**Appeal Number: FTC/15/2009**

**UPPER TRIBUNAL**
**(TAX AND CHANCERY CHAMBER)**

**DECISION NOTICE**

**EXCISE DUTY – RESTORATION OF EXCISE GOODS AND VEHICLE –** ***Jurisdiction of Tribunal – Deemed forfeiture - Did the Tribunal err in law in accepting jurisdiction on lawfulness of seizure and or underlying facts of own use – No – Appeal dismissed***

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE and CUSTOMS** **Appellant**

**- and -**

**LAWRENCE AND JOAN JONES** **Respondents**

**Tribunal: MICHAEL TILDESLEY OBE**

**Sitting in public at Manchester on 5 January 2010**

**James Puzey counsel instructed by the Solicitor's office of HM Revenue & Customs, for HMRC**

**Lawrence Jones for the Respondents**

## DECISION

### The Appeal

1. HMRC appeals against a decision of the First Tier Tax Tribunal (Judge Richard Barlow and Warren Snowdon) released 18 June 2009 [2009] UK FTT 133 (TC) allowing the Appeal of Mr and Mrs Jones against HMRC decision on review not to restore excise goods and a vehicle. The Tribunal found that the excise goods in question were imported for the own use of Mr and Mrs Jones, in the sense that the goods were partly for their own consumption and partly as gifts to family without reimbursement. The Tribunal directed HMRC to carry out a new review of its decision not to restore the goods and vehicle. The new review was to take into account the Tribunal's finding that the excise goods were not for a commercial purpose and accordingly not liable to seizure.

2. The Appeal concerns the Tribunal's jurisdiction to consider legality of seizure and own use arguments in determining whether the decision by HMRC to refuse restoration is reasonable. The Court of Appeal in *Gora v Customs and Excise Commissioners* [2004] QB 93 CA and *Gascoyne v Customs and Excise Commissioners* [2004] EWCA Civ 1162 held that it was not open to the Tribunal to consider lawfulness of seizure of the excise goods in restoration proceedings where the magistrates' court has condemned the goods as forfeit. The Court of Appeal in *Gascoyne*, however, decided that the Tribunal could reopen the lawfulness of seizure and or the underlying facts where there was a deemed condemnation provided it did not amount to an abuse of process. A series of High Court decisions subsequent to *Gascoyne*: *Her Majesty's Revenue & Customs v Smith* [2005] Ch/App/0117, *Customs and Excise Commissioners v Weller* [2006] EWHC 237, *Her Majesty's Revenue & Customs v Mills* [2007] EWHC 2241 (Ch), and *Her Majesty's Revenue & Customs v Dawkin* [2008] EWHC 1972 (Ch), have considered the issues of abuse of process and the Tribunal's jurisdiction to reopen the lawfulness of seizure.

3. In this Appeal HMRC alleges that the Tribunal erred in law in admitting and giving weight to evidence of own use. In HMRC's view this was an extreme case. It represented a stark example of a party choosing not to go ahead with condemnation proceedings and the Tribunal being over eager in looking for reasons to re-open the lawfulness of seizure.

4. Mr Jones appeared in person. He did not understand the legal arguments put forward by HMRC. Mr Jones believed that he and his wife had suffered an injustice at the hands of HMRC by the forfeiture of their goods and vehicle, which the First Tier Tribunal had recognised by ordering a new review. Mr Jones felt that they had been treated as criminals since April 2008. In his view the Tribunal decision confirmed that they had been telling the truth throughout, the excise goods had been purchased for their own use and as gifts for their family.

### The Grounds of Appeal

5. HMRC put forward two grounds of Appeal. The first ground adopted the question posed in *Dawkin* when assessing the validity of the Tribunal's reasons for re-opening the issue of legality of seizure, namely:

> "Has the Tribunal, having been properly advised as to the law arrived at a reasonable decision which takes account of all relevant matters and leaves out of account all irrelevant matters".

HMRC argued that the reasons given by the Tribunal for its decision to assume jurisdiction over forfeiture were without any evidential foundation and/or were irrelevant.

6. The second ground was that the Tribunal's approach to the legal test which enabled Mr and Mrs Jones to raise own use arguments was highly selective and failed to give any weight to the dicta of the Higher Courts, which had ruled that such a course of action was to be the exception rather than the rule. Mr and Mrs Jones were not entitled to choose the forum in which to raise own use arguments. The onus was on Mr and Mrs Jones to demonstrate that it was not an abuse of process for the Tribunal to admit arguments of own use. It was not up to the Tribunal to search for reasons to overcome the hurdle of abuse of process.

## The Facts

7. Mr and Mrs Jones are 63 years of age and now retired after having worked hard throughout their working lives with no spells of unemployment. They own their home without a mortgage. Mr and Mrs Jones are in receipt of a weekly income of about £400 and hold considerable savings. In recent years they have travelled frequently to Belgium, France and Holland. They owned a Ford Galaxy motor vehicle until it was seized by HMRC. They purchased the vehicle in 2004 for about £18,000 which had an estimated value of £7,000 at the time of the seizure.

8. On 15 April 2008 Customs Officer stopped Mr and Mrs Jones at Hull Ferry Port after arriving from Zeebrugge in their Ford Galaxy motor vehicle. Mr and Mrs Jones had with them six kilograms of Golden Virginia hand rolling tobacco, 228 litres of wine and 187.5 litres of beer. After interviewing Mr and Mrs Jones the Customs Officers were satisfied that the excise goods were held for a commercial purpose and seized the goods and the vehicle. The potential duty on the excise goods was £1,300.

9. At the time of the seizure the Customs Officers issued Mr and Mrs Jones with a *Seizure Information Notice* and *Customs Notice 12A* [1]which advised Mr and Mrs Jones of their rights to challenge the seizure in a magistrates' court by sending a Notice of Claim within one month of the seizure, and to request restoration of the goods and vehicle.

10. On 22 April 2008 a firm of solicitors on behalf of Mr and Mrs Jones wrote to HMRC requiring it to commence condemnation proceedings. The letter stated that

[1] Notice 12 A gives important advice and information on what persons can do following the seizure of goods and vehicles by HMRC. Mr Justice Lewison held in *Smith* that Notice 12A gave fair warning to persons of the consequences of not invoking condemnation proceedings.

> "We are acting on behalf of Mr. Lawrence Jones and Mrs. Joan Jones and write to confirm that our client wishes to appeal to court against the legality of the seizure of the following items …
>
> Please accept this letter as notice that our clients wish to appeal against HMRC's legal right to seize the items listed above".

There was no reference in that letter to any request for restoration.

11. On 28 April 2008, HMRC sent the solicitor a standard form letter saying that Mr and Mrs Jones had chosen "*the Appeal options*", namely, an appeal against legality of seizure, and/or a request for restoration. The letter stated that if this was not correct they must inform HMRC immediately. Under the Appeal against the legality option (condemnation proceedings), Mr and Mrs Jones were informed that they would receive a summons to attend court. Whereas under the restoration option, the letter advised that a decision would be sent in due course. Finally the letter explained that if Mr and Mrs Jones withdrew from condemnation proceedings the goods would be legally seized and they would not be able to contend otherwise.

12. Mr and Mrs Jones instructed another firm of solicitors which on 14 May 2009 advised HMRC that Mr and Mrs Jones wished to proceed with a request for restoration of the motor vehicle but not with the condemnation proceedings before the magistrates' court. The solicitors stated with respect to the condemnation proceedings:

> "Although our clients have accepted our advice that given the background to this matter there is no legal merit in an application challenging the legality of seizure they maintain that the goods which they attempted to import were not for commercial disposal".

13. On 22 May 2008 HMRC refused Mr and Mrs Jones' request for restoration of the goods and motor vehicle. HMRC's letter referred erroneously to the date of request as 22 April 2008, rather than the correct date of 14 May 2008.

14. On 2 June 2009 Mr and Mrs Jones solicitors requested a review of HMRC's refusal of restoration. The solicitors stated that

> "As indicated in our previous correspondence our clients do not challenge the legality of the seizure of the goods in question but their position is that the goods which they attempted to import were not for commercial purpose.
>
> We would reiterate the comments made in our letter of 14 May 2008 we respectfully submit that given the value of the vehicle the penalty imposed upon them being permanently deprived of it would be disproportionate in relation to the duty potentially payable on the goods seized".

15. The review was conducted on 17 July 2008. The Review Officer set out the background which incorporated a detailed account of the interviews with Mr and Mrs Jones. The Review Officer considered the restoration of the excise goods separately from that for the motor vehicle. The Review Officer pointed out that the only reason

advanced for the restoration of goods was that they were for Mr and Mrs Jones own use, and not for commercial purposes. The Review Officer concluded that the excise goods were held for profit and should not be restored. In respect of the motor vehicle the Review Officer found that the excise goods were held for profit which was aggravated by Mr and Mrs Jones inconsistent and unrealistic statements. In those circumstances the Review Officer decided that non restoration of the motor vehicle was fair, reasonable and proportionate.

16. On 13 August 2009 Mr and Mrs Jones appealed the Review Officer's decision to the Tribunal. Mr and Mrs Jones' grounds for Appeal were the severity of the seizure. They pointed out that the quantities of excise goods imported were within the guidelines except for the wine. They reiterated that the hand rolling tobacco was purchased mainly as gifts for their family, whilst the wine and beer were for their own use principally to celebrate their daughter's fortieth birthday.

17. The Appeal was heard on 27 March 2009. At the hearing HMRC raised as a preliminary point whether Mr and Mrs Jones could advance arguments of own use. HMRC maintained that by not dealing with the "*own use*" argument as a preliminary point the Tribunal could be unduly influenced by the evidence on the substantive matter when deciding whether it was an abuse of process to allow evidence of own use. The Tribunal decided that the preliminary point and the substantive issue would be determined after hearing all the evidence and in a reserved decision. The reason given by the Tribunal for its decision at the time was that it was more convenient to do so.

