty deferment instead (note; a WOWGR is not required for storing wine under duty suspension so Corbelli would have had to satisfy the officer that they intended to bring spirits, beer or cider into the UK under duty suspension).
>
> GC advised that the business imports wine under duty suspense to [SC] bonded warehouse in Oldham as WOWGR approval is not required to deposit duty suspended wine in a bonded warehouse. GC confirmed

> that the account with the bonded warehouse has been held for approximately 18 months and they currently have palletts of vermouth stored there. GC confirm that the fact sheets sent by GG had been received and understood. GC advised that he had not read public notice 2002, to which GG informed GC that it is important that the notice is read and understood."

45. Mr Germaney's notes in addition recorded that he explained to Mr Corbelli that the movement was not allowed as CW are registered consignees so they can receive but not dispatch goods under duty suspense. Mr Corbelli explained his brother had been advised by HMRC that the movements were allowed:

> "GC explained that his brother Pietro had carried out these transactions as they contacted a HMRC advice centre who informed them that this movement of goods was allowed. GG asked for the records of these transactions to be sent to him. GG explained that GC had the right to silence but GC explained that he was happy to talk about it and was being transparent."

46. Mr Germaney said in his witness statement that during the visit he and Mr Franklin identified various issues in relation to which he asked for more information.

(1) He noted that, as regards credit notes issued by CW, Mr Corbelli said the stock was received back but there were no delivery notes or stock records for that. Mr Germaney explained that if there was no record the credit note could be seen as a way of manipulating the price. He said Mr Corbelli appeared to take this on board. He kept the credit note to one side so a reference could be sent to an HMRC officer for the customer to verify it. He noted that the VAT position as regards the credit notes needed to be correctly reflected by CW and the customer and HMRC would have to check and verify this in the future.

(2) He noted that there were discrepancies in that the manual spreadsheets which showed goods purchased from overseas contained mistakes in recording the type of product imported when compared with the electronic record. The duty appeared to be correctly calculated but the "errors demonstrate poor record keeping and a lack of effective internal management checks". He said "I showed Mr Corbelli the errors and he did not provide any reason or explanation but appeared to take on board the problems found. I also mentioned that his management checks had appeared to have failed but there was no shortfall in duty so there was no need for any follow up action on any missing duty".

(3) Mr Germaney considered there was a question over the credibility of the suppliers' documentation and the internal management checks. A number of the suppliers' invoices had incorrect total values in relation to the quantity and unit price. Mr Germaney thought this showed a lack of internal management controls and undermined what Mr Corbelli said about he and his brother making regular and accurate management checks.

(4) Insufficient records were held regarding the payments for these purchases which meant that CW could not provide full payment details

during the visit for the invoices inspected. He also noted that the invoice values could not be matched to the payments made by the currency converters. He explained that Mr Corbelli said that CW would put an initial amount into the converter account of, for example, £50,000 at a point at which CW would obtain a good rate of exchange. However, if the account had run low, so that the full amount of a payment could not be made to the relevant supplier from the account, CW would have to top up the account for the remainder to be paid.

> "This seems to contradict the reasons provided by [CW] as they do not appear to be as in in control of their account in order to obtain best exchange rate. Furthermore [CW] have to pay this particular supplier up front for any goods, but Mr Corbelli could not match the payments out of the currency exchange. [Mr Corbelli] remained adamant that the exchange rate offered by the currency converter is always better than the banks so it didn't matter when he put money into the account ([CW] did not have to wait for the rate to be favourable to top up the account, and then finish payment to the supplier).

(5) Mr Germaney inspected the deferment guarantee and noted that the company name was different (Sicilian winery). Mr Corbelli explained that is the name CW uses for its bottling plant. The guarantee was dated 16 October 2014 and the monthly limit was set at £225,000.

(6) Mr Franklin noted some issues on the due diligence files provided by DDE.

47. As regards the credit note Mr Guiseppe Corbelli said in his witness statement that he did not understand the point Mr Germaney was trying to make but at the time "he stood over me waving the papers at me, instead of remaining seated. At another point during the meeting he said "if I was having a bad day I would be accusing you of something, but I am not, so I won't." At the end of the meeting he said "I will leave you to panic now or whatever else you are going to do". Mr Corbelli was shocked by this comment and could not think of a reply at the time. Mr Franklin confirmed at the hearing that he recalled these events happening as Mr Corbelli described them.

48. Mr Germaney said he followed up his queries both during and following the visit. For example, he asked for a number of invoices and bank statements to verify the credit note position, a number of invoices from a supplier in Bulgaria, information as regards the currency converter procedure and information to show the current stock held at SC.

49. On 27 June 2016 Mr Germaney visited the premises again to collect the business records as had been pre-agreed with CW.

50. During the following months actions taken by Mr Germaney included that on 15 July he took steps to verify the credit note he had retained during the visit of 9 June 2016, he initiated money laundering checks on CW's current currency converter and requested assistance from Mr Franklin in obtaining further information on the movements to SC and on the due diligence position.

51. On 5 August 2016 Mr Franklin produced a report on the due diligence position. Essentially he appeared to be concerned that DDE could not have actually made all the visits to suppliers shown in the time scales shown assuming that one person was carrying out the process. He noted that further information may be required from CW to establish whether that was in fact the case.

52. At some point Mr Pietro Corbelli informed HMRC that, at a visit to discuss the WOWGR application, Mr Maskew had also agreed that the movements to SC could be made (as set out in Mr Franklin's notes in [56] below). Mr Germany said in his evidence that he raised this with Mr Maskew orally as they were in the same office and that "Mr Maskew confirmed that he could not remember any discussion about moving goods under the [RC scheme] under duty suspension".

53. The bundles contained an email from Mr Maskew to Mr Germaney on 26 September 2016 in which he provided a case flow reference as regards the WOWGR application (which is a reference for the case report containing items such as notes of visits made). He said in the email that he could not "see any mention of bond-to-bond movements however". The case flow reference enabled Mr Germaney to access the documents retained by HMRC in relation to the application, namely, the Maskew visit notes. It is clear from his evidence at the hearing that Mr Germaney looked at those notes as part of his decision making process.

54. On the same day Mr Germaney sent a report to HMRC's warehousing unit of expertise, to obtain clarification on the appropriate action required regarding the movement of goods to SC. They responded on 27 September 2016 was that this was in breach of regulations and a civil penalty should be considered.

55. On 30 September 2016 Mr Franklin presented his findings on the movement of goods to SC identifying some discrepancies in respect of the amount of wine on the purchase invoices compared with the amount of wine actually moved. On 4 October 2016 Mr Franklin wrote to CW asking for clarification on this and CW provided a folder of information in response on 11 October 2016 which it appears cleared this up. At that time CW also provided HMRC with a folder of visits reports made by DDE for due diligence purposes. It is clear from the reports contained in the bundles presented at the hearing that the visits were not all undertaken by one person. It appears Mr Germaney and Mr Franklin did not thoroughly review these reports as they continued to be concerned that this was an issue.

56. On 18 October 2016 Mr Franklin sent Mr Germaney a report with the issues he considered relevant to the fit and proper criteria. These included the seizures and the movement of goods to SC on which he noted the following:

> "When this issue was identified Mr Guiseppe Corbelli stated they had been informed by HMRC that they were allowed to dispatch goods under duty suspense using their current approvals. During the AWRS visit, Mr Guiseppe Corbelli stated that it was the HMRC advice line that gave this information but was unable to give specifics as to who was spoke to and when. Mr Pietro Corbelli later advised that it was Rob Maskew who gave this information when conducting a visit to the business to consider their WOWGR application. Officer Maskew visited [CW] on

> 05/02/2015, 27/02/2015 and 27/05/2015 and there is no mention in his report of discussing the dispatching of wine under duty suspension. An EMCS check reveals that there are 3 movements listed where [CW] have dispatched duty suspended goods. These movements occurred on 31/07/2014, 28/01/2015 and on 02/06/2015. Two of these movements therefore occurred prior to officer Maskew visiting the premises and makes Mr Pietro Corbelli's explanation as to why they carried out the movement without approval invalid. EMCS shows that [CW] are listed as supplying the movement guarantee for these transactions. When the business was asked to provide details of the movement guarantee, the only details received were insurance documents for the goods themselves. Even if [CW] believed they were authorised to dispatch goods under duty suspense, they have not been able to evidence that they were compliant with HMRC procedures as no valid guarantee covered the movements."

57. He went on to note that these "irregular movements" mean that CW was liable for an excise assessment and wrongdoing penalty. He also identified that the business does not have a stock control system, it applied for a WOWGR but this was rejected and the business did not challenge the decision, there were outstanding tax debts in relation to Castillo and as regards due diligence "analysis indicates that it would be extremely unlikely that one person could conduct thorough due diligence on the dates specified in [CW's] due diligence folder."

58. It is not disputed that the movements to SC took place on the dates specified in Mr Franklin's notes without payment of duty when the goods were received by CW and that CW used its wine approval reference to make the relevant entries on the ECMS system. It is also common ground that duty was duly paid when the goods left the SC warehouse.

59. On 7 November 2016, having discussed the progress of the case with his manager, Mr Germaney wrote to CW regarding the need for CW to amend an incorrect national insurance number on the AWRS application form and requesting evidence that a stock reporting system had been put in place. On 9 November 2016 Mr Germaney issued a reference to another HMRC office, Mr Sandip Ranch, to take forward the issue as regards the movement of goods to SC for excise duty/penalty purposes.

60. On 10 November 2016 Mr Pietro Corbelli responded to the letter of 7 November advising that the mix up with the national insurance numbers had been corrected (there was a mix up with his later father's number) and confirming that CW had put in place a new stock control system and he provided a snapshot of the current stock position.

61. On 18 November 2016 Mr Germaney sent his manager his recommendation for HMRC to refuse the application. The proposal was then sent to the head of his business unit, Ms Sally Jefferson, for her agreement. On 28 November 2016 Mr Germaney changed roles (although his line manager remained the same as regards the CW's application).

Correspondence from 1 December 2016

62. On 1 December 2016, following Ms Jefferson endorsing his view, Mr Germaney wrote to CW stating that he was considering refusing the application. He said "the purpose of this notice is to afford you an opportunity to provide any further information that you might wish for me to consider before I make my decision. If you wish to provide any further information then you must do so by 10 December 2016." Included as item 5 was a heading "Satisfactory due diligence procedures" and underneath it was stated that "HMRC checks indicate there may be credibility issues with the undertaking of the physical checks made to the companies." As set out below, both Mr Curley and DDE asked repeatedly for clarification as to what Mr Germaney meant by this. The full text of the warning letter is set out at [77].

63. On 8 December 2016 Mr Curley wrote to Mr Germaney requesting a further 14 days from that date to provide information in response to the warning letter. Mr Curley noted, as regards item 5 in the warning letter, that "CW agrees it operates satisfactory due diligence procedures" and that "CW does not understand" the statement under that heading, and he asked for an explanation and full particulars to enable CW to address this point to be provided by return.

64. Mr Guiseppe Corbelli said that he had given Mr Curley authority to engage counsel to seek legal advice for the purpose of responding to the warning letter and CW required additional time to brief and take advice from counsel.

65. Mr Germaney said that he was not in the office on 7, 8 or 9 December 2016 and so could not respond to Mr Curley until Monday 12 December 2016.

66. On 8 December 2016 Mr David Winnick MP wrote to the chief executive of HMRC on behalf of CW asking for CW to be given extra time for a reply to the warning letter. Mr Germaney was copied into this email.

67. On 9 December 2016 Mr Arron Warner of DDE wrote to Mr Germaney referring to the first sentence of item 5 in the warning letter stating:

> "We have confirmed with our clients that we are the only company they have outsourced due diligence to and therefore your above comments related to our company. You seem to be suggesting that physical checks we carried out did not take place? Apart from office based checks, the only physical checks we carried out for this client was to visit suppliers on their behalf. Are you suggesting that the visits we carried out did not take place? Unfortunately the statements you have made in your letter are obtuse. We wish to make it perfectly clear to you that will not countenance anyone making libellous statements about our company. Please can you therefore explain by return what it is that you are trying to say so that we can respond accordingly."

68. Mr Curley wrote again to HMRC on 12 December 2016 asking for confirmation of the extension of time and he made a number of calls to HMRC also for that purpose. Mr Germaney confirmed by email at 17.05pm that day that he would allow an extension of two working days so that that any further information CW wanted him to consider had to be provided by the close of play on 13 December 2016. Mr Guiseppe Corbelli said that this delay and limited extra time then given meant that the

reply made by Mr Curley to the warning letter on 13 December 2016 was made without the opportunity to take legal advice.

