Neutral Citation Number: [2020] EWCA Civ 569

Case No: A3/2019/0808

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
Mr Justice Morgan
Judge Jonathan Richards
[2018] UKUT 0422 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2020

Before:

LORD JUSTICE COULSON
LADY JUSTICE ROSE
and
SIR TIMOTHY LLOYD

- -

Between:

LOGFRET (UK) LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondent**

- -
- -

David Bedenham (instructed by **Rainer Hughes**) for the **Appellant**
Jessica Simor QC and Joanna Vicary (instructed by **The General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondent**

Hearing date: 11 March 2020

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Approved Judgment

- "Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Wednesday 29th day of April 2020."

Sir Timothy Lloyd:

Introduction

1. This appeal concerns excise duty, in particular the liability of a guarantor for duty in respect of goods which are moved under arrangements which suspend the payment of duty. HMRC assessed the appellant, Logfret (UK) Ltd (Logfret) as liable to pay duty on four movements of alcohol which were dispatched from UK warehouses between 2011 and 2013 to go to warehouses in other Member States. Logfret's appeal to the First Tier Tribunal was allowed, but this was reversed on HMRC's appeal to the Upper Tribunal. On this further appeal Logfret was represented by Mr David Bedenham and HMRC by Ms Jessica Simor QC and Ms Joanna Vicary. I am grateful to them all for their clear and helpful submissions, both written and oral.

2. Excise duty is payable on tobacco and alcohol products, and on some energy products. In principle, duty is payable when excise goods enter the European Union or when they come into existence within a Member State. However, they may be kept in bond, without the payment of duty, until they are released for consumption. They may be transported within or between Member States under duty suspension arrangements. Given that rates of duty are not the same in all Member States, it matters not only when but also where liability to pay the duty arises. For that reason a consistent scheme for the allocation of liability for the duty within the European Union is essential. Given also that there is a high risk of fraud in relation to excise duty, the operation and regulation of the system of suspension of duty and of the movement of goods under a duty suspension arrangement requires a comprehensive regulatory and administrative system. This came to be provided by a computerised electronic system, the Excise Management and Control System (EMCS). The regulatory provisions were set out in Council Directive 2008/118/EC (the Directive). This was transposed into UK law by, among other provisions, the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the HMDP Regulations), but for most purposes it is only necessary to refer in this judgment to the Directive.

3. Paragraph (8) of the Preamble to the Directive sets the scene:

> "Since it remains necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all Member States, it is necessary to make clear at Community level when excise goods are released for consumption and who the person liable to pay the excise duty is."

4. One requirement of the system is a guarantee of "the risks inherent in the movement under suspension of excise duty". Logfret contracted with a consignor to carry consignments of alcohol products from a bonded warehouse in the UK to bonded warehouses in other Member States. It did not undertake the carriage itself, however, but sub-contracted that task. In addition, it gave the required guarantee as regards the eventual liability to excise duty in respect of the goods, wherever and whenever that liability might arise.

5. Three of the consignments with which this appeal is concerned were never recorded on the EMCS as having arrived at their destinations. The fourth was recorded as having

arrived at an Italian bonded warehouse, after several changes in the intended destination of the goods, and not until 11 months after the goods had been dispatched. It is not suggested that Logfret was a party to, or had any knowledge of, the circumstances in which any of the goods went astray. The question is whether, in the given circumstances, the relevant legislation imposes liability on Logfret under its guarantee. This depends on the correct interpretation of the European legislation governing excise duty and, in particular, the movement of excise goods under duty suspension arrangements.

6. Consignors and consignees of excise goods under duty suspension arrangements must have been authorised for the purpose by the relevant competent authorities, and are referred to in the Directive as "registered" consignors and consignees: see Article 4(9) and (10). The consignor of excise goods which are to be moved under a duty suspension arrangement must complete and submit to the competent authority in the Member State of dispatch through the EMCS an Electronic Administrative Document (EAD) with details of the consignor and consignee, the goods, the transporter, the vehicle registration, expected journey time and guarantor. The EMCS generates a unique Administrative Reference Code (ARC) for the movement. The goods must move with the ARC which can be presented to relevant authorities during the movement. The consignor receives the validated EAD and the authorities of the Member State of the destination also receive the EAD through the EMCS, which is then passed on to the consignee. Authorised warehouse keepers and registered consignors and consignees have direct access to the EMCS, but a carrier or guarantor such as Logfret does not have such access. When the goods are dispatched, they will travel with a copy of the ARC. On arrival at the tax warehouse (the term used in the Directive for what is commonly known as a bonded warehouse) which is the specified destination, the consignee is to check the goods and confirm their arrival through the EMCS, submitting a report of receipt, which it is bound to do within 5 days of receipt. The authorities in the destination state receive the report of receipt and validate it. The validated report of receipt is then received directly by the consignee and by the authorities in the state of dispatch, and via those authorities also by the consignor. Once a report of receipt has been issued and validated then the duty suspended movement has come to an end. If the movement comes to an end in an orderly and regular manner, all the goods dispatched having been confirmed as having been received at the tax warehouse which was the specified destination, then the liability of the guarantor comes to an end.

The essential facts

7. The four Movements may be summarised as follows:

Movement	Dispatch Date	UK duty suspended	Date of receipt per EMCS
1	4 August 2011	£37,950	None
2	19 October 2012	£56,896.98	None
3	10 June 2013	£40,749.43	None
4	10 June 2013	£40,749.44	16 May 2014

8. The first assessment, made on 6 October 2014, related to the first three Movements. The second, on 9 February 2015, covered the fourth.