18. The Tribunal released its decision on 18 June 2009. Permission to Appeal was granted to HMRC on 1 September 2009.

## Tribunal Decision

19. The Tribunal decision was effectively set out in three sections. The first 12 paragraphs dealt with the legal authorities on the abuse of process with a focus on whether the Tribunal should adopt a two stage process. The Tribunal considered that its decision to hear the abuse issue as part of a single hearing was convenient and consistent with the authorities. At paragraph 4 the Tribunal said:

> "It would be inconvenient if the Tribunal had to adopt that two stage approach to the questions potentially before it and to try to separate out the evidence that is relevant to the question of abuse of process, particularly where, as is often the case, the appellant is unrepresented and can hardly be expected to understand the fine distinctions involved. Such a procedure might well require the Tribunal to withdraw and decide on the abuse issue and then give its decision on that and then resume later, possibly on a different day and hear the rest of the evidence; if it rules that it would not be an abuse of process for the appellant to raise the legality of the seizure".

20. At paragraph 10 the Tribunal analysed the decision of Evans-Lombe J in *Weller* and concluded that

> "That last remark makes it clear that the Tribunal can find the full facts, including those relating to the substantive merits of the appeal, even at the stage in its reasoning where it is considering whether the appeal can be allowed to proceed. In our view that is a most cogent reason for hearing both the abuse and the substantive issues in the same proceedings".

21. At paragraphs 15 to 24 the Tribunal examined the issue of abuse of process in relation to Mr and Mrs Jones' Appeal. At paragraph 15 the Tribunal noted that it was common ground between the parties that the goods in question were jointly owned by Mr and Mrs Jones. The Tribunal referred to the contents of Notice 12A. The Tribunal acknowledged that the Notice set out reasonably accurately the rights of the owner in respect of challenging the seizure of the goods and requesting restoration. The Tribunal, however, added that *experience has shown that lay people did not understand the distinction* and *that the current state of the law with its division of jurisdiction between the Courts and the Tribunal has been repeatedly criticised both in the Tribunal and in the Higher Courts.* The Tribunal noted that the letters from HMRC to Mr and Mrs Jones did not refer to any Human Rights Convention Rights or Community Law Rights.

22. In paragraph 19 the Tribunal highlighted a perceived inconsistency in Mr and Mrs Jones' solicitors' letter of 14 May 2008, namely, no legal merit in an application challenging the legality of seizure despite Mr and Mrs Jones' assertion that the importation of excise goods was not for a commercial purpose. The Tribunal stated that "*Those two passages are, of course, inconsistent with each other to anyone properly familiar with the law in this respect".*

23. The Tribunal concluded that the phrase *no legal merit* in the solicitors' letter of 14 May 2008 should be viewed in the context of the advice given by the solicitors. At paragraph 20 the Tribunal held:

> "In evidence Mr Jones said the first solicitor he consulted had said he should appeal the legality of the seizure and "something else". The second solicitor had said that he should not appeal the legality of the seizure because in his experience Mr and Mrs Jones would not have won. He had said Customs and Excise were a law unto themselves and once they had seized the goods the only way to get them back would be to appeal for leniency and rely on the severity of the seizure. We consider that the phrase "no legal merit" in the letter of 14 May 2008 should be read in light of that advice rather than as a reference to any factual issue conceded by the appellants".

24. At paragraphs 21 and 22 the Tribunal found that Mrs Jones would not contemplate going to the magistrates' court to give evidence because of her condition. She was ill at the time and unable to leave the house or sleep properly for a time after the seizure of the goods. The Tribunal placed weight on Mrs Jones comment that she would not have *put herself through this* if she had intended to sell the goods. The Tribunal inferred that it would have been more of an ordeal for Mrs Jones to have gone to a magistrates' court.

25. The Tribunal stated that it was satisfied that Mr and Mrs Jones told the truth about why they did not pursue the Appeal before a magistrates' court.

26. On the abuse of process issue the Tribunal decided at paragraph 24 that

> "There may well be cases where it would be an abuse of process for an appellant to be allowed to pursue an appeal to the Tribunal because they have taken legal advice and withdrawn their notice of claim in light of it but we do not regard that as being necessarily a conclusive factor. We hold that this appeal can proceed without there being an abuse of process because Mr and Mrs Jones were incorrectly advised by their solicitor and it is understandable that lay people cannot understand the fine distinctions about the legal processes involved in a case like this one. In particular we also take into account Mrs Jones's condition. Given the nature of the decision we have reached on the substantive issue this is also a case where Evans-Lombe J's judgment in *Weller*, quoted in paragraph 10 above, is highly relevant".

27. The remainder of the Tribunal's decision dealt with its findings on the substantive issue which were not challenged by HMRC in this Appeal. Essentially the Tribunal found that the amount spent by Mr and Mrs Jones on the excise goods was substantial but not beyond their means. The Tribunal considered that there were no significant discrepancies in Mr and Mrs Jones' respective statements about their trips to the continent, Mrs Jones' smoking preferences and their reasons for purchasing the alcohol. In short the Tribunal found Mr Jones a truthful witness and that the goods were partly for their own use and partly as gifts to family without reimbursement. The Tribunal, however, made an additional observation on Mrs Jones which had some bearing on the abuse of process dispute:

> "Mrs Jones put herself through an ordeal to come to the Tribunal. Her actual words were "It took a lot for me to come here today. If I had known it was going to be an ordeal like this I would not have come". She also said "We have come here today because it is so unjust that we have lost our car". Bearing in mind that Mrs Jones had found the Tribunal hearing an ordeal, even without her having had to give evidence, we regard it as significant that she felt the injustice of the situation demanded her presence. That sense of injustice was not a pretence in our view".

28. The Tribunal recorded its decision at paragraph 34:

> "We hold that the appeal is allowed and the respondents are directed to carry out a new review of their decision not to restore the seized excise goods and the vehicle. In carrying out that review we direct the Commissioners to take into account our findings of fact including the fact that the goods were not for a commercial purpose and accordingly were not liable to seizure and to consider whether it would be unreasonable for them to refuse to restore the goods in those circumstances".

## The Law relating to Seizure of Excise Goods and the Tribunal' Jurisdiction

29. Excise duty is payable on certain types of goods including, tobacco, wine and beer which are imported by persons returning from other countries within the European Union for a commercial purpose. By statutory provision, particularly the Excise Goods Beer and Tobacco Products (Amendment) Regulations 2002, various considerations have to be taken into account in deciding whether the excise goods are for a commercial purpose, which include, amongst others, the person's reasons for

possessing the goods, the person's conduct and the mode of transport used to convey the goods. The Regulations provide guidelines for quantities of goods imported, above which are indicative of a commercial purpose. The guideline limits relevant to Mr and Mrs Jones Appeal are six kilograms of tobacco, 180 litres of wine and 220 litres of beer[2]. Excise goods imported for own use which includes use as personal gifts are exempt from duty.

30. If excise duty has not been paid or secured prior to the time that the goods are held for a commercial purpose, they are liable to forfeiture under section 49(1) of the Customs and Excise Management Act 1979 (hereinafter 1979 Act). Section 141 permits the forfeiture of other items with which the goods have been mixed, and of vehicles in which the goods are conveyed. Sections 49(1) and 141 of the 1979 Act were the authorities under which Mr and Mrs Jones' excise goods and motor vehicle were seized and forfeited.

31. Schedule 3 to the 1979 Act provides a mechanism for challenging the forfeiture and seizure of the goods and vehicle. Essentially an importer within one month of the seizure must give HMRC notice of his claim that anything seized as liable to forfeiture is not so liable. If a claim is made HMRC is required to initiate legal proceedings usually before the magistrates' courts for condemnation of the goods and vehicle as truly forfeit.

32. If no notice of claim is made within the requisite time period, paragraph 5 of schedule 3 provides that the goods and vehicle shall be deemed to have been duly condemned as forfeited (deemed forfeiture).

33. Section 152(b) of the 1979 Act gives HMRC discretion to restore anything forfeited or seized. The Finance Act 1994 (hereinafter the 1994 Act) provides a separate statutory mechanism for challenging a refusal by HMRC to restore goods and or vehicles, which includes a restoration on conditions. The first stage of the statutory mechanism is an internal review by an independent HMRC Officer (the Review Officer) of the decision not to restore. Under section 16 of the 1994 Act there is a right of Appeal to the First Tier Tax Tribunal against the decision of the Review Officer.

34. A decision not to restore anything is an "*ancillary matter*". As such the powers of the Tribunal on Appeal are limited by section 16(4) to deciding whether the Review Officer's decision is one that could not have been arrived at reasonably. If the Tribunal decides that the decision is unreasonable the Tribunal may direct that the Review Officer's decision ceases to have effect and or require HMRC to conduct a further review of the decision not to restore.

[2] The guideline limits have been doubled to reflect the fact that the guideline applies to an individual importer. The actual quantities of excise goods imported by Mr and Mrs Jones were six kilograms of hand rolling tobacco, 228 litres of wine and 187.5 litres of beer.

**The Authorities on the Tribunal's Jurisdiction in Restoration Proceedings**

35. The extent of the Tribunal's jurisdiction under section 16 of the 1994 Act, and in particular the overlap with condemnation proceedings under schedule 3 of the 1979 Act has been considered by the Court of Appeal and the High Court on several occasions.