69. On 13 December 2016:

(1) Mr Curley wrote to Mr Franklin and later Mr Germaney requesting copies of HMRC's notes of their officers' visits to CW. Mr Germaney referred the request to the Freedom of Information request team and notified Mr Curley of that.

(2) Mr Germaney wrote to DDE acknowledging receipt of their letter of 9 December and informing them it was being dealt with as a complaint.

(3) Mr Germaney notified Ms Jefferson that the query raised by Mr David Winnick MP in his letter of 8 December 2016 had been dealt with directly with Mr Curley so that there was no need for any further action.

(4) Mr Curley wrote to Mr Germaney responding to the warning letter. The points made in that letter are set out in [78] to [86].

70. On 15 December 2016 DDE replied to Mr Germaney stating that his previous letter did not answer the query raised as regards due diligence:

> "We note that rather than reply to our enquiry you have reported yourself for the matter to be dealt with as a complaint. Unfortunately this does not answer our enquiry because the statement you made in your letter to our client is obtuse. Please can you therefore explain by return what you meant in your letter when you said [the comments on due diligence in item 5 of the warning letter].

71. On 22 December 2016 a member of the HMRC complaints team wrote to Mr Germaney advising him he should respond to the query from DDE in the first instance.

72. On 30 December 2016, Mr Germaney sent out the following letters.

(1) He wrote to DDE stating that the information inspected at CW's premises on 9 June 2016 consisted of files produced by DDE and "analysis of these files has thrown doubt over the credibility of one person conducting thorough due diligence checks on the dates specified…." (and he set out various examples). He concluded he had concerns:

> "centred on [CW] and their reliance on third party information, without making their own judgment on the information presented. It is lack of checks [CW] perform on any third party information, which potentially fails the due diligence obligations for [AWRS]. It is for [CW] to take any further action required in this instance ie to confirm with the DDE the basis of the checks performed, to satisfy themselves no issues exists".

(2) He wrote to CW refusing the application on 30 December 2016 stating that CW must not, therefore, carry on the controlled activity of the wholesale of alcohol with effect from 30 January 2017. The text of the decision letter is set out at [87].

(3) He wrote to Mr Curley refusing to produce the note books and visit reports on the basis that "the information you required has been included within the letter, attached".

73. On 9 January 2017 Mr Curley wrote to Mr Germaney requesting an extension of time for the cessation of the wholesale of alcohol by CW to 28 February 2017 and noting that the decision would be legally challenged. He repeated the request for the production of all note books/visit reports on the basis that no reason had been provided for the refusal to provide these and that, as Mr Germaney had said he had considered circumstances in the last six years to be relevant to his decision, "if you have nothing to hide then we can see no good cause why you have not complied with our reasonable request". He also asked for copies of all telephone attendance notes and visit reports for the asserted attempts to contact Mr Corbelli regarding the outstanding debts of the Castillo business. He noted Mr Germaney issued the decision letter when both his firm and CW's business were closed for the holiday period.

74. On 10 January 2017 Mr Germaney responded to Mr Curley allowing a further period, until 28 February 2017, for CW to cease the wholesale of alcohol. He refused again to produce the note books/visit reports on the basis that all of the information relating to the refusal had been presented in the decision letter and any representation against the decision would be based on the information within the letter.

75. Prior to the hearing CW applied to bring judicial review proceedings against HMRC which was considered by the High Court and subsequently the Court of Appeal. As a result of these proceedings, at the time of the hearing, the effect of the decision, that CW must stop the wholesale of alcohol, was suspended pending the release of the decision of the Court of Appeal.

76. As regards Mr Ranch's further investigation into the issue of the movements to SC:

(1) On 12 January 2017, Mr Curley wrote to Mr Ranch stating that Mr Pietro Corbelli contacted HMRC's advice line for advice and assistance on this. He asked for copies of HMRC's records of the telephone calls made on 24, 28 and 31 July 2014.

(2) On 25 January 2017, Mr Ranch responded asking for the phone numbers Mr Corbelli had called on and stating that he had checked with the EMCS helpline who advised that they do not record telephone conversations.

(3) On 31 January 2017, Mr Curley responded stating that the number called was 0300 2003701, as regards the calls made on 24 and 28 July 2014, and that the telephone record print out for 31 July 2014 was quite poor but it was either the same number or 0300 2008701.

(4) On 21 April 2017 Mr Ranch issued a penalty explanation letter stating HMRC intended to charge CW a penalty of £20,367.06 (under schedule 41 of the Finance Act 2008) on the basis CW had deliberately acted in breach of the RC scheme requirements (under the Excise Goods (Holding, Movement and Duty Point) Regulations 2010).

(5) CW wrote to Mr Ranch disputing the penalty on 26 April 2017. At the hearing the applicants confirmed their intention to appeal against the penalty.

Warning letter

77. The reasons Mr Germaney gave in the letter of 1 December 2016 for HMRC potentially refusing the application were as follows:

> "1. There is evidence of illicit trading
>
> You were involved in three separate seizures of duty unpaid products. In September 2012, December 2012 and February 2013 goods were seized as they had been identified as being involved in multiple use of ARC numbers.
>
> You have also brought goods into the UK under the [RC scheme] but did not account for duty when they were received at your premises. The goods had crossed the duty point but were moved under duty suspension, by yourselves, to an excise warehouse. These took place on three separate occasions, July 2014, January 2015 and June 2015. Neither of these occasions did the goods travel with a valid movement guarantee, which in itself creates a duty point irrespective of the validity or otherwise of the movement.
>
> 2. There have been persistent and negligent failures in record keeping and an absence of key business records.
>
> The business does not have a stock control system, which makes reconciling invoices and credit notes to specific stock impossible. A stock control system is required for AWRS as stated in Annex A of excise notice 2002….You consider a record of a stock take each quarter to be sufficient for the size of your business. This is not satisfactory as the same problem exists with the new system, in that there is no clear audit trail of stock received, stored on site and sold at any one time.
>
> Other administrative errors were found with the records inspected, high-lighting poor record keeping and a lack of internal management checks, which have resulted in trader's records which are not fit for purpose.
>
> 3. Evidence of trading unapproved
>
> You state that you applied for a WOWGR, to get around increasing their deferment guarantee for the [RC scheme]. The WOWGR was rejected on the grounds that the due diligence was provided in Italian. You did not challenge this decision.
>
> You then used your [wine approval] number to move the goods under duty suspension to a bonded warehouse.
>
> As a Registered Consignee you do not have an approval to hold and send goods received under duty suspension. As Wine Producer you do not have an approval to send wine you have not produced under duty suspension to a bonded warehouse.

> This appears to be a blatant attempt to circumvent the circumvent the correct HMRC approval procedures set up to safeguard the proper controls required for moving alcohol under duty suspense.
>
> 4. Outstanding debts and history of poor payment to HMRC
>
> Guiseppe Corbelli has large debts to HMRC spanning a significant period from another business. There is little chance these debts will be paid off as the company is being put wound up. You have made it clear that the company is going but you intend to keep that business but using a different company name.
>
> 5. The business has satisfactory due diligence procedures
>
> The due diligence checks have been outsourced to a third party company. Although you state you have checked the information, HMRC checks indicate there may be credibility issues with the undertaking of the physical checks made to the companies.
>
> Therefore you do not meet the fit and proper criteria.
>
> If you have not made your representations by 10 December 2016 then your application will be refused in line with the above grounds."

CW's response letter of 13 December 2016

78. In the letter of 13 December 2016 responding to the warning letter, Mr Curley made the following points on behalf of CW.

Illicit trading and seizures

79. It was noted that:

> "You have not provided any evidence of any illicit trade. CW denies it has been involved in any illicit trading. Please remember that this is a family business of over 50 years standing, it is not some sort of shady back street operation".

80. As regards the seizures, it was stated that:

> (1) CW denies it was involved in these three seizures and was not involved in and has no knowledge of use of multiple ARC numbers.
>
> (2) CW makes numerous imports every year and has never had goods seized before these three incidents nor has it suffered any seizures since that time. The last seizure was over three years ago and therefore they ought not to be considered relevant matters to the AWRS application.
>
> (3) The seizures were made when vehicles were checked on entry to the UK from Europe. CW therefore had no involvement whatsoever in the packing of the vehicles, on the collection of the goods by the transport companies, on raising the documentation required for release of the goods from overseas warehouses, in the transportation of the goods across Europe or entry of the vehicles into the UK.
>
> (4) The seizures were made by BF and not HMRC and it is not reasonable for HMRC to take into account matters that have nothing to do with HMRC. BF took no action against CW.

(5) Following the third seizure CW thought that any problems were caused by the transport companies and so changed companies.

Movements to SC

81. As regards the movements to SC:

(1) The movements were to a third party excise duty warehouse approved by HMRC and the excise duty was paid on the goods when they were removed from that warehouse for sale in the UK.

(2) Before arranging these movements CW sought advice from HMRC's telephone advice line and the HMRC officer talked CW through the necessary entry onto EMCS.

(3) It has since transpired that CW may have made an error in moving these goods in this manner and if so then this was an innocent error.

Record keeping

82. As regards the asserted failures in record keeping:

(1) There have been no persistent or negligent failures of record keeping completing or an absence of any key business records.

(2) It is incorrect that the business did not have a stock control system. Such a system is not defined in a notice nor in any associated legislation The Revenue Traders (Accounts & Records) regulations 1992 and regulation 8 of the Wholesaling of Controlled Liquor Regulations 2015 do not make any mention of a or define a stock control system. A stock control system is whatever system a business operates for controlling its stock and to ensure that it can re-order stock when required. There is no legal requirement nor commercial requirement to have a stock control system that "makes reconciling invoices and credit notes to specific stock".

(3) For goods that CW produced there were production records. For goods imported from overseas suppliers, they were all entered onto the EMCS system. There are individual electronic accompanying documents with individual ARC reference numbers for every consignment of goods. The goods that arrive at the warehouse did so accompanied by CMRs (deliver documents) and the goods were physically checked against the CMRs when they were unloaded. The EMCS entries were then closed off with the date that the goods were received.

(4) All goods are stored in racking systems in designative named areas with the premises. There are two warehouses; one for single pallets and loose goods ready for release to customers on sale and the other for storage of multiple pallets. Goods are picked from stock to satisfy sales. Regular visual inspections are made of the goods held in stock for the purposes of re-ordering goods as required. There is no need for a more elaborate system as visual inspections are sufficient to maintain the necessary stock levels of each line.

(5) Orders are received by telephone and fax. Goods are delivered against orders and customers attend the premises to collect them. For every order, whether for delivery or customer collection, a delivery notice is raised. Occasionally a proforma sales invoice will be raised instead of a delivery note. In any case these documents all records the dates the goods are released to the customers. Sales invoices are then raised in accordance with the VAT tax point rules.

(6) An annual stock valuation is carried out.

(7) This system fully satisfied the need for a stock control system.

(8) Following the visit in June 2016 CW purchased stock control system software and notified Mr Germaney of that on 7 November 2016. CW also then sent a list of stock on hand at the time but Mr Germaney has never actually examined or inspected the new stock control system. The new system involves entering all goods on the system on receipt and a monthly physical stock take is now carried out against the inventory stock reports produced by using the new system.

(9) CW denies there are other failings. CW has been operating for over 50 years and has throughout that time received regular visits from HMRC. During these visits officers inspected the business records and made telephone and written enquiries for information and documents. During this entire period of time none of the numerous visiting officers have suggested that there have been any short comings in the business records keeping.

WOWGR application

83. As regards the WOWGR application:

(1) CW did not apply for a WOWGR approval with the intention to "get around" anything.

(2) CW felt that a WOWGR registration may have assisted its business operations when it was operating close to the upper limits of its deferment account.

(3) In the circumstances CW was legally entitled to make application to HMRC for a WOWGR registration and did so. The fact that the officer dealing with the application did not approve a registration does not mean that CW did not have a legitimate reason and legal entitlement to make the application in the first instance.

(4) Correspondence with the officer who dealt with the WOWGR application was enclosed and it was noted that the communications were very amicable and there was no suggestion that there was anything improper in the application.

(5) The reason given for refusing the application was due diligence documents CW had collected were mostly in Italian and had not been translated into English. The relevant due diligence requirements for WOWGR registrations are set out in HMRC Notice 196 (see pages 234 to

242). The officer made an error as there was in fact no requirement to translate documents in foreign languages into English.

(6) However at the time CW decided not to pursue this WOWGR application any further. On taking professional advice CW realises it did not need a WOWGR to be able to deal in duty suspended wines. It merely needs to have the wines delivered into its account in an approved excise duty warehouse. Following the application CW instructed DDE to carry out due diligence on its behalf.