9. It is not necessary to go into any more detail as regards the facts except, briefly, for Movements 3 and 4.

10. Movement 3: The consignor was Medway Bond & Storage Ltd (Medway). The order was placed on 10 June 2013 for immediate collection. The original consignee was Ess Key in Belgium. Logfret sub-contracted the carriage to Insight Logistics Ltd. Medway changed the consignee first to Care Distribution (in France) on 26 June 2013 and then to MT Manutention (also in France) on 27 September 2013. Logfret was not made aware of these changes.

11. Movement 4: Also on 10 June 2013 Medway issued a second purchase order for another transport to Ess Key, the carriage for which was again sub-contracted by Logfret to Insight Logistics. Medway changed the consignee four times: to Care Distribution, then to MT Manutention, both in France, then to DAB Di Arruzzoli Bruno and last, on 7 May 2014, to Palmeri Giovanni, both in Italy. Logfret was not made aware of these changes either.

12. Logfret received CMR documents for both of these shipments, both stamped "Ess Key". HMRC became aware that Movements 1, 2 and 3 were still open on the EMCS at the time of a visit to Medway's premises in May 2014. They then told Logfret that these three Movements were still open on the EMCS and invited Logfret to provide information, failing which it would be assessed to the duty as guarantor. In June 2014 Ess Key told Logfret that it had never received any deliveries from Medway and that the stamped CMRs were forgeries, and that the French authorities had found false Ess Key stamps in the possession of MT Manutention, and the signatures were forged. Logfret gave HMRC such information as it had to prove that the goods had been properly delivered including CMR documents, but HMRC did not accept that this material was sufficient to prove that the goods had been delivered to the specified tax warehouse of destination.

13. HMRC's investigation of Movement 4 arose separately, but with similar result, save that, while the investigation was under way, the Movement was eventually shown as received through EMCS, in May 2014. Logfret was given the opportunity to provide material to HMRC in this case as well, and it did so but with the same result. To add to the uncertainty surrounding the events, the Belgian authorities later told HMRC that Ess Key had carried out fictitious receipts and deliveries and its warehouse authorisation had been withdrawn in August 2014. All of the other substituted consignees were the subjects of investigation by their own national authorities, being suspected of excise fraud.

14. HMRC's position is that if goods travelling under a duty suspension arrangement have not arrived at the destination warehouse within four months of dispatch, then duty is payable in the country of dispatch, unless the irregularity can be identified as having happened in another Member State, and it is due from the guarantor. Accordingly, Logfret was assessed to UK duty on all four Movements.

The 2008 Directive

15. In order to address the several issues on the appeal it is necessary to examine much of Article 10 of the Directive. It is to be construed in the light of paragraph (11) of the Preamble:

> "In the event of an irregularity, excise duty should be due in the Member State on whose territory the irregularity has been committed which has led to the release for consumption or, if it not possible to establish where the irregularity has been committed, it should be due in the Member State where it has been detected. Where excise goods do not arrive at their destination and no irregularity has been detected, the irregularity shall be deemed to have occurred in the Member State of dispatch."

16. Article 10 provides as follows:

> "1. Where an irregularity has occurred during a movement of excise goods under a duty suspension arrangement, giving rise to their release for consumption in accordance with Article 7(2)(a), the release for consumption shall take place in the Member State where the irregularity occurred."
>
> 2. Where an irregularity has been detected during a movement of excise goods under a duty suspension arrangement, giving rise to their release for consumption in accordance with Article 7(2)(a), and it is not possible to determine where the irregularity occurred, it shall be deemed to have occurred in the Member State in which and at the time when the irregularity was detected.
>
> 3. In the situations referred to in paragraphs 1 and 2, the competent authorities of the Member States where the goods have been or are deemed to have been released for consumption shall inform the competent authorities of the Member State of dispatch.
>
> 4. Where excise goods moving under a duty suspension arrangement have not arrived at their destination and no irregularity giving rise to their release for consumption in accordance with Article 7(2)(a) has been detected during the movement, an irregularity shall be deemed to have occurred in the Member State of dispatch and at the time when the movement began, unless, within a period of four months from the start of the movement in accordance with Article 20(1), evidence is provided to the satisfaction of the competent authorities of the Member State of dispatch of the end of the movement in accordance with Article 20(2), or of the place where the irregularity occurred.
>
> Where the person who guaranteed the payment in accordance with Article 18 has not been, or could not have been, informed that the goods have not arrived at their destination, a period of one month from the date of communication of this information by the competent authorities of the Member State of dispatch shall be granted to enable him to provide evidence of the end of

> the movement in accordance with Article 20(2), or of the place where the irregularity occurred.
>
> 5. However, in the situations referred to in paragraphs 2 and 4, if, before the expiry of a period of three years from the date on which the movement began, in accordance with Article 20(1), it is ascertained in which Member State the irregularity actually occurred, the provisions of paragraph 1 shall apply.
>
> In these situations, the competent authorities of the Member State where the irregularity occurred shall inform the competent authorities of the Member State where the excise duty was levied, which shall reimburse or remit it as soon as evidence of the levying of the excise duty in the other Member State has been provided.
>
> 6. For the purposes of this Article, 'irregularity' shall mean a situation occurring during a movement of excise goods under a duty suspension arrangement, other than the one referred to in Article 7(4), due to which a movement, or a part of a movement of excise goods, has not ended in accordance with Article 20(2)."