36. The starting point is the decision of the Court of Appeal in *Gora* [2004] QB 93 CA. Lord Justice Pill at paragraphs 38 and 39 decided that the Tribunal had a comprehensive fact finding jurisdiction, which enabled the Tribunal to decide in the light of its findings of fact whether the decision on restoration was reasonable. The fact finding jurisdiction, however, did not extend to deciding whether the goods were duly condemned as forfeited. Lord Justice Pill said at paragraphs 56 to 58:

> "The Tribunal accepted that where liability to forfeiture has been determined by a court in condemnation proceedings, "there is no further room for -fact finding by the Tribunal" and it has no jurisdiction. However, the Tribunal went on to hold that Mr Gora did not give a notice under paragraph 3 "and as a result the law took its course and the goods were treated as property seized and so liable to forfeiture. No finding of fact resulted. A deemed fact is not a real fact. It cannot consequently rank as a consideration relevant to the subsequent decision on restoration until determined by the Tribunal or conceded to exist". It was held to be open to the Tribunal to determine the question of fact whether the goods were seized.
>
> I do not agree with that conclusion. Jurisdiction to decide whether any thing forfeited is to be restored under section 152(b) is with the Tribunal. The jurisdiction in condemnation proceedings is, by virtue of Schedule 3, with the courts. If the deeming provision in paragraph 5 of the Schedule operates, the thing in question shall be deemed to have been duly condemned as forfeited. The effect of this deeming provision is to provide that the thing is to be treated as forfeited. The purpose of the provision is to treat the deemed fact as a fact and I cannot accept that it can be treated as "not a real fact".
>
> While the division of jurisdiction between the courts and the Tribunal may arguably be curious, and is probably retained because of the long standing jurisdiction of the courts in proceedings for condemnation, the division is clear and it is not intended that the Tribunal should have jurisdiction to reconsider the condemnation of goods as forfeited. Mr Cordara's submission that the Tribunal should have jurisdiction to consider whether duty has been paid is no more than another way of claiming that the court's findings should be re-opened. The Tribunal's view would produce the surprising result that the person whose goods had been seized could make a choice of fact-finding tribunal. If he wanted the court to determine the issue he would serve a notice under paragraphs 3 and 4; if he wanted the Tribunal he would do nothing. In my judgment, the statutory scheme does not produce that result. The application to the Tribunal is for restoration under section 152. There is no breach of Article 6 because the owner has recourse to the courts in the condemnation proceedings".

37. Lord Justice Buxton in *Gascoyne* [2004] EWCA Civ 1162 examined the ruling of Lord Justice Pill in *Gora* on the jurisdiction of the Tribunal to consider whether the goods were duly condemned as forfeited. Although holding Lord Justice Pill's ruling

as obiter, Lord Justice Buxton had no difficulty in finding that Lord Justice Pill's observations on the extent of the Tribunal's jurisdiction was correct so far as domestic law was concerned. In Lord Justice Buxton's view an importer was not entitled to have a second bite at the cherry of lawfulness of seizure before the Tribunal, having failed in the condemnation proceedings, or let them go by default.

38. Lord Justice Buxton, however, adjusted his analysis in one important respect after applying the provisions of the European Convention on Human Rights. He decided that the forfeiture process under the 1979 Act interfered with the importer's rights to property protected by article 1 of the First Protocol to the Convention. That being so, issues of proportionality, and indeed of due process in the arrangements made by domestic jurisdiction for dealing with issues of forfeiture, potentially arose.

39. Lord Justice Buxton went on to state that he saw no Convention objection to holding that an actual finding in condemnation proceedings bound a Tribunal on the lawfulness of seizure, and the underlying facts. In such circumstances the importer has had his day in court in front of a judicial body. The Convention jurisprudence permitted a proportionate restriction on access to a court, provided the essential rights that were in contest from a Convention point of view were not thereby rendered nugatory.

40. Lord Justice Buxton, however, considered that an importer was not prevented from raising lawfulness of seizure and the underlying facts before the Tribunal where there was a deemed forfeiture under paragraph 5 of Schedule 3 of the 1979 Act. He held at paragraphs 54:

> "As it seems to me, for an importer to be completely shut out in the only tribunal before which he has in fact appeared from ventilating the matters that are deemed to have been decided against him because of paragraph 5 of Schedule 3 does not adequately enable him to assert his Convention rights".

41. In reaching his decision that the deeming provisions should not shut out the importer from ventilating issues regarding lawfulness of seizure, Lord Justice Buxton placed emphasis on Convention principles of proportionality, citing with approval the dicta of Lord Phillips MR in *Lindsay v Customs and Excise Commissioners*:

> "The action taken must, however, strike a fair balance between the rights of the individual and the public interest. There must be a reasonable relationship of proportionality between the means employed and the aim pursued (para. 52)"
>
> "….. that each case should be considered on its particular facts (par.64)".

42. In paragraph 55 of *Gascoyne* Lord Justice Buxton held that a Tribunal could reopen the issues surrounding lawfulness of seizure in a restoration Appeal when there was a deemed confiscation order:

> "In my view, therefore, in a case where the deeming provisions under paragraph 5 are applied, the tribunal can reopen those issues: though the tribunal will always have very well in mind considerations of, or similar to,

> abuse of process in considering whether such issues should in fact be ventilated before it".

43. Lord Justice Buxton, however, placed a constraint on the Tribunal's discretion to reopen by requiring it to have in mind considerations of, or similar to, abuse of process. At paragraph 56 Lord Justice Buxton on abuse of process stated that

> **"** The mere fact that the applicant has not applied to the commissioners, and therefore there have been no condemnation proceedings, would not, in my view, be enough. But, in my judgment, it goes too far to say that the deeming provisions have always, in every case, got to be paramount".

44. The first case to consider the implications of Lord Justice Buxton's ruling on the Tribunal's jurisdiction following a deemed forfeiture was the unreported High Court case in *Smith* [2005] Ch/App/0117, which was an Appeal by HMRC challenging the Tribunal's decision to admit evidence of own use.

45. In *Smith* Mr Justice Lewison explored the meaning of paragraph 56 of Lord Justice Buxton's judgment:

> " Just pausing there, what Lord Justice Buxton is saying is not enough is the mere fact that the Applicant has not applied to the Commissioners, requiring them to invoke condemnation proceedings. Not enough for what? Well clearly, in my view, not enough to enable the Tribunal to reopen the question, or indeed, open the question for the first time. There must, therefore, be something more than a failure on the part of the applicant to invoke the condemnation proceedings before the Tribunal is empowered to question the legality of the forfeiture.
>
> This is borne out by a subsequent passage in Lord Justice Buxton's judgment …… Commenting on that, in paragraph 76 of his judgment, Lord Justice Buxton says this, What, however, about paragraph 66? In the light of Gora's case, what the Judge says there is not correct or at least not unequivocally correct. That is because failure to give a paragraph 3 notice will in most cases preclude subsequent challenge to the lawfulness of seizure.
>
> It is, in my judgment, clear from that passage that in the run of mill case where there has been a failure to give a paragraph 3 notice invoking the condemnation proceedings the deeming provision will operate against the applicant in any subsequent appeal to a Tribunal. The Tribunal's function, therefore, is analogous to a sentencing court once a defendant has been convicted. No matter that the defendant still protests his innocence of the charge against him, the function of a sentencing court is to accept mitigation but not to question the original conviction" (paras 20 -22)..

46. Mr Justice Lewison then examined Lord Justice Buxton's reference to abuse of process. At paragraph 23 he said:

> "….. in my view, references to the well-known principle that it may be an abuse of process to raise in one tribunal matters that could and should have been raised in another. So the relevant questions will always be first, could the Applicant have raised the question of lawfulness of forfeiture in other proceedings, and if the answer to that question is yes, why did he not do so?

> then it will be, in most cases, an abuse of process for him to raise the question before the Tribunal".

47. Thus according to Mr Justice Lewison:

> The validity of the seizure does not become an issue if, and only if, the Tribunal is satisfied that the applicant had good reasons for not having raised the matter by way of condemnation proceedings. There must, in my judgment be a burden on the applicant to satisfy that there was a good reason why he did not challenge the forfeiture".

48. Mr Justice Lewison allowed HMRC's Appeal, holding that the reasons found by the Tribunal for considering the lawfulness of the seizure amounted to no more than a failure to issue a Notice of a Claim under schedule 3 of the 1979 Act.

49. The next case was *Weller* [2006] EWHC 237 which was an Appeal by HMRC against an the interlocutory order of the Tribunal that it had jurisdiction to consider whether the seized goods were for the Appellant's personal use even though there have been no condemnation proceedings and condemnation had not been challenged.

50. Mr Justice Evans-Lombe in *Weller* likewise considered Lord Justice Buxton's judgment in *Gascoyne* on the Tribunal's jurisdiction to re-open a deemed forfeiture:

> "Whether the Commissioners, and on appeal from them, the VAT and Duties Tribunal, should permit him to do so would depend on the application of the principle of proportionality to the particular facts of the case in question. Lord Justice Buxton did not seek to limit what sort of facts would be relevant to the decision beyond a recommendation that the Tribunal "will always have very well in mind considerations of, or similar to abuse of process...". It would not be enough "that the applicant has not applied to the commissioners" under paragraph 3 of schedule 3". Later in his judgment, commenting on a statement in the judgment being appealed that the importer "was still able to maintain a right to argue against the validity of the seizure" on the review under sections 14 and 15 to the commissioners and on appeal to the tribunal under section 16, he says, at paragraph 76, "in the light of Gora's case ...what the judge says there is not correct, or at least not unequivocally correct. That is because failure to give a paragraph 3 notice will, in most cases, preclude subsequent challenge to the lawfulness of the seizure." He does not say in all cases"(para.13).

51. Mr Justice Evans-Lombe agreed with Mr Justice Lewison's two question approach as articulated in *Smith*:

> "Whether or not an importer, having suffered a deemed forfeiture under paragraph 5 of schedule 3, is able to raise the validity of the forfeiture on a review by the Commissioners and on appeal from them to the Tribunal, depends on two questions, first, did the importer have a realistic opportunity to invoke the condemnation procedure and, secondly, if he did, are there nonetheless reasons, disclosed by the facts of the case which should persuade the Commissioners or the tribunal to permit him to reopen the question of the validity of the original seizure on a application for return of the goods" (para. 16).

52. Mr Justice Evans-Lombe did not have before him the detailed reasons why the Tribunal decided that it had jurisdiction to consider whether the seized goods were for personal use. Instead Mr Justice Evans-Lombe took account of a witness statement of a HMRC representative setting out the reasons put forward by Mr Weller at the Tribunal. In addition he decided that the Tribunal would have had regard to the relatively modest amount spent by Mr Weller compared with the indicative costs for the condemnation, and that the amount of excise goods imported by Mr Weller was substantially below HMRC guideline amounts for assessing commercial purpose.