84. Further points were made as regards the movements of goods to SC:

(1) At the time CW was conducting its operations near to its financial maximum limit of the deferment account. CW researched publicly available HMRC information and based on this understood it could transfer goods as it did. CW understood goods could be held in the SC warehouse in duty suspension until it was able to remove the goods for home use on payment of the duty through the deferment account.

(2) CW also contacted HMRC advice line and their advice confirmed that CW was able to transfer the goods in this manner:

> "Should you wish you could no doubt verify this by checking your advice service telephone enquiry records. Indeed we would encourage you to do so as this is plainly material to the mens rea that informed CW's decision making process."

(3) It was pointed out that SC, an experienced warehouse approved by HMRC, agreed to accept the goods on CW's account on this basis.

(4) It is clear that the goods were entered on to the EMCS system, all the relevant transport documentation is available and excise duty was accounted for when the goods were removed for home use.

Debts

85. As regards debts:

(1) There has been no history of poor payment to HMRC by CW nor does CW have any outstanding debts with HMRC.

(2) CW has paid all taxes due to HMRC on time for decades. CW is currently paying in excess of £3,000,000 in excise duty and VAT.

(3) The Castillo business operated a single bar and was run on a daily basis by a manager and not by Mr Corbelli. Unfortunately businesses fail from time to time and it is wholly unreasonable to take into consideration the failure of a small business when considering a registration for a successful fifty year old business.

(4) The statement in the letter that Mr Corbelli intends to keep the business in a different name is a misunderstanding. CW had previously purchased the property in the name of the partners and this was wholly unconnected with the business activities of Castillo. After the liquidation CW have been negotiating the assignment of the lease with the aim of then obtaining rental income from renting out the premises.

Due diligence

86. As regards due diligence, CW agrees it operates satisfactory due diligence procedures. As this appeared to be directed to DDE the information had been passed on to them but:

> "in the alternative if there is anything in your remark that you intend to take into account in relation to CW's registration application, then we will need your full explanation of this point as we quite frankly do not understand the issue you have raised here".

Decision letter

87. In the refusal letter of 30 December 2016 Mr Germaney said that he had taken into account the response provided by Mr Curley in his letter of 13 December 2016 and set out the following as the "key points considered in making the decision":

> "Section 6.10 of Excise Notice 2002 Establish that there is no evidence of illicit trading indicating the business is a serious threat to the revenue or involved in significant revenue non-compliance within excise or other regimes.
>
> Within the last six years you were involved in three separate seizures of duty unpaid products. In September 2012, December 2012 and February 2013 goods were seized as they had been identified as being involved in multiple use of ARC numbers.
>
> It is acknowledged that these happened over three years ago and that a review of the transport arrangements was undertaken after the third seizure. However, when considering the fit and proper criteria for the [AWRS] application, all aspects of HMRC compliance is reviewed. It is reasonable for HMRC to take into account seizures of goods due to suspicion of excise diversion fraud, irrespective of which agency deals with it.
>
> The next point further demonstrates that you continue to pose a significant threat to the revenue.
>
> You have also brought goods into the UK under the [RC scheme] but did not account for duty when they were received at your premises. The goods had crossed the duty point but were moved under duty suspension, by yourselves, to an excise warehouse. These took place on three separate occasions, July 2014, January 2015 and June 2015. Neither of these occasions did the goods travel with a valid movement guarantee, which in itself creates a duty point irrespective of the validity or otherwise of the movement.
>
> No evidence has been presented which substantiates HMRC agreement to this abuse of the duty suspended system.
>
> Section 6.10 of Excise Notice 2002 Establish there have not been persistent or negligent failures to comply with any HMRC record-keeping requirements. E.g poor record keeping despite warnings or absence of key business records.
>
> It is acknowledged that a stock control system has now been purchased, as is required for [the AWRS] scheme.

Other administrative errors found with the records inspected, high-lighting poor record keeping and lack of internal management checks. The records were inadequate and not fit for purpose.

Checks of your records on 9 June 2016 found the following

- Incorrect duty rates quoted in the records (although the correct duty was declared)
- Transposition of quantities of stock noted in the records compared to the accompanying invoices
- Insufficient product types noted in the records compared to the accompanying invoices.
- Incorrect pricing shown on the invoices from suppliers and no currency specified.
- Unable to trace payments for the purchases through the records

During the visit you were shown these issues with the documentation, errors in you records and advised of the lack of proper internal management controls. Although you were given the opportunity you did not provide any reasons or excuse for these failures being found in every area of the records inspected.

<u>Section 6.10 of Excise Notice 2002 Establish the applicant, or key persons in the business have not previously attempted to avoid being approved and traded unapproved.</u>

You state that you applied for a WOWGR to get around increasing their deferment guarantee for the [RC scheme]. The WOWGR was rejected on the grounds that the due diligence provided was in Italian. You did not challenge the decision.

You then used your [wine approval] number to move the goods under duty suspension to a bonded warehouse. These goods had been brought in under the [RC scheme] and you had not declared the duty on them.

The publications by HMRC clearly state that as a Registered Consignee you do not have an approval to hold and send goods received under duty suspension. And as a Wine Producer you do not have an approval to receive wine, you have not produced yourself, under duty suspension to a bonded warehouse.

Excise Notice 203a Registered Consignees paragraph 3.1 "*Registered Consignees may not hold or dispatch goods under duty-suspension arrangements*".

Excise Notice 163 Wine Production paragraph 3.5 "*You are not allowed to receive in duty suspense;*

- *wine, not previously produced on your licensed premises, in a ready for sale state from other licensed premises or approved warehouses*"

This appears to be a blatant attempt to circumvent the correct HMRC approval procedures set up to safeguard the proper controls required for moving alcohol under duty suspense.

<u>Section 6.10 of Excise Notice 2002 establish that there are no outstanding, unmanaged HMRC debts or a history of poor payment.</u>

[The letter then referred to HMRC's notice as regards the fit and proper criteria and continued that] "Mr Guiseppe Corbelli is the partner and a key person in the

running of [CW] as well as being the sole director of [Castillo]. As at 13 October 2016 there are debts outstanding to HMRC for VAT and corporation tax. The company had not deregistered for VAT but had not submitted any VAT returns since 01/16. HMRC have attempted to telephone Mr Guiseppe Corbelli on numerous occasions concerning this debt but have been unsuccessful in securing contact. The business has also been visited by HMRC to chase the debt, but no one has been available.

There is little chance these debts will be paid off as the company is being wound up and therefore this represents outstanding debts and history of poor payment to HMRC by the Partner who is also a key person in [CW].

Section 6.10 of Excise Notice 2002 also requires the business to have in place satisfactory due diligence procedures covering its dealings with customers and suppliers to protect it from trading in illicit supply-chains, see section 12 of Excise Notice 2002 for more information about due diligence. [There was then a section on due diligence procedures which set out the concerns on the same basis as in the letter to DDE.]"

CW's evidence on the seizures

First seizure - witness statements

88. In his first witness statement Mr Guiseppe Corbelli said the following as regards the seizures.

(1) CW were not involved in any of the seizures referred to in the decision letter nor were CW involved nor did they have any knowledge of the multiple use of ARC numbers. CW makes numerous imports every year and never suffered seizures before these three incidents nor since. The goods were not seized from CW's business premises and, therefore, were not goods that CW were in possession of or had any control over. CW had no involvement whatsoever in the packing of the vehicles, in the collection of the goods by the transport companies, in raising the documentation required for release of the goods from the overseas warehouses or in the transportation of the goods across Europe.

(2) After the first seizure "we spoke with the suppliers concerned and it appeared that there had been an error made when loading the goods so the wrong goods and wrong paperwork had been despatched from the warehouse in Italy." Mr Guiseppe Corbelli contacted Mr Simon Hewitt at HMRC, at the local Wolverhampton office, who visited him and he explained the situation about the apparent error of loading and the paperwork. He took the details and said there was nothing he could do but he would pass the information on to the relevant section in BF/HMRC.

(3) He recalled that one of the transport companies involved was Matthews. He was informed at the time that BF and/or HMRC had investigated the seizures and had assessed that company with excise duty on the seized goods. So it appeared any irregularities were investigated and action taken against that company and not against CW.

(4) Following the third seizure, CW reviewed all the circumstances and determined that any problems that had arisen in respect of seized goods

were caused by the transport companies and so they changed their transport companies.

89. In his second witness statement, having then seen Mr Germaney's witness statement, Mr Guiseppe Corbelli said that, as regards the first seizure, he had no knowledge of the circumstances Mr Germaney set out where he talked of a vehicle with the same use of ARC numbers or of any interview with the driver or paperwork in his possession.

First seizure - documents

90. As regards the first seizure the blue folder documents included the notice of seizure, copies of the documents accompanying the intercepted load and correspondence between HMRC and CW.

91. The CMR for the load intercepted on the first seizure records the consignor as Abruzzo Vini SRL ("**Abruzzo**") of Cepagatti (a town in central Italy) and the consignee as CW at their business address. The load is recorded as 25 pallets of "vino/birra/liquor". It is undated. The notes BF made when they interviewed the driver, record that he said he had come from "Via Alla Valle 25 13045 Lozzolo" and was going to Capper Transport, Unit 1, Holland Industrial Estate, Bentley road, Darlaston.

92. The notice of seizure addressed to CW dated 17 September 2012 records that all 6 of the ARC numbers entered on the accompanying documents ("**AADs**") for this load had already been sighted by BF officers in respect of a previous movement of excise goods by the relevant vehicles which travelled to the UK on 14 September 2012.

93. A letter from CW dated 18 September 2012, which GC accepted in evidence that he had signed, records the following explanation as regards the load which had entered the UK on 14 September 2012:

> "Yesterday I have received my delivery and on examine the paper work discovered that …I should have 37 pallets instead of 25 pallets. On examination of the load there was indeed 25 pallets (lorry cannot carry more than 25-36 by law). I looked at the paper work again and discovered that there was an extra e-ad for 12 pallets with the arc number [ending with 12553] dated 12.09.12.
>
> These goods were due to be loaded on another truck of Friday 14.09.12.
>
> I found out then they had not been loaded on the second truck but there had been some confusion at the pick up depot and the same load had been loaded again with all the documents (the warehouse copies) had been given to the driver thus leaving the second load in Italy and bringing the wrong load to the UK, but with the paper work with the second load.
>
> As I understand from the transport you have now seized the truck with the goods. There has been an error in loading as is plain to see…

> According to the paper work you have in hand there should be 37 pallets on the truck, but clearly this is not correct and not physically possible.
>
> There has been a grave error in loading which we can clearly see based on the evidence before us with regards to all the paperwork.
>
> Adding up to this large amount of pallets and second load still in Italy."

94. According to an email from Mr Hewitt to a HMRC colleague dated 29 October 2012, at his visit to CW, Mr Guiseppe Corbelli gave the following further account:

> "Mr Guiseppe Corbelli said that he had ordered 37 pallets from a number of suppliers as per those listed in the notice of seizure. Mr Pietro Corbelli arranged the transport with Matthews for 3 vehicles. The first was to go to Berteletti and collect 25 pallets which were to be delivered to CW, the second was to collect 12 from Azienda Agricola at Treviso and deliver them to Berteletti. This vehicle then collected a full load from there of coffee, pasta and other foodstuffs for delivery to CW. The third vehicle was to go Berteletti and collect the remaining 12 pallets from there. Mr Corbelli claimed the third vehicle wrongly loaded an identical load to the first as the warehouse copies of the paperwork was still lying around the warehouse. This was given to the driver. Among this load was 2 of the 12 pallets that had been delivered from Azienda. He said he thought these 2 were Pinot supplied by Agricola Al Galli. He said that the remaining 23 pallets on the load do not belong to CW although he was in the process of trying to buy them off the companies concerned. Allegedly Pietro Corbelli was away for his birthday when this happened and therefore not able to sort things out. Mr Corbelli said there was no paperwork as regards the orders placed with Matthews."

95. At the hearing CW produced a letter from BF to CW dated 16 October 2012 (the "**seizure letter**"), which stated the following:

> "Any request for restoration for the goods directed to the NPSU should be from the owner of the goods at the date of seizure. As you state that you had not ordered the seized goods, I am presuming that you were not the owner at that time.
>
> Your offer of payment of Excise Duty in order to release the goods cannot be accepted and the NPSU will deal with your request in the normal manner."