17. Article 20 provides, so far as relevant, at paragraph (1) that the movement of excise goods under a duty suspension arrangement begins when the goods leave the tax warehouse of dispatch. According to paragraph (2) such a movement ends, in the case of a movement from one tax warehouse to another (which is what was supposed to happen in all four cases now relevant), when the consignee has taken delivery of the goods. Article 7(4) deals with the total destruction of the goods, so that does not concern us. Under Article 7(1) the basic rule is that excise duty is chargeable at the time, and in the Member State, of release for consumption. Release for consumption is defined in Article 7(2). The instance relevant to the present case is Article 7(2)(a): "the departure of excise goods, including irregular departure, from a duty suspension arrangement". Thus, if goods move under a duty suspension arrangement and safely reach the specified tax warehouse of destination then, subject to the issue of the time taken, the movement ends on receipt by the consignee. But they may be released for consumption by an irregular departure from the duty suspension arrangement rather than by arriving at their destination as intended, for example if they are delivered to a different destination, or if they are stolen from the transporting vehicle.

18. Article 10 deals with the consequences of irregularities and lays down the basic rule that the release for consumption (which gives rise to a charge to duty under Article 7) occurs in the Member State where the irregularity occurred. Thus, if the goods travelled properly out of the United Kingdom but were diverted from their proper course and custody in France, then duty is chargeable in France. However, it may not be possible to determine where the irregularity occurred. That case is covered first by Article 10(2). This deals with the case "where an irregularity has been detected during a movement of excise goods under a duty suspension arrangement", but it is not possible to determine where the irregularity occurred. In that case it is deemed to have occurred in the Member State where, and at the time when, it was detected.

19. A different case is dealt with by Article 10(4). Here, as the paragraph reads, no irregularity giving rise to a release for consumption under Article 7(2)(a) has been detected during the movement, but the goods have not arrived at their destination. The provision is that an irregularity is deemed to have occurred in the Member State of dispatch, at the time when the movement began, unless within four months of the start of the movement, satisfactory evidence is provided either of the regular arrival of the goods, so that the movement is shown to have ended in accordance with Article 20(2), or of the place where the irregularity occurred, so as to bring Article 10(1) into play. This is the provision which lies at the centre of the main issue in the present case.

20. Each of paragraphs (2) and (4) is subject to an overriding provision in paragraph (5). By this paragraph, if before the expiry of three years from when the movement began it is ascertained in which Member State the irregularity actually occurred, then paragraph (1) is to apply, and there is provision for the refunding of excise duty paid under paragraph (2) or (4) as the case may be.

The issues on the appeal

21. The issues argued before us as arising from these provisions are these:

(i) Does Article 10(4) apply in a case where the goods did arrive, but not within the four month period mentioned, as in the case of Movement 4? For this purpose it is necessary to consider what is meant by the words referring to an irregularity being "detected during a movement", and also when a movement comes to an end.

(ii) Does the second paragraph of Article 10(4) allow a person such as Logfret as guarantor in the present cases a month in which to show (if it can) that the goods have arrived at the specified destination by the end of the month, or must it show that the goods arrived there before the end of the four month period? In either case, what evidence is it entitled to rely on for this purpose?

(iii) What is meant in Article 10(5) by "it is ascertained"? On the facts of the present case, as regards Movements 3 and 4, was it ascertained within the three year period that the irregularity occurred in a Member State other than the UK?

22. Logfret contends that Article 10(4) cannot apply to Movement 4, the goods comprised in which are proved to have arrived at their destination, so that the Movement ended in accordance with Article 20(2). It also argues that a movement of goods can only come to an end under Article 20(2) so that the first three Movements had not (and have not) come to an end, from which it would follow that any irregularity was detected during the Movement, and Article 10(1) or (2) applies rather than Article 10(4), and excise duty would be due, if at all, in another Member State and not in the UK.

23. As regards the second paragraph of Article 10(4) Logfret's case is that this paragraph allows one month to show that the goods have arrived at their destination, and does not require the person in question to show that the goods arrived there within the four month period. It also says that there is no limit to the kind of evidence that can be used for this purpose. It does not have to be evidence emanating from, or endorsed by, the relevant fiscal authorities of another Member State.

24. As for Article 10(5), the First Tier Tribunal concluded on the evidence that an irregularity occurred as regards Movement 3 in France. Logfret argues that, because the information and material which led the FTT to this conclusion was in the possession of HMRC before the end of the three year period, therefore it is to be treated as having been ascertained within that period that the irregularity did occur in France, and Article 10(5) applies accordingly.

25. The FTT (Judge Peter Kempster and Mr Terence Baylis) accepted Logfret's arguments in relation to Article 10(4). They held that this Article does not mean that non-delivery within four months constituted an irregularity: paragraphs 133-4. It followed, among other things, that Article 10(4) and the equivalent regulation did not apply to Movement 4: paragraphs 141 to 146. They held that a movement continued until it came to an end in accordance with Article 20(2), so that detection of an irregularity at any time up to and including, but not after, the moment of receipt would constitute detection during a movement for the purposes of Article 10(2) and (4). They also considered the facts as regards Movements 3 and 4 and concluded that irregularities occurred in France as regards both Movements: paragraphs 147 to 156. They did not deal with any point arising under Article 10(5). Their decision is at [2017] UKFTT 0484 (TC).

26. On HMRC's appeal to the Upper Tribunal, the UT (Mr Justice Morgan and Judge Jonathan Richards) held that Article 10(4) has the effect that if goods have not arrived within four months there is a deemed irregularity, such that liability arises in the Member State of dispatch unless, by the end of the four months, it can be shown where the irregularity occurred, in which case Article 10(1) applies. They also held that the second paragraph of Article 10(4) gives the person in the position of Logfret one month in which to show that which the first paragraph refers to, that is to say that the movement had ended in accordance with Article 20(2) within the four month period, or the place where the irregularity had occurred. As regards the nature of the evidence which can be relied on to show that the goods have arrived at their destination, for the purposes of the second paragraph of Article 10(4), the UT held that it must be evidence that has been endorsed by a relevant tax authority in a Member State. As regards Article 10(5) the UT said that the conclusions of the FTT that irregularities occurred in France could not cause the paragraph to apply since it was reached and expressed well after the end of the three year period. Their decision is at [2018] UKUT 0422 (TCC).