53. Mr Justice Evans-Lombe considered that an Appellate court should only disturb the Tribunal's decision on jurisdiction if satisfied that it was unlawful, or, if lawful, that there was either no material before the Tribunal upon which, if properly advised, it could have made the challenged direction or, if the court was satisfied in all the circumstances no reasonable Tribunal, properly advised, could have made the order. Mr Justice Evans-Lombe upheld the decision of the Tribunal, adding that

> "……. the conclusions of the Tribunal which made the order under appeal and the conclusions which I have arrived at, on what amounts to the same material as was before that Tribunal, will not bind the Tribunal which hears the appeal. That Tribunal will be able to go into all the facts of the case, probably with more evidence before it than was before the Tribunal which made the order under appeal. That Tribunal may conclude, as a step in arriving at its decision that in all the circumstances Mr Weller should not be allowed to challenge the validity of the forfeiture. Though it is unlikely to do so if it was going on to allow Mr Weller's appeal" (para.20).

54. Finally Mr Justice Evans-Lombe echoed the call of the Court of Appeal in *Gascoyne* that a statutory rationalisation of the procedure governing the forfeiture of goods by HMRC was urgently required. It seemed to Mr Justice Evans-Lombe that the present system was confusing to the public and pregnant with the possibility of substantial injustice.

55. In *Mills* [2007] EWHC 241 (Ch) Mr Justice Mann after approving the two stage approach of Mr Justice Lewison elaborated upon the abuse of process doctrine by saying it prevented not only a re-litigation of the validity of the forfeiture but also of the facts underlying the forfeiture. According to Mr Justice Mann in the normal case contemplated by Mr Justice Lewison in *Smith* the only basis for forfeiture is the absence of own use, which should be determined in the magistrates' court not in restoration proceedings where it would be an abuse of to take an own use point.

56. The Appeal considered by Mr Justice Mann, however, was not a normal case in that Mr Mill's goods were mixed with those belonging to a Mr Kerry. The Tribunal at first instance decided that the magistrates would have made a forfeiture order regardless of whether Mr Mills held the goods for his own use because of the mixing with Mr Kerry's goods. Although Mr Justice Mann questioned the inevitability of a forfeiture order, he accepted the logic of the Tribunal's reasoning holding that

> "in those circumstances one cannot say that a deeming of a proper forfeiture arising out of a failure to apply for forfeiture proceedings inevitably carries

> with it an assumption or inference of own use on the part of Mr Mills (para.35).
>
> Accordingly, while it would be an abuse to challenge the forfeiture, one cannot identify other underlying facts which must also be assumed against Mr Mills. The abuse point therefore does not run, or at least not in the same way (para. 36).
>
> I do not see why it should be an abuse of the process for him to take it. Absent some clear act of acquiescence on the part of Mr Mills, it would be unfair to conclude that he is debarred from running a point when a proper appreciation of the situation would have meant he would have been entitled to run it in the restoration proceedings anyway because HMRC could not have "insisted" that it be determined in the magistrates' court (para.38)".

57. .Mr Justice Mann also held that a notice requiring condemnation proceedings could be withdrawn before the proceedings were commenced, in which case the seized goods would be deemed duly condemned as forfeit. Mr Justice Mann's ruling applied to the circumstances of Mr and Mrs Jones' Appeal in that they withdrew their notice invoking condemnation proceedings.

58. The final case was that of *Dawkin* [2008] EWHC 1972 (Ch) in which Mr Justice David Richards identified the issue as

> "…..whether the Tribunal misdirected itself in its consideration of the question of abuse of process. The decision as to whether there is or is not an abuse of process requires the Tribunal to consider and give appropriate weight, one way or the other, to all relevant factors and to disregard irrelevant factors. Its decision must be one capable of being reached by a reasonable Tribunal having regard to the relevant factors. The decision is not in my view strictly an exercise of discretion. Either it is, or it is not, an abuse of process for the grounds for seizure to be investigated by the Tribunal, but that is a question of judgment to be made on a consideration of the relevant factors. The grounds on which the Tribunal's decision can be challenged on appeal are therefore effectively the same as for a challenge to an exercise of discretion. I accept the test put forward by Mr Puzey for HMRC in a subsequent written submission: has the Tribunal, having been properly advised as to the law, arrived at a reasonable decision which takes account of all relevant matters and leaves out of account all irrelevant matters?"(para.32)

59. Mr Justice David Richards considered that raising the issue of own use in restoration proceedings was an exceptional course of action (see para.33). He held that the decision in *Weller* a somewhat odd case, where on appeal it was impossible to be sure of the factors which had led the Tribunal to its decision. In his view it was important to note that in *Weller* the order was interlocutory, not final, and Mr Justice Evans-Lombe made clear at paragraph 23 that the Tribunal hearing the substantive appeal would not be bound either by the conclusions of the Tribunal under appeal before him or by his own conclusions. Mr Justice David Richards concluded that *Weller* could not provide much guidance in other cases.

60. In relation to the Appeal before him Mr Justice David Richards decided that

> "I therefore conclude that none of the factors on which the Tribunal relied could justify its decision. They were, in some cases, factors which should not have been taken into account and, in others, factors without foundation in the evidence. There were in my judgment no factors which could take Mr Dawkin's case out of the usual run of cases where it is an abuse of process to raise the facts of seizure in the Tribunal. For reasons given earlier in this judgment, the Tribunal should not have relied as they did on the decision and specific circumstances of Weller".

**Discussion**

61. I have set out in detail the authorities dealing with the Tribunal's jurisdiction in restoration proceedings, in particular the developments since the Court of Appeal decision in *Gascoyne* primarily for the purpose of considering the validity of HMRC's grounds of Appeal. I, however, hold reservations about whether some of the developments are wholly consistent with *Gascoyne*.

62. The decision in *Gascoyne* was a reasoned view of the Court of Appeal in a reserved judgment in a case where the Court had the benefit of argument by leading counsel on both sides together with counsel as advocate to the Court. The ratio of Lord Justice Buxton's judgment on the Tribunal's jurisdiction to entertain arguments on the legality of seizure and or the underlying facts was found at paragraphs 51 to 56 of the *Gascoyne* decision.

63. The critical features of Lord Justice Buxton's judgment were that the deeming provisions under paragraph 5 of schedule 3 of the 1979 Act did not comply with the Convention on Human Rights, and that the importer, therefore, should not be completely shut out in the only tribunal before which he has in fact appeared from ventilating matters of seizure and own use. In those circumstances Lord Justice Buxton held that the Tribunal in a case where the deeming provisions under paragraph 5 applied, could reopen those matters provided the Tribunal always had in mind considerations of, or similar to, abuse of process.

64. Lord Justice Buxton's judgment was based on the principles of proportionality. I derive from those principles the proposition that any restriction on the Appellant's right to argue lawfulness of the seizure in the Tribunal following a deemed forfeiture must be based on the individual circumstances of the case and strike a fair balance between the rights of the individual and the public interest (see paras. 50 & 53 of *Gascoyne* which specific reference to paras 52 & 64 of *Lindsay*).

65. As Mr Justice Evans-Lombe in *Weller* pointed out correctly, in my view, that Lord Justice Buxton did not seek to limit what sort of facts would be relevant to the Tribunal's decision to admit evidence on the legality of seizure beyond a recommendation that the Tribunal have in mind considerations of, or similar to abuse of process.

66. Mr Justice Lewison decided that the Tribunal should ask itself two questions when faced with the dilemma of admitting evidence on lawfulness of seizure following a

deemed forfeiture. The subsequent High Court authorities have endorsed the two questions posed by Mr Justice Lewison which are:

> "did the importer have a realistic opportunity to invoke the condemnation procedure, and if he did, are there nonetheless reasons, disclosed by the facts of the case which should persuade the Tribunal to reopen the question of the validity of the original seizure".

The answer to the first question would as a rule be yes, in which case the dilemma of admitting evidence would in most instances be resolved by the Tribunal's decision on the reasons put forward by the Appellant. The onus is on the Appellant to establish that his reasons are good in the sense that they amount to something more than a mere failure to invoke condemnation proceedings.

67. Mr Justice Lewison in *Smith* highlighted Lord Justice Buxton's comment at paragraph 76 of *Gascoyne,* namely, that *a failure to invoke condemnation proceedings would in most cases preclude a subsequent challenge to the lawfulness of seizure.* Mr Justice Lewison ventured that Lord Justice Buxton's use of the phrase *most cases* meant that it would be an abuse of process to admit evidence on legality of seizure in the run of the mill case where no notice invoking condemnation proceedings has been given. Mr Justice Lewison's construction of *most cases* was extended in *Dawkin* to the proposition that the Tribunal was adopting an *exceptional course* by admitting such evidence (see para. 33). I consider the description *exceptional course* goes beyond the ratio of Lord Justice Buxton in *Gascoyne* on the Tribunal's jurisdiction.

68. Lord Justice Buxton's reference to *most cases* appeared in paragraph 76 and did not form part of his ratio on the Tribunal's jurisdiction which was set out in paragraphs 51-56 of *Gascoyne.* The comments in paragraph 76 were directed at correcting an error of the Judge at first instance in holding that Mr Gascoyne was still able to maintain a right to argue against the validity of the seizure in restoration proceedings and the part played by that error in the Judge's construction of whether Mr Gascoyne's letter constituted a notice to institute condemnation proceedings. In those circumstances I consider that paragraph 76 should not take precedence over what Lord Justice Buxton said in paragraphs 51-56. Mr Justice Lewison's concept of run of mill case has a clear connection with paragraph 56 in that it adds colour to Lord Justice Buxton's statement that a mere failure to give a Notice of Claim would not be enough to entertain arguments on legality of seizure. Further it provides a useful benchmark for determining whether it would be abuse of process to admit such arguments.