First seizure - evidence at the hearing

96. Mr Guiseppe Corbelli confirmed in his oral evidence that he had received a load of goods he had ordered following the arrival of the goods in the UK on 14 September 2012 and that the goods came from a warehouse in Italy called Berteletti in Turin that CW had used for consolidating loads. He said that "if we were doing a groupage of a lorry, we would have different pallets of wine from different areas brought there and then loaded from there".

97. It was pointed out that the CMR referred to the consignor being Abruzzo which did not appear to be anything to do with Berteletti. He confirmed that was a separate

company based in central Italy. He sought to explain this on the basis that, as he had already indicated, Berteletti were acting as a hub:

> "The only thing at that stage is that we used to use this [Abruzzo] as well for the same kind of operations…… Matthews would pick up goods for us and then drop them off at - for instance, they could pick up 10 pallets on one side of Italy and drop them in another place for us for then consolidation of a load…..I am looking at this and I am thinking that the lorry could quite possibly have dropped off from [Abruzzo] for other loads into Berteletti to pick up at a later stage. That is the only thing that I can see for this."

98. As regards the fact that the CMR referred to Abruzzo as the supplier, he said:

> "I cannot be responsible for transport - how they fill out the documents at the time, I am not responsible for - until I see the documents when they arrive at my warehouse, where a driver, who I believe, looking, was not even English, who needed a translator, to then fill out the document."

99. He agreed that CW were responsible for engaging the hauliers to pick up goods for CW but said he was "not responsible for the way the lorries are loaded" or "for what is packed on the pallets. I only see the goods when they arrive in my warehouse."

100. He was asked what went wrong with the load of goods that was intercepted. He said he thought that one of the Matthews' lorries that went to the Berteletti warehouse to load, picked up the wrong goods:

> "They were supposed to be picking up another load. They picked up the same load. I was not aware of that; it was over a weekend. Then, I was informed of that, I believe it was on the Monday…. They picked up goods that I had already had delivered or were on the way to be delivered to me."

101. He was asked if he meant the load was a duplicate. He said that was not the case:

> "because if we look, as you have read out, at my letter, it says there are a mixture of goods on there. There are goods that should not be on there. There was paperwork that should not be there. So, it was a mix-up at the warehouse. In fact, in one of the statements, I believe it is officer Germaney's, he points out…….that none of the paperwork tallied up, save for one ARC number. If it was a duplicate load, then all the paperwork would have tallied up…..I am dealing with something that I have no knowledge of what has happened. I am in the UK. I am told there is a seizure. I am trying to work out what has happened. I am coming up with what I perceive has happened."

102. In response to the question of what enquiries he made, he said he rang the owner of Berteletti in Italy. It was noted that in the letter to HMRC of 18 September 2012 he said "the same load had been loaded again, with all the documents." He confirmed that is what he believed to be the case at the time but since reading Mr Germaney's witness statement, "he points out something else and he says that none of the ARC numbers matched".

103. He was asked again what he was told by the warehouse as regards the load. He said:

> "He told me that they had loaded some of the same load, some part of another load and given the documents for the previous load and for part of the load that was still in Italy."

104. It was put to him that is not what he had said at the time in the letter of 18 September 2012. He said in effect that what he had said in that letter was what he understood the position to be "straight after the fact" but he had more information which he spoke to officer Hewitt in October 2012 to "shed more light on it". When pressed on whether Berteletti had told him it was the same load that was loaded or it was part of the same load with some other goods, he said he was told there "has been an error, there is part of that load, part of another load. I explained that to [officer Hewitt]". He confirmed that he was told that the documents that were sent with the load were the warehouse copies for the load that arrived with CW.

105. He was asked how any entries could have been made on the EMCS system for the load that was intercepted if the ARC numbers had already been used. He said he did not know. He was asked if he knew that the multiple use of the same ARC number is a means by which smuggled alcohol can be brought into the UK. He said he was "not familiar with that. All I do is order my goods, wait for them to arrive, account for the duty" although he had heard of this happening.

106. He was taken to a number of documents, with a number of ARC numbers, referring to goods for delivery to CW from a number of places in Italy in September 2012. He was asked if these were the relevant goods that arrived with CW at the time. He said:

> "No, not all of them. If you will notice, there are two Azienda….so I did not receive all those on that consignment…..The reason why there is another one here in the seized documents, if I refer you to my information letter that I sent to the Customs at the time - I say that there was a load in Italy that should have been loaded up that was not, but the paperwork was also given to the driver, and part of that load, for some reason, so in the seized ones you end up with the documents from the load that were in Italy. That is why you have two from the same company."

107. It was noted to him that there were several different suppliers in different locations all consigning goods to CW directly but there was no mention of Berteletti on any of these. He said:

> "no… Each ARC is a separate movement. We put the ARCs together in order to have a groupage lorry that leaves with all these different, as you pointed out, or as you asked me where the places were, they are all in different places in Italy."

108. It was put to him that he was saying that for each of the ARCs there were effectively two movements: one to Berteletti, and then from Berteletti to the UK or in other words that Berteletti acts as a hub. He said:

> "yes ….. this happens quite a lot with transport companies and you do not call it two movements. If you have a company where it is going to

> transport some goods for you, that company can pick up ten pallets, take it to a depot, wait for another ten pallets of anything; it could be salad to leave for England then it leaves and goes to England. It is not constituted as two movements, as you say, because it is waiting for a part-load."

109. He was asked how long a load might wait for. He said it would depend on different factors, it could be hours or days, depending on where the transport has unloaded, where it has loaded. A company could say the goods will be ready but then fail to do so.

110. It was put to him that the CMR found with the intercepted seized load, as it referred to a full lorry-load of 25 pallets for delivery from Cepagatti to CW, plainly was not right. He said:

> "I believe that that is an error. That could have been goods that they loaded at [Abruzzo] for us, to drop in Berteletti's, and the lorry then did not do a new - he did not do a new CMR, because if he had done, he would have found 37 pallets in his paperwork, not 25".

111. It was put to Mr Corbelli that the driver of the intercepted load, who confirmed he was working for Matthews, said he was delivering the goods to Capper Transport (as recorded in BF's notes). Mr Corbelli said he may have been delivering there as "sometimes over a weekend we would have lorries deliver there, because we would not have any space or the times would be awkward. So, we had asked on occasion for it to be delivered there and then brought to us". The driver said he was instructed to take the goods there by the haulier and Mr Corbelli confirmed that such an instruction would have initially come from CW. He agreed that Capper Transport are not a registered consignee or an excise warehouse but "they were not accepting goods for the closing of an ARC".

112. He was asked how Berteletti would know what to load on a vehicle that was coming to CW. Mr Corbelli said: "He would have the paperwork……the different printout that you see of those ARC numbers". He was asked how, in a complex sequence like this, Berteletti know what goods to put on what lorry. Mr Corbelli said Berteletti would have a copy of the generated ARC numbers and CW would have told them what to load generally verbally over the phone. It was put to him that gave rise to the potential for confusion. He said "it had not in the past…. We want the goods. We order the goods, we need them. There is no particular sequence……We would tell them we want these particular products to load." He confirmed that CW does not pay Berteletti for this. As CW also buy wine from Berteletti, "as a favour, and this happens a lot… in Italian culture, that there will not be a charge for this kind of help". He confirmed no written instructions would be given.

113. He was asked why the second vehicle CW had ordered did not simply take the remaining 12 pallets straight to CW. He said he did not know but suggested that perhaps the transport were organising another part load of other goods that were not CW's. He said he did not have any knowledge of what a transport company could be doing. He could not comment on it.

114. It was noted that, as shown in a note of a meeting with Matthews and BF/HMRC officers, it was confirmed "that loads for Corbelli only ever contained

goods for Corbelli, so it is treated as the movement of a full load, whether full or not". Mr Corbelli said that he thought CW had done part loads with them. He had not seen CW's loads being combined with those of others but "I am not always in the warehouse watching everything unload". As a rule his brother would deal with the transport part of it but he was not aware of Matthews saying they needed to make a diversion to pick up or drop off somebody else's goods. Matthews were just instructed to go and load in a particular destination for a particular quantity of wine on a date but "with transport it is not an appointment at the dentist. You could say the 18th and they could turn up a day early, they could turn up two days late, so it is not an exact science. Generally, my brother would ring up a contact he had at Matthews." There was no written record of contact with Matthews.

115. He was asked what would happen if there was a dispute between CW and Matthews about what they were told to do, where they were told to go or what they were told to pick up. He said they never had a dispute or any misunderstandings that he could recall.

116. He was asked about the prices charged for delivery of loads. He said he could not really remember the prices at the time. Matthews were found to be very good value, "because they exported, I think it was turkey, because they were part of the Bernard Matthews family…..so they would bring turkey down to the south of Europe and they charged a very cheap price to come back, as I recall". He said he did not know the exact prices but he thought it was perhaps £1,000 to £1,200 cheaper than the other transporters because they wanted to have a return load when they dropped off the turkey.

117. He was asked why CW had dropped Matthews as their transporter. He said he thought that:

> "the Matthews' drivers were not allowed to check the loads for health and safety reasons - for their own health and safety reasons. They are not allowed to check a load, and in some places, where they go to delivery, they are not allowed to be on the bays. We decided we had had this problem, and we would re-look at the way we had things loaded. So, that is what we did, so we did not use Matthews again….. I understood that Matthews were not allowing drivers….We wanted them to take a bit more effort to check what they are doing, even though I do not suppose they are legally bound to check every detail, but we wanted them to check so we could avoid these kind of problems….To check the goods".

118. He was asked if there was any correspondence about this seizure with Berteletti after the event. He thought it happened over a weekend and then he spoke to him after the seizure had happened. As regards the other ten pallets that CW were waiting for, "we had to generate another ARC number for them, because the ARC number with all the paperwork was with the lorry that had been seized and part of that load, two pallets were on that lorry. So the goods were still in Italy, so I believe we had to ring the company and they had to generate a further ARC number in order for those ten pallets then to move to our warehouse".

Second seizure – witness statements and documents

119. In his second witness statement Mr Guiseppe Corbelli said he knew nothing about the documents or goods which were in the possession of the transport company when the second seizure took place. He noted that Mr Germaney said there were discrepancies in the delivery document which CW provided but it was not possible that CW provided this, as the paperwork would have been travelling with the seized load. He said he understood that the seized goods did not match with the goods CW had ordered and the seized goods were not, therefore, the property of CW and could not be intended for delivery to them.

120. The blue folder contained the following documents as regards the second seizure.

(1) A letter from Mr Pietro Corbelli dated 17 December 2012 referring to the detention of "my goods" on the relevant vehicle and enclosing all accompanying documents and invoices relating to the load and asking for the restoration process to start with some urgency "as we have been waiting for these goods for some time". The enclosed documents showed a number of deliveries with ARC numbers ending in 4028, 2896, 8617, 9835, 6151, 1770, 1119 and 5997.

(2) An email from BF on 20 December 2012 stating that the ARCs provided ending with 1770, 5997 and 9835 did not match the ARCs on the documents accompanying the seized load and asking if Mr Corbelli could explain this. It was also noted that the ARC ending 1770 related to a full load of wine on a different vehicle to the intercepted vehicle. BF asked if that load had been delivered and where and when it was delivered.

(3) On the same day Mr Pietro Corbelli responded that in all the rush to get the documents over to resolve this issue he had included by error an ARC ending in 1770 which did not pertain to the seized load. The load with that number was delivered to him at his business address the day before. The other numbers he had faxed over referred to the detained load. Also he had just looked at the gate way system and realised that by error he had closed ARC ending 8859 which had "obviously not arrived yet as you have it there I will try and email or fax you the [purchase] order for this".

(4) On 28 December 2012 Mr Corbelli again emailed Mr Baker stating that on completion of the December REDS he had come across the ARC ending 1120 from Abruzzo and it was in fact this delivery that arrived on 6 December 2012 and not the ARC ending 8859 that he closed by error. He asked for any reply to be sent to Mr Curley.

(5) On 29 June 2013 Mr Curley wrote to BF stating that "having considered all the information you have provided in this matter it is clear these seized goods were not our client's property [nor] were intended for delivery to our client. It follows that our client cannot make a claim against the seizure and this is withdrawn. Our client also does not wish to pursue a claim for restoration of goods that are not our client's property".

Second seizure – evidence at the hearing

121. Mr Pietro Corbelli said he thought that what had happened, as regards the ARC numbers which did not match the seized load, was that he was expecting two deliveries from Abruzzo. BF informed him after the seizure that one of the ARC numbers "had been closed from [Abruzzo] on that vehicle and I said it was impossible…..And then when I got into the office the next day what I done is I picked up the other [Abruzzo] document that I was expecting and I closed that one off by mistake. It was a clerical error". He later said: "What happened was I had closed the one and this is where the error has happened, where Mr Baker had the closed ARC number from the same company, but for a different load". It appeared from the documents in the bundle that many of the other ARC numbers did tally with the accompanying documents for the load. Mr Corbelli accepted that CW had ordered goods that were in the seized load.