27. On the appeal to this court, Mr Bedenham for Logfret (who had not appeared below) argued that the UT was wrong on all these points. He contended that Article 10(4) cannot apply if the goods have in fact arrived at their destination, even if more than four months after dispatch, that a movement only comes to an end under Article 20(2) so that any detection of an irregularity before that date is a detection during a movement, that under the second paragraph of Article 10(4) it is sufficient to show that the goods have reached their destination by the end of the extra month, and that there is no limit to the evidence that may be used to show such arrival. He also argued that because HMRC was in possession of evidence which showed that an irregularity occurred in France within the three years relevant under Article 10(5), then that had been ascertained within the specified time.

When does a movement of goods under a duty suspension arrangement come to an end?

28. This question lies at the heart of some of the present issues. Article 20(2) shows that it shall end in the relevant case where the consignee has taken delivery of the excise

goods. However, in a typical case of diversion of the goods (of which Movements 1, 2 and 3 seem to be examples) the goods never do reach the consignee, so the end of the movement provided for in that Article will not occur. Can it follow that the movement continues indefinitely? That idea seems nonsensical. Article 7(2)(a) provides that excise goods are released for consumption when they depart from a duty suspension arrangement, including on an irregular departure. A regular departure following a movement will occur after delivery to the consignee. An irregular departure is likely to prevent the goods ever reaching the consignee, and will give rise to an immediate charge to excise duty under Article 7(1). Surely, if goods have departed from a movement under a duty suspension arrangement, the movement cannot be treated as still continuing? Article 7 does not deal only with goods that are being or have been moved under a duty suspension arrangement. In Article 7(3) which does relate to goods moving under such an arrangement, it deals with cases of regularity not irregularity. But it seems to me that where all the excise goods comprised in a particular movement have departed irregularly from that movement, for example by being improperly removed from the relevant means of transport, that movement cannot be treated as still continuing. The goods will never reach the intended destination, so Article 20(2) will never be satisfied, but the movement has, and must be treated as having, come to an end, at the moment of the departure of the goods from the duty suspension arrangement, which is also the moment at which duty becomes chargeable. I agree with paragraph 44 of the UT's decision on this point.

29. Mr Bedenham showed us paragraph (23) of the Preamble to the Directive:

> "In order to ensure the proper functioning of the rules relating to movement under suspension of excise duty, the conditions for the start of the movement as well as the end, and the discharge of responsibilities, should be clarified."

30. He argued that Article 20 should be taken as intended to achieve the clarity of which the paragraph speaks, and should therefore be treated as comprehensive in defining both the beginning and the end of a movement. It should not be legitimate to look to any other provision of the Directive to identify the moment at which a movement comes to an end. As to that, the Article does define the beginning and end of a movement if all goes as it should. But manifestly it does not deal with the case of an irregularity, at any rate not one which results in the release of the goods for consumption. For that one has to refer to the provisions which do deal with such a situation, and they are to be found in Article 7. Moreover, the provisions of Article 10(6), which show what is meant by irregularity in that Article, provide for the case of a movement coming to an end otherwise than under Article 20(2). The phrase "a situation occurring during a movement of excise goods under a duty suspension arrangement … due to which a movement, or part of a movement, of excise goods has not ended in accordance with Article 20(2)" does not refer to a case where the movement of the goods has not come to an end at all, but to one where it has come to an end otherwise than in accordance with Article 20(2).

Detection of an irregularity during a movement of excise goods

31. Another important question is this: what is meant by the phrase in Article 10(2) "where an irregularity has been detected during a movement of excise goods under a duty suspension arrangement giving rise to their release for consumption"? Such an

irregularity means a departure of the goods from the duty suspension arrangement: see Article 7(2)(a). For reasons just explained, this brings the movement to an end as regards the goods so departing. In what circumstances could that irregularity be detected during the course of the movement? The course of the movement does no doubt include the moment at which the movement ends, so that if the diversion of the goods were detected while it was happening this could be a detection during the course of the movement. In any other circumstances, the detection must occur after the irregularity has occurred, and therefore after the movement has come to an end at least as regards the particular goods, but often as regards the entire consignment. Article 10(2) itself shows that this must have been envisaged and provided for, because it speaks of an irregularity having been detected during a movement but of it being impossible to determine where the irregularity occurred. Thus it is manifestly not concerned with the case where the irregularity is detected as it is happening, the guilty persons being caught red-handed, and it must include the case of detection after the event, by which time at least some, and in many cases all, of the goods have gone.

32. In my judgment the correct interpretation of this phrase, as was contended for by Miss Simor Q.C. for HMRC, is that the irregularity has to occur during the movement, which may include the case where it is the irregularity that brings the movement to an end, but the detection may occur later. Otherwise the circumstances provided for in Article 10(2) could never occur. The same applies to the similar words in Article 10(4). That is supported by the wording of paragraph (11) of the Preamble, cited above (paragraph 15).

Article 10(4): is there a four month limit on the movement of goods?