69. The description, *exceptional course,* however, has no connection with paragraphs 51-56 of *Gascoyne* and does not sit comfortably with Lord Justice Buxton's dictum that the deeming provisions should not to be paramount in every case. Further the description dilutes the principles of proportionality and the requirement to consider each case on its own facts which forms the basis of the ruling in *Gascoyne.* In effect an *exceptional course* has the potential of placing an unjustified limit on the facts that can be considered by the Tribunal. It shifts the focus of the Tribunal's enquiry from whether the Appellant's reasons for not invoking condemnation proceedings amount

to something more than a mere failure to give a Notice of Claim to whether they are exceptional.

70. Equally I have reservations with the appropriateness of the analogy of a sentencing court used by Mr Justice Lewison in *Smith* for the situation of a deemed forfeiture where the Court of Appeal has decided that the deeming provisions are not compliant with the Convention on Human Rights. The reason why a sentencing court is restricted to mitigation is that the facts of the conviction have been considered and ruled upon by a court or the defendant has entered an unequivocal plea of guilty. This is not the case with the deeming provisions which applies automatically without the intervention of a judicial ruling. The analogy appears to be derived from an interpretation that the abuse of process principles referred to in Lord Justice Buxton's judgment are a species of res judicata. This interpretation suggests that the Tribunal should adopt an approach following a deemed forfeiture that an Appellant is prevented from raising arguments of own use unless he has exceptional reasons. In my view such an approach is not consistent with the Court of Appeal's ruling that the deeming provisions are not Convention compliant, which produces a different analysis, namely that the Appellant should not be shut out from ventilating arguments of own use unless it would be proportionate to do so, and does not render Convention rights nugatory. In this respect abuse of process should be interpreted in the context of the principles of proportionality rather than res judicata.

71. I prefer the approach adopted by Mr Justice Evans-Lombe in paragraph 13 of his judgment in *Weller* in which he stressed the part played by application of the principle of proportionality to the particular facts of the case in the decision by the Tribunal to permit arguments on own use. Further Mr Justice Evans-Lombe opined that Lord Justice Buxton did not seek to limit which facts would be relevant to the decision beyond the recommendation of having in mind abuse of process. On paragraph 76 of Lord Justice Buxton's judgment, Mr Justice Evans-Lombe remarked that the phrase *most cases* did not mean every case.

72. I believe that Mr Justice Evans-Lombe captured the essence of the decision in *Gascoyne* in that restrictions on the Appellant raising lawfulness of seizure following a deemed forfeiture should be proportionate. The part played by the principles of proportionality in determining the Tribunal's jurisdiction was missing from the arguments advanced by HMRC in its Appeal against Mr and Mrs Jones. The three other High Court cases decided after *Gascoyne* did not make specific reference in their reasoning to the principle of proportionality, which may have skewed HMRC's arguments in this Appeal in the direction of exceptional circumstances. It may be significant that in *Weller* the Appellant was represented by Counsel, whereas the Appellant acted in person in *Smith* and *Mills.* In *Dawkin* the Appellant did not appear.

73. I note Mr Justice David Richards' reservations with the decision in *Weller.* I share his concerns with the difficulties faced by Mr Justice Evans-Lombe in reaching a decision about the facts found by the Tribunal. Those difficulties, however, did not undermine the validity of Mr Justice Evans-Lombe's interpretation of *Gascoyne*.

74. At paragraph 16 of *Weller* Mr Justice Evans-Lombe endorsed the two questions adopted by Mr Justice Lewison's in *Smith*. The two questions are uncontroversial and determine the approach that should be adopted by the Tribunal when deciding whether it would be an abuse of process to accept jurisdiction on the lawfulness of seizure. As an aside I note that Mr Justice Evans-Lombe did not expressly approve the reference to the analogy of sentencing court in paragraph 22 cited from Mr Justice Lewison's judgment.

75. Mr Justice David Richards in *Dawkin* introduced a new legal test for the Tribunal when considering whether it would be an abuse of process to admit evidence on lawfulness of seizure.

> "The appropriate test was whether the tribunal, having been properly advised as to the law, had arrived at a reasonable decision which took account of all relevant matters and left out of account all relevant matters. The decision as to whether or not there was an abuse of process required the tribunal to consider and give appropriate weight, one way or the other, to all relevant factors and to disregard irrelevant factors".

I am unsure how this test fits in with the two questions posed by Mr Justice Lewison. Counsel for HMRC explained that Mr Justice Lewison's two questions constituted the issue of fact to be decided by the First Tier Tribunal. Mr Justice David Richards' test, on the other hand, was the one to be applied by this Tribunal in deciding whether the First Tier Tribunal misdirected itself on the law. If that is the case I prefer the traditional formulation of *whether I am satisfied in all the circumstances no reasonable Tribunal, properly advised, could have made the order* as the test for misdirection by the First Tier Tribunal.

76. After reading the notes of evidence of Mr and Mrs Jones' Appeal it appeared that counsel was arguing for the application of Mr Justice David Richards' test to Mr and Mrs Jones' reasons for not progressing the condemnation proceedings.. If that is so, I question whether the test adds value to the two questions approach advocated by Mr Justice Lewison. The wording of the test follows the approach adopted by the Tribunal when exercising a quasi judicial review function. This happens when the Tribunal reviews the exercise of discretionary powers on the part of HMRC, which is not the case in this situation when the Tribunal is deciding whether it is an abuse of process to accept jurisdiction on lawfulness of seizure. Also the test gives no context on how a Tribunal should determine whether factors are relevant or not.

77. At paragraph 41 of the *Dawkin* decision Mr Justice David Richards found that there were no factors which could take Mr Dawkin's case out of the usual run of cases where it is an abuse of process to raise the facts of seizure in the Tribunal. I believe his findings confirm that the relevance/irrelevance test is no more than an alternative articulation of the two questions and run of the mill approach championed by Mr Justice Lewison. In those circumstances the gloss of relevant and irrelevant factors seems unnecessary.

78. The final point of the law that requires addressing and of significance to this Appeal is whether the Tribunal is entitled to take into account the merits of the substantive dispute when deciding on the abuse of process issue. Counsel in this

Appeal against Mr and Mrs Jones was firmly of the view that the merits of the substantive dispute should play no part in the Tribunal's initial decision on the extent of its jurisdiction. He cited in support the view of Mr Justice Lewison in *Smith* at paragraphs 24 and 25:

> "In the present case, the Tribunal directed itself in paragraph 17 of its decision, as follows: *The phrase the Tribunal can reopen these issues in paragraph 55 clearly refers back to the matters that are deemed to have been decided against the importer and so the validity of the seizure does not become an issue whether the goods should be restored. Clearly, in any normal situation where the goods were not liable to seizure in the first place, that would be highly relevant factor for the Commissioners to take into account when they are considering whether to restore the goods even though they have been deemed to be condemned.*
>
> In my judgment this was a misdirection. The validity of the seizure does not become an issue merely because it is relevant to the question whether the goods should be restored. The validity of a seizure will only become an issue if, and only if, the Tribunal is satisfied that the applicant had good reasons for not having raised the matter by way of condemnation proceedings".

79. In contrast Mr Justice Evans-Lombe at paragraph 20 in *Weller* said:

> "That Tribunal will be able to go into all the facts of the case, probably with more evidence before it than was before the Tribunal which made the order under appeal. That Tribunal may conclude, as a step in arriving at its decision that in all the circumstances Mr Weller should not be allowed to challenge the validity of the forfeiture. Though it is unlikely to do so if it was going on to allow Mr Weller's appeal".

80. Counsel for HMRC submitted that Mr Justice Evans-Lombe's views in paragraph 20 were obiter and, in any event, should not be followed. I consider that Mr Justice Evans-Lombe in paragraph 20 was not advocating a significant role for the merits of the substantive dispute in the Tribunal's decision on jurisdiction. His comments should be read in the context that he had already found good reasons for opening the question of lawfulness of seizure. Further Mr Justice Evans-Lombe's use of the words as "*a step in arriving at its decision"* suggests that the Tribunal's ruling on jurisdiction is separate from the decision on merits, and that the latter should not be determinative of the jurisdiction issue.

81. I consider that the decision in *Mills* helps to bridge the gap between the views of Mr Justice Lewison and Mr Justice Evans-Lombe on whether the merits of the substantive dispute are relevant to the issue of jurisdiction. Mr Justice Mann in *Mills* held that the Tribunal when deciding jurisdiction was entitled to examine the underlying facts of a deemed forfeiture where they departed from the normal factual matrix of a forfeiture. Mr Justice Mann equated normal factual matrix with the absence of own use as the sole basis for forfeiture. Since the nature of the underlying facts bears a close relationship with the merits of the substantive dispute, it follows that the Tribunal's enquiry of whether it has jurisdiction on lawfulness of seizure can consider the merits provided the facts go beyond a mere assertion of own use. This conclusion is consistent with Mr Justice Lewison's criticisms of the Tribunal at

paragraphs 24 and 25 of *Smith* where there was nothing in the underlying facts that took the case beyond a mere assertion of own use.

82. In summary the central ruling in *Gascoyne* is that the deeming provisions are not Convention compliant in which case the Tribunal can consider matters relating to the lawfulness of seizure unless it would be an abuse of process to do so. This is a very different starting point from the proposition that the Tribunal cannot entertain such arguments unless exceptional circumstances apply. The construction of abuse of process should be based on the principles of proportionality which involve examining each case on its own individual facts and ensuring that restrictions on the Appellant's right to present his case are proportionate. In determining whether it would be an abuse of process, the Tribunal should ask itself the two questions posed by Mr Justice Lewison: did the importer have a realistic opportunity to invoke the condemnation procedure and, secondly, if he did, are there nonetheless reasons, disclosed by the facts of the case which should persuade the tribunal to permit him to reopen the question of the validity of the original seizure. It is proportionate to deny the Appellant his right to argue legality of seizure and or own use if his reasons are no more than a mere failure to invoke condemnation proceedings and or a mere assertion of own use. In short, the Appellant's case has to be something more than a run of the mill case.