122. He was asked why it appeared that goods were dispatched on 20 November 2012 but did not arrive in the UK until 18 December 2012. He said he had no idea. He does not deal with the logistics of Italy to UK.

123. He was asked why Mr Curley had subsequently written to BF stating that CW were not pursuing the claim in respect of the seized goods on the basis that they were not CW's goods and were not intended to delivery to CW. He said that was a question for Mr Curley. He said "I think it ended up with ….we would have had to have gone to court and the costs exceeded the value of the goods. As a business, it was not economically viable to proceed down that route." It was put to him that CW might have won and he replied that "it would have come at a cost of more than the goods were valued, as a business point of view, and we are running a business". In response to the comment that the duty was several thousand points, he said regardless of what the duty was, "we are looking at the cost of the wine". He was looking at the actual value of the wine and the court costs.

124. He confirmed that proceedings did not start in the Magistrates court as "as a rule in the Customs and Excise, they do not generally return seized goods. They actually say that in their handbook". He was asked if Mr Curley had advised him not to go to the tribunal to ask for the goods and whether he advised that the goods were not those of CW. He said "no". He could not recall having seen Mr Curley's letter before it was sent and he could not recall if he had ever seen it. He said the goods were CW's and maybe he would have "worded it slightly differently".

125. In giving his evidence the following day, Mr Guiseppe Corbelli said that he could explain why the notice of claim was withdrawn by Mr Curley:

> "The goods, we have ordered them. We are then told by Customs that they are not our goods until we pay for them. So, we are under the assumption, yes, they are our goods, so we will restore them, and then Customs say, "No, they are not your goods". I have a letter that I gave to my barrister, I believe you have it as well, that refers to the first seizure, whereby…..At the time of that seizure, I was conscious of the fact of the various suppliers and that I could use those goods, so I made the application to try and have them restored, although in the skeleton argument it says we made no efforts, and I offered to resolve it by trying to buy the goods…..And then I also offered to pay the excise

> duty, and then it was not accepted. They said, "The goods do not belong to you and we are not going to accept the duty from you".

126. It was noted that the seizure letter related to the first seizure (see [95]) and that it did not reflect what Mr Corbelli said. It said: "As you state you had not ordered the seized goods, I am presuming that you are not the owner". Mr Corbelli replied:

> "but I have just explained….that in order to try and resolve this situation, and because I knew all the different people from [the first seizure], I offered to buy the products and pay the excise duty on …..in order, as I said, to resolve the whole situation, because I knew all the other companies that were sending me the goods".

127. As regards the first seizure, he was asked what would have happened if the load had not been intercepted and arrived at the premises. He said he would have known then that they were not his goods, because he had not ordered them. He would have accounted for them for excise duty purposes. He had had that situation a few years ago and that is what HMRC in Wolverhampton advised him to do.

128. Mr Puzey said that as regards the second seizure, however, it was clear that the goods in question did belong to CW. Mr Corbelli said:

> "Again, this is the second seizure and we are under the impression that we own the goods. We are told by Customs on the first one that unless you own the goods, you cannot ask for them back, and that is asserted in the first letter. My brother had ordered these goods, and as I pointed out, had made a mistake on closing this. He had made an application to try and get them restored on the advice of Vincent Curley & Co. He said, "You do not own the goods; there is this thing where the Customs will not give them to you unless you own the goods"."

129. It was put to him that the crucial difference between the first and the second seizures is that CW did not order the goods in the first seizure, so they plainly were not CW's, but CW did order them in the second case. He agreed that was the case and he was not disputing it but, as he had said, HMRC said "the goods do not belong to you till you have paid for them":

> "So they have to come from the owner of the goods at the time….but….the second one we have ordered them, we are still told they are not our goods because we have not paid for them…..As I said to you, we were advised by Vincent Curley that Customs' stance is, you do not own the goods till you have paid for them."

130. It was put to him that his brother explained the failure to continue to challenge the second seizure yesterday on the basis that it was going to cost more than CW were going to make. He said: "My brother pointed out to you that in order to do any legal representation would cost money. And based on that we did not own the goods, we then decided no longer to pursue it. That was the advice that we were given".

131. It was put to him that this was simply an attempt to disassociate CW from this seizure. He said that: "Nobody is disassociating. I am stating to you what happened and the way we tried to deal with it."

Third seizure - evidence

132. As regards the third of the seizures, Mr Guiseppe Corbelli thought that this was one order CW made for 25 pallets with only one ARC number direct from Abruzzo. It was noted that the date of dispatch was 21 January 2013 but it was not seized until 8 February 2013 and he was asked what it had been doing in the 17 days between the date of dispatch and the date that it was seized. He said he did not know. CW were using agency transporters at that time, because when they decided not to use Matthews, they had not found a regular transporter and so used an agent in Italy who would pick up loads and then organise transport for them.

133. He was asked if any action was taken to chase up where this load had got to, as the system would show it was dispatched on 21 January. He said "you do not necessarily log on every moment all the time…. in the day-to-day running of a business, there will be different orders that you put in, and you will not be tracking every single one; you will be doing other things. You will be doing trade fairs, you will be taking orders. So, you are not just sitting there and saying, "Right, let us see"." He agreed it certainly does not take 17 days to do that journey but "we were using agency transport and they could pick a load up, retain it, and then forward it on. I do not even know the name of the transport of the time."

134. It was put to him that looking at the documentation it did not look like the goods have been trans-shipped at any time. He said he did not know. At the time of making the ARC number, if it had been filled out on the same day as the CMR, then they would not have written "transporter not known". They would have written the name of the transporter at the top.

135. It was noted that on 6 March 2013, CW had instructed Mr Curley to file a notice of claim against this seizure and to ask for restoration. He said he did not recall if CW pursued this. He thought it was the same conclusion as on the second seizure, that "you do not own the goods until you actually pay for the goods" so that the seizure could not be challenged. He thought at the time Mr Curley pointed out that in numerous other cases this had been the stance of HMRC.

136. He said that on this occasion also CW had ordered these goods but never received them. It was put to him that Mr Curley, notwithstanding his position that CW could not challenge the seizure, still wrote to HMRC saying that is what he was going to do. He said "he advised us that way" and noted that HMRC could have asked Mr Curley all these questions when Mr Curley gave evidence the previous day because he knows exactly what advice he had given and what he relied upon to give that advice. He could not recall if Mr Curley had given him written advice on this point.

Mr Powell's evidence on seizures

137. In examination in chief Mr Powell was asked what a consignee in the UK could do as a practical matter to discover either a multiple use of an ARC or a loading error before the goods reach them. He said:

> "Practically, very little, if anything. The reason is that everything is a single movement…..The registered consignee is a passive actor in this. He is expecting to receive goods. He cannot influence, unless deliberately, knowingly, involved and complicit in an irregularity,

> which obviously required some planning in advance, he can do nothing about this…….You can try due diligence, but if somebody is moving drugs under duty suspension that is out of your control. This middle party [the haulier] is the problem because the recipient cannot know until after the event or some seizure has taken place that there has been any kind of problem or irregularity."

138. He was asked if, as HMRC appeared to be suggesting, where goods are dispatched from a warehouse to a depository and then to the UK there are two movements for excise duty purposes. He said as a practical matter vehicles stop off en-route. That is not uncommon because there will be breaks, unexpected occurrences, and drivers do not always follow instructions exactly. In cross examination it was put to him that where a vehicle stops off en-route, unloads the load, leaves it in a warehouse and the load is picked up some days later, that there would be a separate movement which would need a separate ARC number. He said:

> "No, it is not a movement. It is not a movement as such. It is outside the universe of the movement in the law……. [it] would [need a separate ARC number], but you could not commence the movement. It is like saying - what is gravity. You cannot start a movement unless it is from a tax warehouse, you cannot have an ARC. If you were to say that it ought to have an ARC, yes…..The ARC is only a number. It is the electronic accompanying document that has all the details. The ARC is just a number. [He confirmed that it is one number for one movement.] People misunderstand it. It is not the ARC, it is the electronic administrative document. It is an electronic version of what was the administrative accompanying document in paper. The ARC number has to travel, but the real thing is the EAD."

139. It was put to him that there must be separate movements where goods coming from multiple locations are dropped off at another location and are taken on by a completely different vehicle and haulier. He said:

> "No, that is not true……No, they are not, sir. It is possible that vehicles could unload and another trailer pick it up at a different location and then be transported on. Yes, it would [be covered by the same ARC number]. You have an ARC number that travels with the goods. If the goods are taken off that lorry that does not mean the movement has ended. They can still be in transit or be held…..It depends on how long the transportation takes. It is not uncommon for this to happen. Preferably, for everyone's peace of mind, it is best if the goods are delivered en route, one way, very quickly, but it is not always the case. Sometimes separate trailers are used, and what happens if a vehicle breaks down, what happens if there is a puncture, or the axle snaps. These are things that happen."

140. It was put to him that it is a risk if a load takes 20 days to arrive in the UK that the ARC number can be used multiple times. He said: "Yes, that is correct."

CW's evidence on WOWGR and movement to SC

Witness statements

141. Both applicants said in their witness statements that there was no intention to "get around" anything in applying for a WOWGR registration and the movements to SC. Mr Guiseppe Corbelli made the same points as regards the WOWGR application and movements to SC as set out in Mr Curley's letter of 13 December 2013. He said that CW did not take any issue with the WOWGR refusal as it was made only in case they found it would assist and it was not a business need. He noted that it was his brother who dealt with the movements to SC and set out what his brother had done (as also set out in his brother's witness statement and set out below). He said this is a complex matter as Mr Sandip Ranch at HMRC, who Mr Germaney referred this matter to, acknowledged in a letter to Mr Curley in January 2017.

142. Mr Pietro Corbelli confirmed in his witness statement that the application for a WOWGR was made between the second and third movements to SC. His understanding was that wines could be moved duty suspended in the UK without the need for a WOWGR registration and that would only be required if CW intended to move alcohol other than wine (such as spirits). He felt it would be more cost effective to move and hold spirits in duty suspension rather than wines as this would reduce the third party warehouse charges involved.

143. He confirmed that he was visited by Mr Maskew and three other officers regarding the WOWGR application. During the visit of 27 February 2015 he explained the movements of wine that had taken place, the reasons for them because of the duty deferment account financial ceiling and that CW wanted the WOWGR registration because it was more cost effective to move and store spirits rather than wines for this purpose. He said:

> "Mr Maskew did not say to me that HMRC's rules did not allow us to move the wines under duty suspension in this manner. Mr Maskew also did not inform us that we would not be able to use a WOWGR registration to move duty suspended spirits in the manner proposed. As a matter of fact, he incorrectly refused the application in the grounds we held due diligence documents supplied to us by Italian producers were in the Italian language."

144. He continued to note that he had contacted the HMRC advice line about transferring goods in this way. He had seen from using the EMCS system that UK to UK movements of duty suspended goods could be entered into the system and he looked at raising an EMCS entry for the first despatch of goods. He was not certain how to fill out this entry on line as he had not previously used EMCS for this purpose. He therefore telephoned HMRC's EMCS advice line on 31 July 2014. He spoke to an officer and explained the movement of goods he proposed to make and "I was logged onto our EMCS account at the time so that I could discuss my queries with the officer. I then simply discussed the EMCS form with the officer and filled it out online during the course of the discussion with the assistance of the officer concerned".

145. He noted that Mr Germaney said in his decision letter that the movement of goods did not travel with a valid movement guarantee. This may be a misunderstanding on his part but "I assumed that the [Marine Cargo] insurance we

held was a guarantee that the duty would be paid on each individual movement of excise goods."

146. He concluded:

> "I categorically deny that CW attempted to "get around" anything or that there was "a blatant attempt to circumvent the HMRC approval procedures". If there have been any errors on our part in respect of any of the above then these were genuine innocent errors. I also must reiterate that we took HMRC's advice from a specialist advisor and also discussed the same with officer Maskew who did not point out that there was any issue with these movements of goods."

WOWGR and movements to SC – documentary evidence

147. The bundles contain transcripts of calls Mr Pietro Corbelli made to HMRC's general advice line on 24 and 28 July 2014. These evidence that he was calling them regarding a WOWGR application. The calls were brief and indicate that HMRC was due to call Mr Corbelli back. There is a record of a longer call of 19.48 minutes to HMRC on 31 July 2014, being the call on which Mr Corbelli stated he was advised he could make the movements to SC. There is no transcript of this call and there is conflicting evidence of why that is not available (see [76] and [262] to [268]). It appears all three calls were made to the same number, being a general line, but it was argued that the third call of 31 July 2014 was put through to the EMCS helpline. We have commented on this below.