33. On that basis, I turn to Article 10(4) and first to the question whether it is sufficient to show that the goods have arrived, albeit outside the four month period. The opening words "Where excise goods moving under a duty suspension arrangement have not arrived at their destination" support the construction favoured by the FTT and argued for by Logfret. However, as the UT pointed out, the Article also expressly contemplates that evidence may be produced, either under the first or the second paragraph, to show that the goods have in fact reached their destination so that the movement has ended as provided for by Article 20(2), having been received by the consignee within the four month period. It must follow that it is not sufficient to show that they have arrived at the specified destination outside the four month period.

34. It is also relevant, though not decisive, that the consignor has to state the expected journey time when supplying the information which is to go into the EAD, and that this must not exceed a given number of days. At the time of the Movements in issue the maximum was 92 days, i.e. three months. The time limit has since then been reduced to between 15 and 45 days depending on the means of transport to be used for the journey. The estimate given in each of the four cases with which we are concerned was 5 days. The 92 day limit does not bind the consignor to achieve the delivery within that period but it does illustrate the timescale that was envisaged. The journey could have been expected to take up to three months to complete, leaving another month within which to ensure that the delivery and receipt was properly documented on the EMCS.

35. In my judgment, the UT was correct to interpret the Article as referring to a case in which the goods do not appear to have arrived within the four months. The correct reading of the first paragraph of Article 10(4) is that if, by the end of the four month

period, (a) goods moving under a duty suspension arrangement have not been recorded on EMCS as having been received by the consignee, and (b) no irregularity occurring during the course of the movement, such as amounts to a departure of the goods from the duty suspension arrangement, has been detected, then an irregularity is deemed to have occurred in the Member State of dispatch and at the time of dispatch, unless satisfactory evidence is provided either that the goods were in fact received by the consignee within the due time, or, if not, of the place where the actual irregularity occurred. In the former case, by the end of the four months it will have been shown that there was in fact no relevant irregularity. In the latter it will have been shown that there was an irregularity, what it was and where it occurred, so that Article 10(1) will apply and will determine in which Member State duty is chargeable. No other reading allows the whole of the paragraph to make sense.

36. On this basis, it is irrelevant to show that the goods were received by the consignee more than four months after dispatch, as can be shown, from the report of receipt registered on EMCS, in respect of Movement 4. Long before that, an irregularity was deemed to have occurred by virtue of the Article, and to have occurred in the UK, as the Member State of dispatch, on the date of such dispatch.

37. Mr Bedenham also relied on regulation 81(4) of the HMDP Regulations in support of his argument that UK duty was not chargeable in respect of Movement 4 because the Movement had been completed in accordance with Article 20(2). Regulation 80, headed "Irregularity occurring or detected in the United Kingdom", deals with the subject matter of Article 10(1) and (2). Regulation 81 is as follows:

> "81.—Failure of excise goods to arrive at their destination
>
> (1) This regulation applies where—
>
> (a) there is a movement of excise goods under a duty suspension arrangement;
>
> (b) the movement starts in the United Kingdom;
>
> (c) the movement is not discharged by the arrival of the goods at their stated destination; and
>
> (d) no irregularity is detected in the course of the movement.
>
> (2) Where this regulation applies an irregularity shall be deemed to have occurred, and the goods accordingly released for consumption, in the United Kingdom at the time when the movement started.
>
> (3) Paragraph (2) does not apply if, within four months of the start of the movement, the person ("P")—
>
> (a) who guaranteed payment of the duty in accordance with regulation 39; or
>
> (b) where no guarantee was required, the consignor of the goods,
>
> satisfies the Commissioners that—
>
> (a) the goods have arrived at their stated destination; or

(b) there has been an irregularity in another Member State.

(4) If, at the time P is informed by the Commissioners that the excise goods have not arrived at their stated destination, P does not know, or could not reasonably have known, that the goods have not so arrived, P may, no later than one month after that time, provide evidence to satisfy the Commissioners that—

(a) the goods have arrived at their stated destination; or

(b) there has been an irregularity in another Member State.

(5) Where the Commissioners are satisfied with any evidence provided in accordance with paragraph (4), paragraph (2) does not apply."

38. Mr Bedenham argued that the regulation, even more clearly than the Article, fails to require that the goods must arrive within four months of dispatch, and therefore supports the contention that the extra month afforded to the guarantor who was not aware of the non-delivery must be read as allowing him time to ensure that the goods are delivered within the month. He also relied on the regulation on the issue about the range of possible evidence. On the first point, whether there is, in effect, a four month time limit for delivery, it seems to me that the same point is true of the regulation as of the Article, namely that both speak of the goods not having arrived at their destination, but they allow the person who would otherwise be liable for the duty to show, within the four month period (or within the extra month for a guarantor such as Logfret), that the goods have arrived at their destination. That point is fatal to the contention that it is sufficient to show, in the case of Movement 4, that the goods were eventually shown as having arrived on the EMCS. Under the regulation, just as under the Article, that fact is irrelevant, the recorded arrival being well after the end of the four month period.

What evidence may be relevant under Article 10(4)?

39. The first paragraph of Article 10(4) also gives rise to the question what form of evidence can be relevant. Evidence may be used to prove one of two different things: one is that the goods were in fact received by the consignee, which ought to be shown by a report of receipt submitted through the EMCS. The other is of the place where an irregularity occurred, which would not be recorded through the EMCS and would require quite different evidence. The relevance of this is that, when Logfret was told that the Movements had not been shown on EMCS as having been received at the destination warehouse, it gathered together and sent to HMRC such documentary material as it had, including CMR paperwork from the transport of the goods, which it said showed that the goods had been correctly carried to their destination and, together with the absence of any complaint of non-delivery by the consignee, might be taken as showing that all had been done properly as it should have been, apart from the failure of the consignee to file a report of receipt through EMCS.