## The Grounds of Appeal

### *HMRC Submissions on the Second Ground*

83. Starting with the second ground of Appeal, HMRC counsel contended that the Tribunal's approach to the legal test of whether Mr and Mrs Jones could raise own use arguments was highly selective. The Tribunal did not give any weight to the dicta of the Higher Court that such a course of action was to be the exception rather than the rule. In particular, the Tribunal's précis of the *Gascoyne* judgement did not accurately reflect the clear implication of the Court of Appeal that a reopening of forfeiture was exceptional. Further the Tribunal made no explicit references to the dicta of Mr Justice Lewison in *Smith* about the onus upon Mr and Mrs Jones to establish good reasons, and to the dicta of Mr Justice David Richards in *Dawkin* on the relevance of those reasons. As a result of these errors the Tribunal sought reasons to consider the issue of own use rather than placing the obligation upon Mr and Mrs Jones to justify such a course of action.

84. Counsel argued that the Tribunal was wrong to take into account the substantive merits of the Appeal when accepting jurisdiction on the lawfulness of seizure. Counsel identified an error at paragraph 12 of the Tribunal decision with its reliance on *Gora* for the proposition that it could have regard to the merits of the Appeal when deciding the abuse issue. Counsel contended that the Tribunal confused two separate legal matters, in that the comprehensive fact finding powers of the Tribunal approved of in *Gora* related to its decision on restoration not on the abuse of process. Finally Counsel suggested that the Tribunal had not accurately recorded his representations. Counsel denied that he cited the case of *Gascoyne* as authority for the proposition that the Tribunal had limited fact finding powers.

85. Mr Jones made no specific contribution on the second ground.

***Discussion***

86. Before dealing with counsel's principal argument that the Tribunal erred in law by not applying the rulings of the Higher Courts, it is important to set the structure of the Tribunal's decision in context. In the decision document the Tribunal accorded priority to the justification of its decision not to hear the jurisdiction dispute as a preliminary matter separate from the substantive appeal. In this respect the majority of the authorities cited by the Tribunal in its judgment were directed at this procedural dispute which the Tribunal identified as the major point of difference on the law with HMRC counsel. This observation is relevant in assessing the strength of counsel's submission that the Tribunal was highly selective with the authorities relied upon in reaching its decision. HMRC did not appeal against the ruling by the Tribunal to hear together the evidence on the jurisdiction issue and on the substantive appeal in the same proceedings.

87. The second preliminary matter concerned counsel's suggestion that the Tribunal had not accurately recorded his arguments before it. The notes of evidence compiled by the Tribunal revealed that it kept a full record of the evidence given and the submissions made by the parties. The Tribunal recorded in detail the authorities cited by counsel, and his interpretation placed upon them. Following production of the notes, counsel withdrew his allegation that the Tribunal had not kept an accurate note[3].

88. Turning to HMRC's substantive challenge on whether the Tribunal applied the law correctly  The principal point made by counsel was that the Tribunal failed to carry out the clear inference drawn from  the Court of Appeal decision in *Gascoyne* that a re-opening of forfeiture following a deemed condemnation was the exception rather than the rule.  In my analysis of the authorities I disagreed with counsel's interpretation of *Gascoyne*. I decided that the exceptional course approach did not sit comfortably with Lord Justice Buxton's dictum that the deeming provisions should not to be paramount in every case and that it diluted the principles of proportionality and the requirement to consider each case on its own facts. The correct approach to be adopted by the Tribunal is that the Appellant should not be shut out from ventilating arguments of own use unless it would constitute an abuse of process.

89. I am satisfied that the Tribunal's précis of *Gasycoyne* at paragraph 7 of its decision was an accurate summary of Lord Justice Buxton's judgment. In paragraph 7(1) the Tribunal highlighted the distinction between the effect of a deemed forfeiture and an actual forfeiture on the Tribunal's jurisdiction to entertain arguments of own use. Paragraph 7(2) recited that the principles of res judicata and abuse of process might prevent the Tribunal from hearing such arguments. The Tribunal's addendum to the *Gasycoyne* decision at paragraph 7(3) reflected the pre-occupation with its ruling to hear the jurisdiction and substantive issues together, which reinforced the perception that the Tribunal saw this as the major point of difference on the law with counsel.

[3] The notes of evidence were only supplied to counsel at the hearing on 5 January 2010.

90. Counsel is correct with his assertion that the Tribunal made no explicit reference in its decision to the dicta of Mr Justice Lewison and Mr Justice David Richards in *Smith* and *Dawkin* respectively. The notes of evidence revealed that the Tribunal was certainly aware of the judgments and the scale of counsel's reliance upon them. The written decision clearly showed that the Tribunal was aware of the requirement to consider whether it would be an abuse of process to allow arguments of own use. Paragraph 9 of the decision sets out the Tribunal's reasons why the deeming provisions applied to the particular facts of this Appeal with specific reference to the decision in *Mills.* Paragraphs 14 to 23 were devoted to the evidence and findings on abuse of process. The Tribunal dealt with the issue of abuse of process by evaluating Mr and Mrs Jones' reasons for not pursuing condemnation proceedings, and it reached a conclusion on the validity of the reasons. The Tribunal's observation at paragraph 24 that in some cases it would be an abuse of process to allow arguments of own use where an Appellant has taken legal advice and withdrawn his notice of claim demonstrated that the Tribunal recognized that a decision on abuse of process had to be justified on the facts of the case, and supported by substantive reasons. The rationale applied by the Tribunal, therefore, embraced the two question approach stipulated by Mr Justice Lewison in *Smith*.

91. Counsel criticised the Tribunal for its reliance on the decision in *Weller* and that it was unduly influenced by the merits of the substantive Appeal. This reliance, according to counsel, resulted in the Tribunal overlooking the necessity to find good reasons for accepting jurisdiction on forfeiture. The principal reference in the Tribunal's decision to *Weller* was at paragraph 10 which was cited in support of its reasoning for not hearing the jurisdiction issue as a preliminary matter. The subsequent reference to *Weller* at paragraph 12 did not indicate that the Tribunal was minimising the requirement to find good reasons. Rather the Tribunal was simply making the point that it could have regard to the merits of the Appeal as one of the factors when deciding the abuse issue. That observation was in line with the ruling of Mr Justice Evans-Lombe in *Weller.* Likewise the Tribunal's reference to *Gora* and the comprehensive fact finding jurisdiction of the Tribunal was primarily directed at the procedural dispute. I accept counsel's complaint that the Tribunal went too far in citing *Gora* as support for the *merits* argument. I consider this transgression by the Tribunal was not material particularly as it was relying principally on *Weller* for its proposition on *merits.*

92. I conclude on the second ground of Appeal that the Tribunal did not err in law on the correct legal test for accepting jurisdiction on lawfulness of seizure. My analysis of the Tribunal's decision making process demonstrated that it followed the principles established by *Gascoyne* by considering whether it would be an abuse of process to permit own use arguments from Mr and Mrs Jones. Further I am satisfied that the Tribunal put the onus on Mr and Mrs Jones to establish they had good reasons for not pursuing condemnation proceedings which applied the rigor demanded by Mr Justice Lewison's two questions approach. Counsel's arguments on exceptional course went too far and not sustainable on a correct analysis of Lord Justice Buxton's judgment. My reading of the Tribunal decision and its notes of evidence was that the Tribunal's choice of Higher Courts' judgments cited was not selective in the sense implied by counsel. The Tribunal in its choice was addressing the procedural matter which it saw

as the principal legal dispute with counsel. I consider that the Tribunal assumed that the legal test on abuse of process uncontroversial, which explained why it did not cite all the Higher Court judgments on this issue. It may have been preferable if the Tribunal had specifically referred to Mr Justice Lewison's decision in *Smith* but that was a failing of form rather than substance. Finally the Tribunal's reliance on *Weller* was primarily directed at the procedural dispute. The Tribunal's reference to the merits of the substantive appeal followed the ruling in *Weller.* The question of whether the Tribunal applied the correct weight to merits is better examined under the first ground of Appeal.

***First Ground of Appeal***

***The Parties' Submissions***

93. Under the first ground of Appeal HMRC contended that the reasons identified by the Tribunal to entertain own use arguments were either without foundation in evidence or irrelevant. According to counsel, the Tribunal identified three reasons for accepting jurisdiction, namely:

(1) The Appellants received incorrect advice from their solicitors.

(2) Lay people cannot understand the fine distinctions about the legal processes involved in case like this one.

(3) Mrs Jones suffered with nerves and therefore had not wished to go to the magistrates' court.

I would add a fourth, namely the Tribunal's decision on merits of the substantive dispute which it considered relevant in the light of Mr Justice Evans-Lombe ruling in *Weller* at paragraph 20.

94. Counsel argued that it was not clear from the decision the nature of the incorrect legal advice relied upon by the Tribunal for its finding. It appeared that the Tribunal was referring to the advice given by the second firm of solicitors that Mr and Mrs Jones' challenge to the legality of the seizure had no legal merit. That being the case, it mattered not whether the Tribunal agreed with the legal advice. The fact was that Mr and Mrs Jones accepted the advice which they acted upon by withdrawing the condemnation proceedings.

95. According to Counsel, there was no suggestion that the advice of the second firm of solicitors was based on a misapprehension of the law. This was a situation where the Tribunal held a differing view of the facts from the solicitors advising Mr and Mrs Jones. Counsel disagreed with the Tribunal's finding of inconsistency in respect of the solicitors' letter of 14 May 2008. In counsel's view it was perfectly reasonable for a party to decide his legal position to withdraw condemnation proceedings and at the same time refuse to concede personal use. The steps taken by Mr and Mrs Jones followed the precise procedure laid down by HMRC Notice 12A. Under paragraph 3.1 of Notice 12A Mr and Mrs Jones could still ask for restoration even if they did not accept the excise goods were liable for seizure. Counsel considered the solicitors' advice recorded at paragraph 20 of the Tribunal's decision was a correct statement of law. The advice that Mr and Mrs Jones should plead leniency and rely on the severity of seizure demonstrated an understanding of Mr Justice Lewison's analogy of the

Tribunal acting as a sentencing court concerned with mitigation. The grounds cited in the Notice of Appeal submitted by Mr and Mrs Jones also demonstrated an understanding of the legal considerations involved with the restoration decision. Finally Counsel considered that the principles of legal privilege would render the Tribunal's conclusions on the standards of legal advice given to Mr and Mrs Jones problematical.