148. The Maskew notes contain an aide-memoire document prepared by HMRC recording information about CW required for the WOWGR application and typed notes of visits made by Mr Maskew and other officers to CW regarding the application on 27 February 2015 and 27 May 2015. These record that the February visit lasted for 1.15 hours and that the aide-memoire was completed then. It is stated that:

> "The main reason why they have applied for a WOWGR is that they have reached their duty deferment limit because of the value of spirits they now import and have had it increased from £175k to £225k – see copy letter uplifted. I confirmed that they do not need a WOWGR to bring in wine but PC already knew this was the case. I referred to the EX60 that they had submitted dated 7/8/14 and said because it was so old they still require it. PC said that his father passed away and everything was put on hold. PC also said that he wants the facility in place in case they need it. I confirmed that we would revoke the WOWGR approval if it is not being used as it should as it is high risk for HMRC.
>
> The customer is also a "Registered Consignee" and therefore already has an excise approval in place. I said that there is no guarantee that this would be approved as it is a rigorous process…."

149. The notes of the second meeting record that CW had a wine, cider and perry makers registration, that Mr Pietro Corbelli said he had last made wine some years ago but wanted to make some in memory of his late father. It was noted that the cider and perry registration was to be cancelled.

> "I asked PC about their account in SC in Manchester. PC confirmed they do not hold a WOWGR for this account as it is wine only held there and a WOWGR is not required for this". [There was some discussion of a seizure of Limoncello and then] "I then went on to discuss more importantly the WOWGR application and due diligence condition in particular and how serious HMRC views this condition because of the high levels of excise fraud. I informed PC outright that because of the lack of due diligence (DD) I will be rejecting their application on the following grounds but he has 30 days in which to appeal –
>
> All of the DD is in Italian and HMRC cannot understand any of it so it is no good. DD was introduced late last year and it has thoroughly robust criteria for all new excise approvals and existing ones. I handed PC a copy of Notice 196 and pointed out in particular the DD condition, PC said he would need to try and get most of the DD documents translated into English and I agreed that was a good idea. [There was some further notes on CW taking action as regards due diligence including that CW had arranged to meet with DDE.] It was noted "Customer has already applied and had accepted an increase in their deferment limit but they maintained it was still not enough". In a letter of 16 October 2014 it was confirmed to CW that the monthly guarantee limit was £225,000."

150. The aide-memoire contains no specific mention of any movements of wine to SC. It does record, however, that CW already had an existing account with SC and that all goods "come in duty suspended – Reds. A registered excise business here, Don't do it for other people."

WOWGR and movements to SC - evidence at the hearing

151. Mr Pietro Corbelli was asked what a WOWGR registration is. He said from what he was led to believe it is to move spirits inside the UK in duty suspense. He was asked from where he gained the understanding that imported wines could be moved under duty suspension to another warehouse. He said:

> "on opening up the electronic EMCS system, it has an area on your left hand side where it says "UK to UK movements". So I accessed that, looked through it and thought we can move wine from here to a bond and defer the duty. I then contacted EMCS helpdesk and they talked me through it and that is how I managed to make this error, non-intentional and all visual because as soon as it is on the EMCS system, I was not hiding anything."

152. He said he only had around three years of experience of using the EMCS system at that time and he had never done a UK to UK movement before and so had only done it with the help of HMRC's helpdesk. He said he told the helpdesk the same as he told Mr Maskew at the meeting he had with him. He said the reason was due to the fact "we were reaching our deferment level not to breach that level and have the deferment maybe suspended".

153. He applied for a WOWGR because:

> "it was more economically viable to what I thought I was doing right at the time, to move a smaller quantity of spirits from our warehouse to

> the tax warehouse bond as opposed to moving the wine. Whereas if you had a WOWGR, you can move a smaller quantity of spirits, the transport would have been less, the storage costs would have been less but you would have still freed up the same amount of duty that would have been on the wine, which I thought I was moving correctly at the time".

154. He thought a WOWGR did not apply to wine but he was not certain on that. He said he wanted the WOWGR in place just in case as:

> "we already had in place the deferment application to be raised but it was taking time between HMRC and the bank to have the agreement. So it was only a short term solution. That is the reason. Then once we had the deferment raised, that is why we only did three movements. We did not use SC. "

155. Given the length of time raising the deferment guarantee was taking he thought it was "simpler and quicker option to have something straightaway to be able to carry on working in a normal business way" and once it was sorted out he would not need the WOWGR anymore but the time it took "one of the reasons why I did not appeal it when it was refused was because we had had the deferment raised then, so there was no need to appeal it. It was obsolete for us."

156. As regards the meeting with Mr Maskew he said he did not make his own notes as he left that to HMRC as there were four of them present and two of them were making notes. He said he gave Mr Maskew the explanation about why he wanted the WOWGR to move spirits and he did not advise him otherwise. It was put to him that the subject did not come up and he replied: "Oh it did". He said he could not be held responsible for what Mr Maskew writes if he did not write full details in his notes then it was not his fault.

157. He was asked why he thought it was alright, having applied for a WOWGR and not having got it, to then seek to move goods in duty suspension. He said two movements were done before the WOWGR application with the help of the ECMS helpdesk

158. He was taken to regulation 26 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 which provides that a registered consignee "may neither hold nor dispatch excise goods under a duty suspension arrangement". He agreed that as regards the movement to SC, he had dispatched goods without paying duty on them. He said he had "overlooked that" and it was brought to his attention at a later date and "with the help of the HMRC helpdesk at the EMCS system, they talked me through it. At no point did they correct me."

159. He was also shown regulation 27 which provides that a registered consignee must account for the duty due on goods imported under duty suspension immediately after they have been received. He confirmed that the goods were closed off on the EMCS system as regards the Italy to UK movement and then he generated as fresh UK to UK movement. He said the duty was paid but only at a later date when the goods left SC so after the goods had left CW's warehouse. He said:

> "I accept that I was not allowed to do it after I found out. I am not at the point of it being done. I did not do it intentionally. I did not do it knowingly."

160. He was asked if he was aware of the public notice 203a issued by HMRC relating to registered consignees as referred to by Mr Germaney in the decision letter. He said he was not aware of it at the time:

> "otherwise I would not have made the transactions. This information was handed to me via e-mail when I was on annual leave and I only read the first part where we were refused. The Excise Notice 203 was not available to me on my annual leave……I may have read it since. I have read that many documents in the past six months. Regardless of whether I have read it after the fact, the fact is the three movements were made unknowingly that I was breaking any regulations……I may have read it 20 years ago when we had the consignee."

161. He was taken to print outs from the EMCS system which showed that he had used his wine approval reference number to make the relevant entries. It was put to him that approval did not authorise him to move the relevant goods he had imported as registered consignee. He said "not that I was aware of at the time. I am aware now, but not at the time". It was put to him that in any event he needed a movement guarantee in order to dispatch goods in duty-suspense and he was asked what he thought that guarantee was. He said "a policy that would cover the duty, in any event….in case it goes missing…" He had not enquired of HMRC what was meant by movement guarantee but "was under the impression that it was a policy that would cover the duty….. I was under the impression that our duty insurance policy - Marine Cargo insurance policy for duty would have covered it." He confirmed that it was "most definitely" a misunderstanding on his part.

162. He said he did not ask the advice line if he could use the Marine Cargo insurance policy as a guarantee:

> "because I found it irrelevant to something that I already assumed that I was covered for…… I had never had to do this movement before, I was unaware what the movement guarantee was in that particular term, because I was under the impression that our Marine Cargo insurance to cover duty was a guarantee….. the policy that we hold for duty is an ongoing policy that we have constantly for 12 months of the year and renewed every year."

163. In re-examination Mr Corbelli confirmed that he had no legal training. He was taken to regulation 37 of the regulations which states that excise goods of a certain class or description may only be moved within the UK under duty suspension if they are dispatched from a tax warehouse to another tax warehouse approved in relation to excise goods of that class or description. He confirmed that the relevant goods moved from a tax warehouse to another tax warehouse.

164. He was asked what he said to Mr Maskew at the meeting he had with him about the reasons why CW wanted the WOWGR. He said:

> "Obviously, the first question that is asked by officers when you make applications is for what reason you do want it. The reason given was I

> would like to receive goods into my premises and then move them, UK to UK, on the EMCS system on to the bond for what I need to keep, what I do not need to move on.
>
> I thought it would free up my duty deferment level and allow us to carry on trading by using the WOWGR as opposed to the wine. It would have made it more economically viable to move smaller quantities, release the same amount of duty but have less storage charge at the bond."

165. In response to the question of what Mr Maskew said about that purpose, he said he "just conferred with his senior". He said that the typed notes of the visit of 27 February 2015 did not seem to reflect an hour's worth of the meeting. He thought Mr Maskew and one other officer took notes during the meeting. He was asked to explain the difference between wines and spirits in relation to WOWGR approval. He said:

> "A WOWGR is to move from - we do not need a WOWGR to import spirits because I am the consignee, but to move from our warehouse to another warehouse, you need a WOWGR. You can with wine, but to move spirits you would need a WOWGR."

166. He was asked what he meant when he said "you can with wine". He said:

> "I thought you could move wine from our warehouse to another warehouse. We can with a tax excise warehouse, but not with a consignee, as I have been led to believe now."

167. Mr Guiseppe Corbelli confirmed that he personally had no involvements in the movements to SC and it was his brother who made the relevant entries on the EMCS. He was asked if he was aware, prior to those movements, of Notice 203a about registered consignees. He said he had not read that notice.

CW's evidence on administrative failings

Administrative failings – witness statements

168. Mr Guiseppe Corbelli noted the following in his witness statement as regards the asserted administrative failings Mr Germaney listed in the decision letter:

> (1) Following the visit from Mr Germaney, a new stock system was put in place as set out above.
>
> (2) Although Mr Germaney pointed to "incorrect duty rates quoted in the records", the fact is that the correct duty was paid.
>
> (3) The "transposition of quantities of stock noted within the records compared to the accompanying invoices" was a minor clerical error.
>
> (4) As regards the comment "insufficient product types noted in the records compared to the accompanying invoices", this seemed to be referring to the fact that the book keeper occasionally recorded goods in the books as red wine or white wine rather than by reference to the specific variety. However, there is no prescribed form for drawing up business records and transferring information about description of products.

(5) As regards the assertion that there was incorrect pricing shown on the invoices from suppliers and no currency specified, Mr Corbelli recalled that Mr Germaney queried an invoice from a supplier in Bulgaria where it showed the charges for goods on the invoice but did not actually say that the charges were in euros. He thought it went without saying that the charges were in the currency used in Bulgaria at the time. In any event this point relates to invoices raised by suppliers and not documents raised by CW.

(6) He did not agree that CW were "unable to trace payments for the purchases through the records" as regards payments made to suppliers through the currency converter companies. It is simply that to be able to confirm payments CW has to check both their business records and the currency company statements. This is part of the information that was sent to Mr Germaney after the visit of 9 June 2016.

(7) CW has received regular visits from HMRC over its fifty years of operation during which officers inspected the records and made telephone and written enquiries for information and documents. During this entire period none of the numerous officers have suggested that there have been any short comings in the business record keeping. No other officer over the past fifty years has found the business records to be "not fit and proper".

Administrative failings – evidence at the hearing

169. It was noted to Mr Guiseppe Corbelli that it was CW's legal obligation to keep a record of any excise goods that are dealt in or handled after receipt (under regulation 4 of The Revenue Traders (Accounts and Records) Regulations 1992) and he was asked what record of stock movements CW kept before the visit in June 2016. He said that:

> "we would buy the goods, bring them to the warehouse, enter them into a stock list, a read system which showed all the different arrivals. The quantities of the wines were all listed. Then we would then invoice them out. Then the stock would obviously deplete and we would order again…..Those were what we deemed necessary for a small company with partners that can open a door and see the stock there and decide what to order…….We recorded the goods that arrived at our warehouse and put them in a list…..but we would then account for the duty, and then we would invoice them out to our customers."

170. He was asked how he matched up particular goods. He said "we would do a visual check of what we needed and then we would order it". Mr Puzey said he was talking about where goods have come in and then some goods have gone out. Mr Corbelli said:

> "We covered that when I said that if it was 50 cases and 20 had gone, I would have 30. Then, because it is a reasonably slow seller, Barolo, I would not order it. I may wait until there are 10 or 15 cases, and then I would order it. This is not a warehouse that goes on forever with hundreds and hundreds and hundreds of pallets in. It is a family business with two partners that can look at that, but officer Germaney

pointed out that you needed a more robust stock system, and it was part of the AWRS, so we implemented one."