40. We do not have to decide what sort of evidence could be used to show where an irregularity had occurred. That might well be or include material which had not been endorsed by a tax authority, such as documents of the kind that were put before the FTT and led that tribunal to conclude that irregularities in relation to Movements 3 and 4 occurred in France. When considering what evidence can be relevant for showing that the movement did end on receipt by the consignee, as provided for in Article 20(2), it

is necessary to remember that Article 10(4) is not only concerned with evidence to be used for that purpose.

41. Later Articles are relevant on the question of evidence of receipt by the consignee. Article 27 deals with instances where the EMCS is not available at a relevant time. Article 28 then provides as follows:

> "1. Notwithstanding Article 27, the report of receipt provided for in Article 24(1) or the report of export provided for in Article 25(1) shall constitute proof that a movement of excise goods has ended, in accordance with Article 20(2).
>
> 2. By way of derogation from paragraph 1, in the absence of the report of receipt or the report of export for reasons other than those mentioned in Article 27, alternative proof of the end of a movement of excise goods under a duty suspension arrangement may be provided, in the cases referred to in Article 17(1)(a)(i), (ii) and (iv), Article 17(1)(b) and Article 17(2), through an endorsement by the competent authorities of the Member State of destination, based on appropriate evidence, that the excise goods dispatched have reached their stated destination or, in the case referred to in Article 17(1)(a)(iii), through an endorsement by the competent authorities of the Member State in which the customs office of exit is located, certifying that the excise goods have left the territory of the Community.
>
> A document submitted by the consignee containing the same data as the report of receipt or the report of export shall constitute appropriate evidence for the purposes of the first subparagraph.
>
> Where appropriate evidence has been accepted by the competent authorities of the Member State of dispatch, it shall end the movement in the computerised system."

42. The UT held, by reference to this Article, that evidence to show, for the purposes of Article 10(4), that goods had been received by the consignee so that the movement had ended under Article 20(2) must have been endorsed by a relevant tax authority in a Member State. Mr Bedenham submitted that, if Article 10(4) had been intended to be limited to such evidence, it could have said so by making reference to Article 28. That submission fails to take account of the entirely different nature of the evidence that would be required to show where an irregularity had occurred, also for the purposes of Article 10(4). Given that evidence may be needed for one or other of two very different purposes, the use of the general wording "evidence is provided to the satisfaction of the competent authorities of the Member State of dispatch", and the omission of any reference to Article 28, is understandable and natural.

43. On this point Mr Bedenham also relied on the wording of regulation 81(4) of the HMDP Regulations, which provide that the person in the position of Logfret "may … provide evidence to satisfy the Commissioners" of the arrival of the goods at their stated destination or of an irregularity having occurred in another Member State. The equivalent passage in Regulation 81(3), dealing with the position of the person primarily liable for the duty, is even more brief and open: "satisfies the

Commissioners". The equivalent to Article 28 is regulation 49. Regulation 49(3) provides that a report of receipt (on the EMCS) is proof that the movement of goods referred to in the report has ended, as in Article 28(1). Regulation 49(4) refers, without prejudice to 49(3), to an endorsement by the relevant authorities of the destination Member State to the effect that the goods have arrived as constituting proof that the movement of those goods has ended. So this is the equivalent of Article 28(2). These two regulations together are clearly intended to implement Articles 28 and 10(4) in UK law. They must therefore be construed together with and in the light of the Directive, as the UT said in paragraph 112 of their decision.

44. Mr Bedenham contended, as had been argued below, that it was unreasonable and unrealistic to suggest that it would be open to someone such as Logfret to obtain a document endorsed by a relevant foreign tax authority at all, let alone within the short timescale that is applicable under Article 10(4). The UT recognised the force of this as a practical matter, but held that to allow the use of commercial documents or statements from individuals involved in the relevant transport, for example, would subvert the benefits of the computerised system, and should therefore not be taken as acceptable for this purpose, however relevant such material might be in seeking to show where a particular irregularity had occurred.

45. It seems to me that the UT was correct in this conclusion. They referred at paragraph 107 to paragraphs 20 and 21 of the preamble to the Directive, of which paragraph 21 is particularly relevant:

> "(21) For that purpose, it is appropriate to use the computerised system established by Decision No 1152/2003/EC of the European Parliament and of the Council of 16 June 2003 on computerising the movement and surveillance of excisable products. Use of that system, as opposed to a paper-based system, accelerates the necessary formalities and facilitates the monitoring of movement of excise goods under suspension of excise duty."

46. I agree with the UT that the system should not accept the possibility of proof of receipt of goods so as to satisfy Article 20(2) except by either a report of receipt through the EMCS or a document endorsed by the relevant tax authority. Since proof of the receipt of the goods has the consequence of recognising that the relevant goods have come within the territory of the competent authority of the Member State of receipt, it is logical that that authority should be required to be involved in confirmation of the receipt, as it would be if a report of receipt were filed by the consignee on EMCS.

47. As Mr Bedenham submitted, the wording of the regulation is more open than that of the Directive on this point, but given the context of the regulation of inter-State movements of excise goods, it seems to me clear that the national legislation by which the Directive is implemented in UK law must be construed so as to have the same effect as the relevant provisions of the Directive, in areas (such as this) in which the Directive does not afford to the national legislation a degree of freedom.

48. Accordingly, I would interpret regulation 81, taken with regulation 49, in the same way as Article 10(4), taken with Article 28.

What does the extra month allow a guarantor to show?