96. Counsel argued that the Tribunal's finding about lay people not understanding the fine distinctions of legal processes ignored the facts that two firms of solicitors had advised Mr and Mrs Jones and that they received Notice 12A which gave clear guidance on the appropriate forum for own use arguments. Finally counsel observed that the Tribunal did not record anywhere that Mr and Mrs Jones believed they could go to the Tribunal to argue own use.

97. Counsel challenged the evidential basis upon which the Tribunal made its findings on Mrs Jones' inability to attend the magistrates' court. According to counsel, the Tribunal relied upon Mrs Jones' statement made as part of Mr Jones' closing submissions which denied counsel the opportunity for cross examination. There was no medical evidence at all to support the nervous condition of Mrs Jones. Counsel pointed out that the Appellants' solicitors did not mention Mrs Jones' medical condition in their correspondence with HMRC. Finally there was no justification at all for the Tribunal's finding that the magistrates' court would be a more stressful experience than the tribunal.

98. Mr Jones in reply said that they were unaware of the need to produce medical evidence to substantiate Mrs Jones' nervous condition. Before this Tribunal Mr Jones supplied a letter from Dr N Sahoo of the Horden Group Practice which stated that

> 'Mrs Jones was a 63 year old lady who suffered from anxiety and depression and had been on antidepressants for the past five years. Mrs Jones felt that she could not cope with attending a Tribunal".

99. Mr Jones disputed counsel's observation of not being given the opportunity to cross examine Mrs Jones. Mr Jones pointed out that the Tribunal Chairman asked counsel whether he wished to question Mrs Jones. According to Mr Jones, counsel turned down the offer to question Mrs Jones because he had asked Mr Jones everything he needed to know. Mr Jones also asserted that counsel requested the Tribunal to carry on without a break for lunch as he had an appointment in Birmingham at 2.30pm. Counsel denied the timing of the appointment.

100. Counsel for HMRC contended that the Tribunal's faulty reasoning demonstrated that it expressly and wrongly took into account the merits of Mr and Mrs Jones' Appeal in determining the preliminary issue on jurisdiction. This was the real driver which moulded the Tribunal's approach to Mr and Mrs Jones' Appeal and constituted a blatant misdirection on the part of the Tribunal. Effectively the Tribunal decided first on the substantive merits and then found reasons for justifying its decision to open up the issue of own use. In this respect Counsel asserted that the Tribunal placed undue reliance on the *Weller* decision of which they should have been more

circumspect in the light of Mr Justice Lewison's finding that the facts of seizure had nothing to do with the Tribunal's preliminary decision on jurisdiction.

***Discussion***

101.HMRC challenged the Tribunal's finding of no abuse of process on three grounds. First the reasons found by the Tribunal had no evidential foundation in the facts of the case. Second, the reasons found were in any event irrelevant. Finally the process adopted by the Tribunal was fatally flawed in that it gave undue weight to the merits of the substantive dispute.

102. The Tribunal's conclusions on abuse of process were set out in paragraph 24 of its decision:

> "There may well be cases where it would be an abuse of process for an appellant to be allowed to pursue an appeal to the Tribunal because they have taken legal advice and withdrawn their notice of claim in light of it but we do not regard that as being necessarily a conclusive factor. We hold that this appeal can proceed without there being an abuse of process because Mr and Mrs Jones were incorrectly advised by their solicitor and it is understandable that lay people cannot understand the fine distinctions about the legal processes involved in a case like this one. In particular we also take into account Mrs Jones's condition. Given the nature of the decision we have reached on the substantive issue this is also a case where Evans-Lombe J's judgment in *Weller*, quoted in paragraph 10 above, is highly relevant".

103. My reading of the Tribunal's reasons for holding an abuse of process was that the incorrect legal advice and the lack of understanding of the fine distinctions were connected and constituted a single reason. The Tribunal's findings to support that reason were found in paragraph 15 to 21. The Tribunal relied particularly on its finding that the solicitors' advice of 14 May 2009 was inconsistent, in that Mr and Mrs Jones persisted with their assertions of own use even though they withdrew the condemnation proceedings. The Tribunal decided that the reason of *no legal merit* advanced by the solicitors for withdrawing the condemnation proceedings had nothing to do with any factual issue conceded by Mr and Mrs Jones but instead referred to the solicitors' observation that Customs were a law unto themselves.

104. Counsel suggested that the solicitors' advice was not flawed. In effect the solicitors were telling Mr and Mrs Jones that their best chance of retrieving their vehicle was to ask the Tribunal for leniency. Counsel pointed out such advice was followed by Mr and Mrs Jones in their grounds of Appeal to the Tribunal and consistent with the contents of Notice 12A. I disagree with Counsel's submissions. Notice 12A makes it clear that where a person is challenging the lawfulness of seizure he must institute proceedings before the magistrates' courts. Equally the documentation submitted by Mr and Mrs Jones in support of their application for restoration of vehicle was dominated by their protestations that the goods had not been purchased for commercial disposal. The documentation showed that the solicitors were well aware of the nature of Mr and Mrs Jones' protestations as revealed in their letter of 14 May 2009. The solicitors should have known that the magistrates' court was the correct forum for hearing arguments of own use. In those

circumstances I consider that the Tribunal was entitled to conclude on the evidence that the solicitors' advice was mistaken.

105. Counsel suggested that incorrect legal advice could not amount to a good reason because of the problems of legal privilege. I am not convinced that legal privilege is a show stopper in the sense implied by counsel. It may make the evaluation of the accuracy of the advice more difficult but this would depend upon the facts of each case. In Mr and Mrs Jones' Appeal I am satisfied on the evidence that the Tribunal was entitled to conclude that the advice was incorrect.

106. I am less convinced with the evidential justification in the Tribunal decision for its findings on the knowledge of lay people about the legal processes involved in restoration proceedings. The justification was set out in paragraph 15 of the decision, and consisted of the Tribunal's inference from their experience of dealing with lay people and judicial criticisms of the division of jurisdiction between the Courts and the Tribunal. The Tribunal's justification was open to the criticisms that the Tribunal's experience was not evidence, too remote from the particular facts of Mr and Mrs Jones' Appeal, and ignored the clear guidance in Notice 12A about the options open to lay people challenging HMRC's seizure of their goods.

107. It is unfortunate that the Tribunal used the phrase *lay people* rather than making a direct reference in its decision to Mr and Mrs Jones' lack of understanding. My construction of the Tribunal's reasoning in paragraph 24 was that when it referred to lay people, it meant Mr and Mrs Jones. Further there was solid evidence that Mr and Mrs Jones had been misled by the incorrect evidence and acted upon it to their detriment. In this respect, the fact that Mr and Mrs Jones' case before the Tribunal was solely based on own use arguments lends some credibility that the Tribunal had in mind the effect of incorrect advice on the actions of Mr and Mrs Jones. Moreover, the Tribunal's notes of evidence recorded explicit statements from Mr Jones under cross-examination that they did not understand the advice and were misled by it. Mr Jones' statements included: "*I did not understand these things"* (reference to the magistrates' jurisdiction); *"I could not remember the solicitor advising that own use had to be magistrates"; and "I believed I was badly advised"*. It is not clear why the Tribunal omitted this evidence from its decision. The impact of this omission, however, is somewhat mitigated by the Tribunal's finding at paragraph 23 that "*it was satisfied that Mr and Mrs Jones were telling the truth about why they did not pursue condemnation proceedings"*.

108. I consider that the Tribunal treated incorrect advice and lay people as a single reason and that its reference to lay people meant Mr and Mrs Jones. My interpretation of the reason from the decision and notes of evidence is that Mr and Mrs Jones acted on incorrect legal advice to their detriment, and that Mr and Mrs Jones did not have the knowledge and confidence to challenge their solicitor's advice.

109. The other substantive reason relied upon by the Tribunal was Mrs Jones' condition. HMRC counsel attacked this finding on several levels. First counsel argued that the finding was not derived from sworn testimony of Mrs Jones which was subject to cross examination. On this point Mr Jones gave unambiguous evidence

tested by cross examination of Mrs Jones' condition that she was ill and would not go to court. Further, as revealed in the notes of evidence and in the decision counsel declined the opportunity given by the Tribunal to ask questions of Mrs Jones. In those circumstances I consider the Tribunal was entitled to rely on Mr Jones' evidence and Mrs Jones' statements in respect of its findings on Mrs Jones' condition.

110. The second criticism pursued by counsel was that there was no medical evidence corroborating Mrs Jones' condition. This criticism went to the question of weight rather than the absence of evidence to substantiate the Tribunal's finding. In this respect this was a matter that fell within the Tribunal's jurisdiction to find facts. Suffice it to say I consider there was persuasive evidence which supported the Tribunal's conclusions on Mrs Jones' condition.

111. Finally counsel challenged the propriety of the Tribunal's inference that it would have been more of an ordeal for Mrs Jones to have gone to the magistrates' court. The inference was in part drawn from Mrs Jones' statement about her appearance before the Tribunal that "*If I had known it was going to be an ordeal like this I would not have come"*. Having found that, I consider that the Tribunal was entitled to rely on general knowledge of the difference between courts and tribunals in respect of the formality of the proceedings to decide that Mrs Jones would find giving evidence in the magistrates' court a significant ordeal. Whatever the merits of this inference on the part of the Tribunal, it should not detract from the Tribunal's principal finding that it was Mrs Jones' condition which prevented her from attending the magistrates' court. The Tribunal accepted Mr Jones' evidence that Mrs Jones would not contemplate going to the magistrates' court because of her condition. She was bad with her nerves and unable to leave her home and sleep properly for a time after seizure of the goods.