171. As regards the new stock system put in place following Mr Germaney's visit, he was asked if he could follow an individual case of wine from its arrival through to its sale. He explained:

> "I cannot check the actual individual case, because the case could be anywhere, but now we have a different system. For instance, let us say 100 cases of wine arrive of a particular, like Frascati. That is put into this stock system. Then, when we invoice five cases to one customer and five to the other, it automatically is taken out of the stock and it becomes 90 cases. Five cases have gone to one customer and five to another. So, at any one time it will show that there are those particular cases on the premises at that particular time."

172. He was questioned about the arrangements for payments through the currency converter. It was put to him that the system does not show what invoices the payments to suppliers are allocated against. He agreed it did not. He was asked how he would track which invoices had been paid and which had not. He said:

> "As a rule, we would pay per invoice. On occasions when there was not enough money in the account, as you put it, which it is an account, you would have a currency account. First you start with, for instance, having £50,000. The bank gives you a not very good rate for changing the money, so you wait until the rate is a good rate and then you ring the currency company up and say "What is the best rate you do me?" The say "X amount on 50." You transfer the 50 to that company and then you have the best rate you could have. Then we will pay bills out of that. So there could be an entire invoice, but then if there is a residue perhaps left over of 15,000 and you do not have enough money left, you could say pay that invoice part of the 15,000 that is in the account and then in a few days, depending on how the rate goes, change some more money and then send a second payment."

173. Mr Puzey said that was understood but queried how CW tracked the payments. Mr Corbelli said "We have the bill that needs to be paid. We inform, as my brother did there, "Please pay Vinogradez." They pay it. Then they send us a receipt that they have paid it. Then we print that off".

174. He was asked how he tracked the part payments that were made. He said that as a rule CW do not do part payments except sometimes when there is a residue. CW does not do it any more now since this became an issue:

> "For instance, if you had three invoices to pay for one particular company, and one was three, one was two and one was five, and there is €10,000 to pay, even though there is €10,000 to pay for three invoices, the currency company now pay them individually. We will say to them, "Just so there is no confusion", which we have now of this, "pay 3,000 for that invoice, pay 2,000 for that one and pay 5,000 for that one. Then we will print those off and we will staple that payment with the invoice and the date it was paid."

175. It was put to him that seemed a rather difficult and haphazard system. He said that "but for us it works rather well". He explained the rationale and procedure as follows:

> "We get a better rate from the bank. Instead of just going to the bank and say "pay this invoice", they give you any old rate, and over a long period of time it is a benefit, because you get a better rate with the currency. It is not very difficult. You owe €10,500. So you send an e-mail to the company to say please pay it. They ring you, sometimes, to confirm, because of all the fraud, and you confirm it to be paid. They pay it for you. They send you on e-mail of confirmation. You print it off and you put it with the invoice. It is rather a simple procedure, in my opinion, and it saves you money."

176. Mr Corbelli was asked how the return of stock was reflected in CW's records. He said that "basically it will sit there doing nothing, because it cannot be sent back to Italy, it is too complicated". If it is sent back on the basis it is no good "you will either destroy it or you leave it there in the hope that maybe the person will say it is okay, but generally you cannot send it back anywhere". He said there were not a lot of returns "so we do not have any particular format to write down those returns", apart from the issue of credit notes.

177. Mr Corbelli accepted that Mr Germaney found some errors as he recorded but he considered they were "minor" as set out above.

CW's evidence on the Castillo debts

178. Mr Guiseppe Corbelli stated in his witness statement that CW does not have any outstanding HMRC debts nor does it have a history of poor payment to HMRC. CW currently pays in excess of £3 million in excise duty and VAT to HMRC. The total amount due on the liquidation of Castillo is £49,000 to £50,000 which includes taxes and VAT. The business was a bar/pub from a building which at the time was owned by Marston Brewery Ltd. The business was run on a daily basis by a manager. It was tied to the brewery for the purchase of alcohol and soft drinks. The prices charged for the rents and the goods proved uneconomic and that was why the business failed. Mr Corbelli has no knowledge of any calls to him from or visits by HMRC. He does not ignore such matters. The winding up was not completed until March 2017. Mr Corbelli felt a moral obligation to pay the debts owed to HMRC and this has now been done.

179. In cross examination Mr Corbelli confirmed that he was aware that the manager at the bar had concerns about the way business was going and "we were falling behind" and that the manager arranged a time to pay agreement with HMRC. He said she made an effort to pay as and when she could.

180. It was noted that on 17 March 2017 Mr Corbelli had notified HMRC (through his advisers) that "whilst there is no legal obligation for him to do so Mr Corbelli feels a moral obligation to repay the sums due to HMRC." It was noted that this offer was made just before the judicial review proceedings were about to be heard and he was asked why he did not pay the debt when it arose. He suggested that the reason he did not do this sooner was that the liquidation in its entirety was not completed until March 2017.

181. It was put to him that he did not pay this large debt when it arose but put the company into liquidation. He said that it was the type of business that he hoped would work. There were very high rents, high running costs. It proved not feasible to have this company carry on: "I did not set out to have a company, to have a bar, to then go to liquidate the company."

182. He was asked why the moral obligation to pay the debt only came upon him during the currency of these proceedings. He said:

> "In all the history of paying my taxes and you refer to this company, which is not an associate company of [CW], [CW] is a separate entity that has existed for over 50 years, has paid all of its VAT on time, has paid all its duty on time, pays all these obligations on time, and you do not sound any trumpet for that.
>
> My PAYE is up-to-date. All is up-to-date. Even self-assessment is in credit if anyone of your colleagues has checked that, but then again if they checked and found that my self-assessment is nearly £5,000 in credit, they are not going to say that. So, I have always felt that I did not want any blemish to do with any credit rating, if I have to get mortgages or anything else. So, the answer to the question is, it came up because I felt I would wait till the end of the liquidation, which came through, and I believe we have a letter somewhere, that the final liquidation statement came through in March…."

183. As noted, he said he did not pay the debt when it arose, because the liquidation had not been finished. It was put to him that this was a debt that was existing before the liquidation. He said "yes, it was, but it was a separate company. Like I said, my manager entered into agreements. If you look at the VAT debt, we were still putting in our VAT returns and we were still paying a little bit in the optimism that this would eventually come good".

CW's evidence on due diligence

184. As regards due diligence, Mr Guiseppe Corbelli said in his witness statement that the visits were carried out by two representatives of DDE and not one as Mr Germaney assumed. He noted that if Mr Germaney had read and properly considered the due diligence reports this would have been obvious to him as the reports include a visit report that details the site visits and the DDE representatives who carried out the visits. Mr Mark Curley confirmed in his evidence, which was not challenged, that visits were carried out by two representatives as he also noted was set out in the visit reports (and he corrected a number of erroneous assumptions on the part of Mr Germaney). It was accepted by HMRC that due diligence was not an issue as regards the decision.

CW's evidence on the effect of the decision on the business

185. Mr Guiseppe Corbelli set out in his witness statement that the decision has dire financial consequences for the business and the applicants' personal circumstances, for their families and employees. CW makes some very minor sales of delicatessen items but almost all of the business income is derived from wholesaling alcohol in the UK. He said that if CW is not approved for registration under the AWRS, CW will not be able to continue with the business, employees will have to be made redundant, the business premises and other assets will have to be disposed of and there will be

significant problems in relation to the stock holdings. The applicants have worked in the business since before leaving school and they do not know what they will do if the business ceases. Mr Pietro Corbelli's wife and son also work in the business and there are 13 employees in total.

Mr Germaney's evidence at the hearing

Request for extension of time to respond to the warning letter

186. It was put to Mr Germaney that, in that context of an enquiry over several months, and of such a very important decision for CW's business, the time allowed of only ten days for the provision of information in response to the warning letter was a very tight deadline. He said:

> "I do not think it was that tight. Obviously, that is what our guidance states is the normal amount of time to present these. It gives an opportunity for [CW] to reply to these letters……It is the guidance that we go to. So, if it was too tight, then it would have been extended……It needed to be done before April 2017, but also my own workload had changed at that time, so it needed to be dealt with properly and make sure that we were able to get all the proper decisions made, but also in a timely manner."

187. In response to the question whether there was any difference in terms of whether his decision came out in any of the months December to March, he said:

> "Yes. I changed jobs at that point and so I needed to make sure that my previous workload was tidied up properly in a timely manner. So that is why it was being dealt with in that manner."

188. As regards whether the initial deadline was appropriate he said again he was "just going on the guidance that we had been given for issuing these letters, which was ten days." As regards extensions of time, "it was one of those issues which could be dealt with, depending on what presented as an issue, why they needed an extension."

189. He was asked if there was any reason why he could not agree to the request for the time limit to be extended to 22 December. He said:

> "I believe this is something which I considered, but did not see why it would really need that much more time to present much more evidence. I assumed the evidence that we had got would be sufficient to send through……He had set the evidence out in his letter…..I am saying there is clearly going to be evidence to provide to us already, so I did not see the need to extend it any further.

190. He was asked whether he meant that he was thinking CW had already had the chance to provide him with information over the last few months. He said "Not at all, no". He was asked to explain what window he was seemingly referring to, as the time when CW already had an opportunity to look for this evidence and provide it to him. He said:

> "When I wrote to them, obviously 10 days earlier, eight days earlier, from this letter, sorry, that would have been presented everything in writing. On my visit, I discussed there were some issues which would need to be dealt with and taken into consideration, but with my

> decision, and this was obviously the first time I put it in writing and I understand that, but yes, Mr. Curley sent through submissions saying…. they may need more time to present more, but I thought I will present that and see if there is any real reason to present any more."

191. In response to the question of whether he was saying he decided to see what CW could send within the initial time limit and then see if they needed more time, he said "I thought that was reasonable" and "I do not see it would be unreasonable to do that."

192. He was asked again whether there was any reason why he could not have extended the deadline as requested. He said:

> I thought the extension, so that they did not fall foul of the ten day deadline, I allowed that extension and gave them a further day to present what they had clearly been working on anyway. So I do not feel there was any real need to go any further than two days. I had consulted with my colleague and the other AWRS team that were in place at the time and they suggest that they have given a couple of days extensions themselves, and that is the normal routine that has been allowed previously.

193. It was put to him that he had gone to other team members who said they were giving a couple of days and just applied that to this case without considering the particular request of this case or the particular features of this case. He said:

> "No, I have obviously taken it all into consideration and I thought it was quite reasonable to allow them another few days and it meant that they did not fall foul of any deadline as well, so it provided for that."

194. He was asked if he was actually interested in what CW might have to say in response. He said "Of course. It would have made a difference on my decision, sir; yes." He described the purpose of the warning letter as being "to set out all the points that I am dealing with in my consideration to refuse the application" and "of course" in sufficient detail for the taxpayer to be able to understand and address them.

Query on due diligence

195. He was taken to the correspondence in which Mr Curley and DDE queried the meaning of his comments in item 5 of the warning letter on the due diligence position. He agreed that, given that in the other sections of the letter he made a negative statement that indicated there was an issue but in item 5 he apparently said there was no issue, the letter was misleading:

> "I am afraid it is misleading when you read it like that and I should have written it differently. I do apologise for any misleading, but I believe that has been dealt with since then".

196. He was asked why he did not respond to Mr Curley's letter of 8 December 2016 as Mr Curley specifically asked for an explanation of what he meant in item 5 and what he did in relation to that request. He said "I would have put it with the rest of the information that was being presented to me to consider for the refusal, and then I would have addressed those points back to them". On being asked to clarify whether he meant he put the query to one side to be considered when reaching his final

decision, he said that was not what he was saying but "all of the evidence which was being presented, I had a look at all of it. I would not put it to one side at all, but I see and address each one as being…" It was put to him that this surely was not an evidence issue but rather case of him being asked to explain what he meant as regards the due diligence issue. He said:

> "It may well have done. If I had had enough time to deal with that, I might well have dealt with that first and then moved on, but I thought it best to deal with all of it in one time…..Like I say, I had to make sure my time was dealt with properly on this, because I changed my jobs at that point in time, so I had to make sure the time I allotted to this was - I had proper time to look at it properly, rather than deal with anything at hand."

197. He was asked if he accepted that he ought to have given an answer to that question before making his decision. He said "I could have done" but "I did not see the need to go any further with that, to be honest, before my decision was made".