49. The question which arises on the second paragraph of Article 10(4) is what is allowed for in the extra month which is afforded to a party such as Logfret, which guaranteed the payment of the duty but has not been informed that the goods had not arrived at their destination. A guarantor in that position is granted a period of a month from being told, by the competent authorities of the Member State of dispatch, of the goods not having arrived. This is to enable him to provide evidence either of the end of the movement in accordance with Article 20(2) or of the place where the irregularity occurred, that is to say of the same things as are allowed for in the first paragraph. In the latter context the evidence has to be provided within the four months, so that the end of the movement must necessarily have occurred by the end of the four month period. The question is whether, if the guarantor seeks to show that the movement has ended in accordance with Article 20(2), it must be shown to have happened by the end of the four month period, or can it be shown to have happened by the end of the extra month. The question is hypothetical in the present case, on the basis of the conclusion expressed above as to the evidence by which it would have to be shown to have happened, since Logfret was not able to produce such evidence in respect of Movement 3 in any event, and although Movement 4 had ended in accordance with Article 20(2), that had occurred long after the end of the four month period.

50. Before the 2008 Directive came into operation excise duty issues were governed by Directive 92/12/EEC. That Directive did not contain any provision equivalent to the second paragraph of Article 10(4). Therefore, on the face of it, a guarantor might be liable for duty arising in circumstances of which he did not know and could not have known. In Case C-395/00, *Cipriani* [2002] ECR I-11877, the European Court of Justice held that this violated the guarantor's right of defence, and that accordingly the guarantor could not be made liable in such circumstances. That accounts for the introduction of the new provision in the second paragraph of Article 10(4).

51. The UT concluded that what the guarantor is allowed to show by the second paragraph, at any rate as regards the end of the movement, must be the same as is provided for in the first paragraph, namely that the goods did arrive at their destination within the four months. For Logfret Mr Bedenham submitted that this allows the guarantor hardly any scope for the exercise of a right of defence, and that it would be far more reasonable and fair to read the paragraph as allowing the guarantor a month in which not only to investigate the position but also to do something about it, and in particular to ensure that the goods did in fact arrive at the intended destination. In practice that seems rather speculative, since if the goods have not arrived by four months after their dispatch, it is almost certain that they have already been diverted or have miscarried in such a way that they cannot realistically be recovered. It may therefore be more likely that what the guarantor may be able to show is where the irregularity occurred, though even to do that may not be at all easy, within one month, if the irregularity is caused by fraud rather than by some accident.

52. I agree with the UT's conclusion expressed at paragraphs 94 to 97 of their decision, on the basis that consistency of reading and scope between the first and second paragraphs of Article 10(4) is the overriding factor. The guarantor, as such, is not responsible for seeing that the movement takes place as it should. Rather, it takes financial responsibility for the consequences if it does not take place correctly. There is no reason to suppose that it was envisaged that the guarantor would or should be in a position to

do anything other than investigate what had happened. That is what the second paragraph of Article 10(4) allows for.

Does Article 10(5) apply to Movements 3 and 4?

53. That then brings me to the last question, arising on Movements 3 and 4, as to the application of Article 10(5) which, if it were to apply as Logfret contends, might result in duty being chargeable in France rather than in the UK. I have outlined the relevant facts at paragraphs 10 to 13 above.

54. Logfret's contention before us on this point in its Grounds of Appeal was that the UT was wrong to conclude that the FTT's findings that irregularities occurred in France did not vitiate an assessment under Article 10(4) or require it to be unwound, given that the evidence on which the FTT based its finding was available to HMRC within the three year period and, as such, it was ascertained within that period that the irregularities did occur in France.

55. The FTT did conclude on the evidence that there had been an irregularity in each Movement and, on the balance of probabilities, that the irregularity occurred in France in each case: paragraphs 155 and 156. The forged stamps were found in France and the tribunal held that it was reasonable to assume in each case that the stamp was applied to the CMR in France. If they had not been able to reach a conclusion as to where the irregularity took place, they would have held that it was at least detected in France, on discovery of the forged stamps. The place of detection is relevant to Article 10(2) but not to Article 10(4) or (5).

56. The information about the forged Ess Key stamps was in the possession of HMRC no later than 7 March 2016 when the Belgian authorities told HMRC of this formally in response to a request for assistance (EMA: Excise Mutual Assistance request). This was within the period of three years from the date of dispatch on 10 June 2013 which is relevant under Article 10(5). That is the basis on which Mr Bedenham argued that the information which was sufficient for the FTT to conclude that the irregularity took place in France was in the possession of HMRC within the prescribed period, from which he submitted that the location of the irregularity should be treated as having been ascertained before the end of that period.

57. It does not seem that Logfret's case before the FTT had involved the proposition that it had been ascertained within the three year period that the irregularities on these two Movements occurred in France. There is no indication in the FTT's decision that this was one of the contentions in issue before them. It is not mentioned in their summary of Logfret's contentions at paragraphs 77 to 91. At paragraph 86 they refer to the argument that any irregularity in Movements 3 and 4 occurred outside the UK, but that point was made under Article 10(1), not under Article 10(4) or (5). Conversely, HMRC is recorded at paragraphs 105 and 106 as relying, among other things, on the absence of any evidence that there had been any excise duty assessment by any other Member State.

58. Accordingly, the FTT investigated the question where the irregularities occurred or were detected, in relation to Movement 3, because of their finding that the Movement was still continuing, not having come to an end under Article 20(2), so that the occurrence of, or detection of, irregularities in France could be relevant under Article

10(1) or (2) as the case might be, not because Article 10(5) might apply. They considered the same in relation to Movement 4 despite their decision that Article 10(4) did not apply, in case a different view was reached on appeal. Article 10(5) was not said to be relevant in that case either. The FTT did not mention Article 10(5) in this part of their decision.