112. Thus in relation to Mrs Jones' condition the Tribunal gave pre-eminence to the nature of her condition and its effects as the reason why she would not attend the magistrates' court. The Tribunal's reference to Mrs Jones finding the magistrates' court more of an ordeal should be viewed in that context, supplementing its principal conclusion on the nature and effects of her condition.

113. The significance of Mrs Jones' condition was that this was not a case where Mr Jones could progress the Appeal before the magistrates' court without Mrs Jones. They jointly owned the excise goods. HMRC's case against them was on the basis of a joint enterprise. Mr Jones knew that Mrs Jones would have to join him in the Appeal. Although Mr Jones was unsure whether Mrs Jones would have to attend the court, their chances of success would be extremely remote if Mrs Jones did not give evidence. In contrast the Appeals Options letter dated 28 April 2008[4] which prompted the withdrawal of the condemnation proceedings made no mention that Mr and Mrs Jones would have to attend the Tribunal to pursue the restoration option. The letter simply stated that their restoration request would be assessed by an independent Higher Officer who would write to Mr and Mrs Jones with his findings.

[4] See paragraph 17 and 18 of the Tribunal decision

114.There remains the contentious issue of the merits of the case. Counsel alleged that the Tribunal was wrong to take the merits into account when deciding the abuse issue. Further counsel contended that the Tribunal was unduly influenced by the merits which had the effect of the Tribunal searching for reasons to vindicate its decision on jurisdiction. I find no evidence that the Tribunal worked backwards from its decision on the substantive matter and then contrived reasons for permitting arguments of own use. The notes of evidence indicated that the Tribunal did not encourage Mr and Mrs Jones to volunteer reasons for why they withdrew the condemnation proceedings. Those reasons emerged from answers given in cross-examination. The structure of the decision demonstrated that the Tribunal correctly treated the jurisdiction issue as a preliminary matter separate from the substantive dispute with each dispute governed by its own discrete legal principles. The reasons relating to the incorrect legal advice and Mrs Jones' condition had a distinctive character which had nothing to do with the substantive matter.

115.The Tribunal did take into account the merits as one of the relevant factors for accepting jurisdiction on seizure. In so doing the Tribunal followed the ruling in *Weller* about the relevance of allowing an Appeal. The Tribunal, however, emphasised at paragraph 12 that merits alone would not answer the question whether it would be an abuse to allow the case to proceed. Counsel argued that the Tribunal should not have followed the decision in *Weller* in view of Mr Justice Lewison's ruling in *Smith* that validity of seizure had nothing to do with abuse of process. The ruling in *Weller,* however, was decided after and in full knowledge of *Smith.* Counsel submitted that Mr Justice Evans-Lombe's comments were in any event obiter dicta. That may be the case but unless another Judge of similar to or higher standing than Mr Justice Evans-Lombe has said so it is difficult for a lower Tribunal to ignore a decision of a Higher Court.

116. Where I hold reservations about the Tribunal's approach to the merits factor was that it was not explicit about which aspects of the merits were relevant to its decision on jurisdiction and the weight attached to the merits. In its explanation in paragraph 24 for finding that the Appeal could proceed without there being an abuse of process the Tribunal stated that

> "Given the nature of the decision we have reached on the substantive issue this is also a case where Evans-Lombe J's judgment in *Weller* is highly relevant".

117. The use of the phrase *highly relevant* implied that the Tribunal accorded significant weight to the merits, in which case it left the Tribunal open to the criticism that it was unduly influenced by the merits of the substantive dispute. On the other hand, the Tribunal's caveat at paragraph 12 that the merits alone would not answer the question of abuse and the structure of paragraph 24 where the decision on the substantive issue appeared to be an after-thought suggested that the merits reason was subsidiary to the principal reasons of incorrect advice and Mrs Jones' condition. My preferred interpretation of the decision is that the merits on the substantive dispute played a minor part in the Tribunal's reasoning for accepting jurisdiction on own use.

118. Counsel contended that whatever the evidential basis for the Tribunal's rationale, the reasons found were not relevant to the dispute on abuse of process. I have decided earlier that the relevance test applied in *Dawkin* did not advance Mr Justice Lewison's dictum that the reasons must be good in the sense that they amount to something more than a mere failure to invoke condemnation proceedings. Counsel when addressing this Tribunal made various suggestions as to what would constitute good reasons. I consider his attempt a fruitless exercise because whether reasons are good depends upon the individual circumstances of the case. I have decided that the Tribunal found two substantive reasons, incorrect legal advice and Mrs Jones' condition, with the merits of the substantive dispute playing a relatively minor part in its reasoning to support its conclusion that it would not be an abuse of process to proceed with Mr and Mrs Jones' Appeal. The question is whether the Tribunal's reasoning is correct in law. I am satisfied that there was evidence to substantiate the Tribunal's reasoning, and that the reasons found, taken as a whole, amounted to something more than a mere failure to invoke condemnation proceedings. Mr and Mrs Jones' Appeal was not a run of the mill case. I, therefore, decide that HMRC has not made out its first ground of Appeal.

**Conclusion**

119. HMRC presented its Appeal on the basis that this was a blatant case of the Tribunal being over sympathetic to the plight of Mr and Mrs Jones with the result that it erred in law by admitting evidence of own use. I disagree with HMRC's perspective of the Tribunal's decision.

120. HMRC's counsel argued that the Tribunal did not apply the correct legal test when it accepted jurisdiction on forfeiture. According to counsel the Tribunal did not acknowledge that such a course of action was to be the exception rather than the rule. I decided that word *exception* was not part of the vocabulary of the test applied by Lord Justice Buxton in *Gascoyne*. Mr and Mrs Jones' Appeal involved a deemed forfeiture, in which case the appropriate legal test is that the Tribunal can reopen issues relating to lawfulness of seizure provided it does not constitute an abuse of process. I am satisfied that on a proper analysis of its decision the Tribunal applied the correct legal test in Mr and Mrs Jones' Appeal. The Tribunal considered in depth whether it would be an abuse of process to admit evidence of own use from Mr and Mrs Jones. In so doing the Tribunal had in mind the two questions posed by Mr Justice Lewison in *Smith*. I acknowledge that it would have been preferable for the Tribunal to have made explicit reference in its decision to the relevant High Court authorities, in particular *Smith* but that was a failing of form rather than substance.

121. The Tribunal conducted a thorough analysis of the evidence relating to Mr and Mrs Jones' reasons for not carrying on with condemnation proceedings before the magistrates' court. The Tribunal decided that Mr and Mrs Jones' Appeal could proceed without there being an abuse of process because of incorrect legal advice and Mrs Jones' condition and their decision on the substantive dispute. I found that the reasons of incorrect legal advice and Mrs Jones' condition were firmly grounded in the evidence heard by the Tribunal. I decided that there was no evidence that the Tribunal was unduly influenced by its decision on the substantive Appeal which

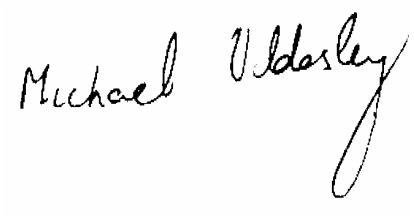
played a relatively minor part in its judgment on abuse of process. I concluded that the reasons found by the Tribunal for why Mr and Mrs Jones did not progress their dispute before the magistrates' court amounted to something more than a mere failure to invoke condemnation proceedings. In short Mr and Mrs Jones' Appeal was not a run of the mill case. The Tribunal was, therefore, justified in finding that it was not an abuse of process to proceed with their Appeal.

122. I considered that in two respects the Tribunal should have expanded upon its reasons given in its decision. The first was the Tribunal's reference *to lay people not understanding the fine distinctions of law involved in restoration proceedings.* I decided that the Tribunal's reference to *lay people* meant Mr and Mrs Jones and that there was solid evidence as revealed in the notes kept by the Tribunal that Mr and Mrs Jones had been misled by the incorrect evidence and acted upon it to their detriment. The second, was the Tribunal's failure to specify which aspects of the merits of the substantive dispute were relevant to its decision to accept jurisdiction and the evidential weight attached to the merits. I concluded that the Tribunal's failure was not material because the merits played a relatively minor role in its decision, and that the reasons of incorrect legal advice and Mrs Jones' condition were sufficient grounds to enable the Tribunal to proceed with Mr and Mrs Jones' Appeal.

123. I did, however, consider whether the Tribunal's failure to be explicit with its reasons in the two respects identified above amounted to an error of law in that the Tribunal did not give adequate reasons for its findings (see *Golobiewska v Commissioners of Customs and Excise* [2005] EWCA Civ 607). I decided on balance for the reasons given in the above paragraph that the failings were not material. Also I considered that the excellent notes of evidence kept by the Tribunal compensated for any perceived shortcomings in the Tribunal's decision. If I am wrong with my decision that these two failings did not amount to an error of law, I would, having regard to all the circumstances, exercised my discretion under section 11(2)(a) of Tribunals Courts and Enforcement Act 2007 not to set aside the decision of the Tribunal.

124. I, therefore, hold that the Tribunal did not err in law when it decided that Mr and Mrs Jones' Appeal could proceed without there being an abuse of process. The decision was one that a reasonable Tribunal, properly advised, could have made. HMRC did not Appeal against the Tribunal's decision in respect of the substantive dispute. In those circumstances I dismiss HMRC's Appeal which has the effect of upholding the Tribunal's decision that HMRC should carry out a new review of its decision in respect of Mr and Mrs Jones not to restore the seized excise goods and the vehicle. The new review will take into account the Tribunal's findings of fact.

.



**MICHAEL TILDESLEY OBE**
**DEPUTY UPPER TRIBUNAL JUDGE**
**RELEASE DATE:**

LON/