198. As regards why he did not provide clarification when asked the same query by DDE on 9 December 2017, he said the letter from them looked like a complaint against him so to ensure it was dealt with properly he flagged it up to the complaints team. It was put to him that whether or not it was a complaint, it was also a question asking him to explain what he meant and he was asked whether he felt any sort of impulse to answer that question. He said again that his first reaction was that DDE were clearly upset by some allegation so that it needed to be sent to the complaints team:

> "There were two issues here really; one that I was dealing with the due diligence that [CW] presented to us and one that obviously the people who had undertaken that had misconstrued, I believe, what I was saying to [CW] within my letter."

199. He was asked why he did not clear up the confusion albeit he was also going to refer it to the complaints team and that surely CW needed to know what he meant in order to make representations. It was put to him that the only other reasonable thing to do was to extend the deadline until he was able to respond to this letter. He responded again that he saw this:

> "as a separate issue with the DDE to what was being dealt with at [CW]….The [DDE] letter here I believe is just a misunderstanding and the actual issue about the due diligence was addressing [CW], the way they looked at the due diligence that they were obtaining…..I did not believe that the DDE was the issue. It was how [CW] looked at the due diligence that this company had presented to them. I was not trying to discredit the company themselves, but I was merely trying to point out to [CW] that they may wish to review the way they look at their due diligence that has been provided for them, rather than them undertake the due diligence themselves."

200. It was noted to him that on 15 December 2016 DDE wrote to him noting that "your co-operation in answering our straightforward inquiry would be appreciated" so that by this point any illusions he may have had about these being separate issues

were gone and it was noted that this was exactly the same question Mr Curley asked. He said:

> "I still see it as a separate issue, and I thought it would be better to be treated as a separate issue, rather than try and get it all tangled up as the same issue…… I thought that that separate issue to what the DDE ……..what their letters to me were about. I thought those were separate issues, because point 5 was relating to what [CW] do for due diligence. Obviously, they outsource their checks to a third party and myself and Mr Franklin saw that there was a potential for issues there that needed to be clarified, and this is what we were doing notifying them. The DDE, I felt, was then misinterpreting this issue as a reflection on them."

201. It was put to him that he cannot have thought the request in Mr Curley's letter of 8 December was a separate matter to the representations CW were entitled to make in response to the letter of 1 December 2016. He said:

> "What is set out with Mr Curley's letter regarding to the information I have sent to [CW] about the potential issues for refusal, the issues I was considering for the refusal, I did not see the DDE issue being part of that refusal. Whilst it has clearly had an effect on them, because it is dealing with information they presented, I understand that, but I do not see that as being the same point being dragged in together and dealt with - I felt the proper way of dealing with it would be to treat that separate so that that did not need to be.."

202. He was asked if he understood that this was not a separate issue as regards CW's representations and that they were asking for full particulars in order to address the issue in their representations. He said "I understood that they had queries over the due diligence aspect of it; yes."

203. It was noted that he had not addressed the query until 30 December being the same day as that on which he issued the decision letter and put to him that meant that he was not interested in the answer to the due diligence query. He said:

> "I think it was still an issue that needed to be brought up and that is why I put it in there, because there was still a question about their checks that they were doing on their due diligence. So, it still needed addressing."

204. It was put to him again that he was not interested in the answer to his due diligence query. He said "I would be, yes…. I am, and it would have been considered if they presented any further information. Granted, I have not responded to them within that time about any further checks, but…." He was asked how CW could give any further explanation if he had not explained his query and what he was expecting to happen. He said: "It is a point that I thought they could consider after discussing it with them, saying that there were issues with the due diligence, obviously in writing ten days beforehand, but it is a point I cannot really answer to, really".

Fit and proper test

205. Mr Germaney was asked what test he was applying when he decided whether or not CW was fit and proper. He said:

> "We would be looking at the credibility of the company as a whole…..Then, we would have a look at any risks to the revenue that may be highlighted through beforehand or during our checks, or if there are any concerns we have that may present a risk to the revenue during our checks at the company."

206. He explained that the risk he was looking at was "more focused on the excise products that they deal in….it was merely the control of goods, excise goods, through their business." In response to the question of what level of risk he was looking at and whether he meant a significant or material risk, he said:

> "Any risk which may - the level of risk depends on the situations and that would be, you would look at that further, depending on what was found, but any risk, small risk might lead to a big risk, certainly within excise, because of the amount of duty involved in excise products is quite significant, certainly in spirits, which is one of the things they deal with."

207. He was asked whether he was saying that even a small risk would make someone not a fit and proper person to be registered. He said HMRC "would have to consider small risks, and any risks. Whether that would be sufficient to refuse or otherwise, you would have to look at it in the whole". He was asked if the overall conclusion was that CW posed a small risk that would have led him to refuse approval. He said:

> "If there was a tax loss involved that would be looked at more seriously, but if there were issues with, for instance, record-keeping, which appeared to be small and be able to be dealt with, then that may not in itself, or may itself be small, but it may uncover larger risks behind it, so it depends if there was any evidence of larger risks behind it, whether the smaller risk would have then led to a larger risk….That is part of the thing you would look at. If you found a tax loss, you would have a look at the liabilities, who would have been liable or potentially liable for bringing that tax loss and for that tax loss being a loss."

208. He was asked if he discounted in any way for the length of time that had passed or whether a tax loss six, 10, 15 years ago, was just as relevant as a tax loss in the last three months. He said:

> "Any tax loss is relevant at any point, but I was only looking up to six years ago, because that is the amount of time that a trader is required to keep their records. It would be unfair to look any further than that, I thought."

209. He was asked if he was saying that any tax loss within the last six years was considered to be a serious risk. He said that "from my point of view it is certainly a risk that needed to be looked at and the reasons why." He was asked if he was saying the seriousness of the risk depends upon the reason why the tax loss arose. He replied that "it depends on the liability, but yes, that is all taken into account". He was asked if he meant the seriousness of the loss depends on the size of the loss and or on the reasons for the loss. He said "yes, it relies on all those things."

210. He was asked if there is a tax loss, for which the taxpayer is not responsible, that would that be a serious risk in his view. He said he "would have to look at that tax loss and the connections that the taxpayer would have to make to that tax loss as well, and then make a judgment on that". As regards whether he would need to know the reasons behind the loss he said "we would have a look at certainly information that was presented" and that he would look at the extent of the involvement of the particular taxpayer in causing that tax loss. It was put to him that the reasons would be key to deciding how serious that tax loss was. He replied "not necessarily, no, but it is something you could consider." He was asked how he would decide how serious a tax loss is without looking at the cause or the causative role of the relevant people in that tax loss. He said:

> "Any tax losses, obviously, are a problem, and the size of it is, what caused it, like I said earlier, would be one of the things we would look at. A tax loss is a tax loss, no matter how big or small, and that is how we look at it. If that has been identified, then that is something that cannot be overlooked for the decision."

211. He was asked to explain the relationship between the reasons for the tax loss, as regards CW, and the tax loss and its seriousness. He said:

> "I am sorry, a tax loss is a tax loss. There is no gauging how serious it is. In reality, I have a look at the reasons behind it, but it is still a tax loss, and if anybody has a connection to that, then that is a concern."

212. He was asked if the risk to the revenue and the credibility of the business were the only two things he considered in deciding whether CW were fit and proper. He said:

> "No, I think the letter set out certain different areas. Within that, it sets out the areas we would be looking at specifically with regards to [AWRS]: if there was evidence of illicit trading, and so on; is there negligent failures for record-keeping; is there an attempt to avoid being approved or trading unapproved; any outstanding debts, et cetera and other satisfactory due diligence procedures. These are some of the aspects we would be looking at within a business, whilst taking an overall view on the credibility and also any other risks that were found whilst looking at the trader itself."

213. He agreed that he was saying that these factors were relevant to the overall assessment of the credibility of the business and the risk to the revenue it posed. In response to the question of how he weighed the factors he said "they are not weighed in any particular order. They are not set out in order of weight or seriousness at all". He was asked whether a problem on any of these fronts was enough to deny a registration. He said:

> "Again, we would have to have a look at the trader as a whole. If there was only a few issues, like I said earlier on, with minor clerical errors that might have been found, then that by itself could be dealt with quite easily going forward. Due diligence, again, could be dealt with going forward, but there is concerns with tax loss and inappropriate use of approvals and so on. As a whole, that then made my decision that all

> the smaller things amounted up to the larger issues with the company as well."

214. A regards whether any tax loss was enough to present a significant risk, he said "again it would have to be present with anything else that was found out".

215. He said that "of course" he considered the objective risk to the revenue posed by the business – "that is part of why I was going there". In response to the question of what conclusion he came to in terms of the objective capacity of this type of business to pose a risk to the revenue, he said:

> "I believe improper controls within the company meant there was a risk for any of the excised goods being moved through that company….The issues that I found, along with the tax losses, demonstrate to me that there was not sufficient control of the goods that they have been dealing with to control the excised goods and therefore have proper control of the duty, any duty issues and risks to the duty."

216. He was asked if he considered it relevant who had control of the goods at the particular time. He replied:

> "If you are referring to the seizures, which I assume you are, with that regard, we would have to look at who instigated the whole movement of goods and in my mind those movements of goods and the details of [CW] that were attached to those goods, I believe, would not have been there if they had not have made their initial purchase and moved to purchase those goods. So, that is what I would take into consideration from the seizures aspect."

Disclosure of central processing team notes/intelligence briefing

217. Mr Germaney was asked where were the notes of the central processing team, which he referred to several times in his witness statement. He said that they had not been disclosed because they are sensitive but confirmed he had relied on them in making his decision.

218. Mr Firth said: "We were under the impression that the only things that had not been disclosed were things you did not rely upon, but now you are telling us something you did rely upon also has not been disclosed; is that correct?" At that point Mr Puzey interjected to say:

> "I am sorry, ma'am, the information I have provided was that a document that had been relied upon was not going to be disclosed because it was sensitive. That is what the officer is talking about."

219. The tribunal queried whether that was what was said previously and concluded the hearing for that day. The issues surrounding the intelligence briefing are dealt with below.

Disclosure of blue folder documents

220. When cross examination resumed the following day, Mr Germaney was asked when the blue folder documents were obtained and requested. He said they were sent through to him he thought on 30 May 217 and they had been asked for probably a few months ago – he could not remember the exact date. They all came from the same

source, being BF, the RFDT team. He said he had passed on everything he had received to counsel. He had not had a close look at what was received before it was handed over to counsel.

221. He was asked what he had asked for that produced these documents. He said he was asked to provide certain documents from the "list of documents that were given to us" and that he was "instructed to pick certain parts out that would be beneficial for this case for disclosure purposes and for obviously both sides". He could not recall when he got the list but "it would have been around the same time as the documents were sent through to us. It is all part of the same package." Mr Firth queried whether he was saying there was a two stage process or not and whether he selected things off a list. He said:

> "We got sent through probably a list of the files that contained information from the RFDT action on the goods and along with that was some documentation. And I think some extra documentation was requested on top of that to help fill out both sides of the argument, as it were, but that was under instruction from our counsel and my team that suggested we better produce as much as possible."

222. It was put to him that he had not produced everything on the list and it was pointed out that the numbering in the blue folder indicated that documents were missing (as, for example, there were documents numbered 112, 111 and 110 and then the next document was numbered 127, 126 and 125). He said he had not checked the numbering and did not know what they represented or came from. "All I can say is that we presented the documentation and this is how it was sent to me". He could not say whether there were gaps other than "I presented the information that we requested from them".

223. It was put to him that he could not say where these documents have specifically come from, why there are numbers on the top of the page and whether or not this is a full and fair record of the documents that were held in whatever the place these documents came from. He said "like I say, I do not know the numbering system, so I do not know, but as far as I am aware, we are have obtained all the information that was disclosable at the moment."

224. Mr Germaney was taken to email correspondence of 29 March 2017 from Mr Germaney to HMRC Solicitor's Office stating: "Seizure information requested from RFDT. They are retrieving the files from deep storage. Documentation will be sent once received." This followed on from previous exchanges recording "would it not be good to have the seizure notes" and that advice was received that "would carry more weight if we had either the seizing paperwork or even the notebook accounts. He confirmed that he knew at that time that the seizure documentation was relevant for the tribunal. He did not rely on it for the decision, but he knew it would be important for the tribunal. It was put to him that it is nowhere mentioned in HMRC's list of document that this documentation exists or had been requested, or was going to be relied upon. He replied that he had no control over that and said:

> "sorry, I cannot comment why it was not put in. I do apologise…..I did not have any control over what was submitted to the list of documents. I submitted to counsel the evidence I relied on with regard to my decision and the solicitors came back and said we may need

> 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