59. Logfret had relied on one contention before the FTT to which the time of HMRC's knowledge of relevant matters was pertinent, namely that the assessments had been made too late. That argument was rejected and was not raised again on the appeal to the UT.

60. Before the UT, HMRC challenged the FTT's finding that an irregularity occurred in France on *Edwards v Bairstow* grounds. The UT did not need to consider that ground of appeal, given their conclusions on the other points arising: paragraph 119. On their interpretation of Article 10(4), Article 10(5) could be relevant but there is no indication in their decision that the point was argued before them at all, let alone on the basis now relied on by Mr Bedenham. The UT said that they did not need to consider the issue, on the basis that the FTT's findings of fact did not suggest that Article 10(5) applied, and the fact that the FTT had itself come to conclusions as to where the irregularities took place was not relevant as this happened after the end of the three year period: paragraph 119.

61. If Logfret had argued on its appeal against the assessments to the FTT that the place where relevant irregularities occurred had been ascertained within three years of the dispatch of the goods, it would have been necessary to consider both the relevant facts and the proper interpretation of the phrase "it is ascertained". The Article provides that the information is to be passed by the competent authorities of the Member State in which the irregularity occurred to those in the Member State in which the duty had been levied. This indicates that the ascertainment may be on the part of the competent authorities in the former Member State. The Article then provides that, once evidence of the levying of excise duty in the Member State where the irregularity occurred has been provided, then the duty levied in the other Member State is to be reimbursed or remitted.

62. That led Ms Simor to contend that the Article does not apply unless there is evidence that duty has been levied in another Member State (in this case, in France), because the point of the Article is to prevent a double charge to excise duty. Absent such evidence, she argued, there is no occasion for the Article to be applied.

63. She pointed out that the Article uses the phrase "it is ascertained", not "it is or could be ascertained", and she also referred to the provisions of Article 82 in the HMDP Regulations. This is as follows:

> "82 Repayment of excise duty
>
> (1) This regulation applies where—
>
> (a) an irregularity is deemed to have occurred in the United Kingdom in accordance with regulation 80(3) or 81(2);

> (b) within three years of the start of the movement the Commissioners ascertain that the irregularity actually occurred in another Member State; and
>
> (c) either duty in relation to that irregularity has been paid in the Member State where the irregularity actually occurred or no duty was due under the laws of that Member State.
>
> (2) Where this regulation applies, the person who paid the duty at the excise duty point is entitled to claim a repayment of that duty from the Commissioners."

64. Paragraph (1)(b) supports her argument that what needs to be shown is that HMRC ascertain the location of the irregularity, *i.e.* a subjective test, which would not be satisfied by concluding that they had the information from which they might have come to a given conclusion if they had not done so in fact. Paragraph (1)(c) in turn supports the argument that the provision does not apply unless there is evidence that excise duty has been levied in another Member State (or that under the laws of that other State no duty was leviable in the given circumstances).

65. In the light of these provisions, if the point had been raised before the FTT it would have been relevant to consider the state of knowledge of HMRC on the point. This might therefore have affected the evidence which HMRC chose to adduce before the FTT as the tribunal of fact and, more generally, the way in which the hearing before the FTT was conducted. That being so, it would be wrong to allow Logfret to raise this point for the first time at this stage, on a second appeal. It would offend against the long established principle that a new point will not be allowed to be raised on appeal if, had it been raised at the trial, the trial would or might have been conducted differently as regards the evidence adduced. A recent example of the application of this principle is *Singh v Dass* [2019] EWCA Civ 360, where the point is stated by Haddon-Cave LJ at paragraph 17. He drew support from a decision *Mullarkey v Broad*, [2009] EWCA Civ 2, in which I gave the principal judgment, with which Pill LJ and Moses LJ agreed. In my judgment I observed that the grant of permission to appeal on a given ground of appeal does not, by itself, allow a new point to be taken despite this principle: paragraph 29. I also said, at paragraph 49, that a party who seeks to advance a new case in circumstances of this kind bears a heavy burden of showing that the case could not have been conducted differently, in any material respect, as regards the evidence.

66. Because the point had not been raised before it, nothing that the FTT said in its decision was directed to the issues that might arise under Article 10(5), and what the UT said at paragraph 119 of their decision was, rightly and inevitably, expressed as unnecessary to their decision. It seems to me clear that Logfret could not discharge the burden of showing that, if the point under Article 10(5) had been taken as a ground of appeal before the FTT, the case would not, or might not, have been conducted differently in any material respect as regards the evidence. I would therefore dismiss this ground of the appeal on the basis that the point is not open to Logfret, not having been raised at the proper time on the appeal to the FTT. That being so, it is unnecessary to express any concluded view on any point that might arise on the true construction and effect of Article 10(5) or regulation 82.

Conclusion

67. I therefore hold as follows:

(i) A deemed irregularity occurs if goods moving under a duty suspension arrangement are not shown (on the EMCS) to have arrived at the specified destination by the end of the period of four months from the date of dispatch, unless it can be shown that the goods did in fact arrive within that time, whether that is shown under the first or the second paragraph of Article 10(4). It is therefore irrelevant to show that Movement 4 was eventually the subject of a report of receipt through the EMCS, well after the end of the four month period.

(ii) A movement of excise goods under a duty suspension arrangement comes to an end, as regards all or any of the goods comprised in the movement, if and when those goods are released for consumption on an irregular departure from the duty suspension arrangement, for example on being delivered to a location other than the specified tax warehouse.

(iii) The phrases in Article 10(2) and (3) referring to an irregularity being detected during a movement must be understood as referring to the detection, whether during or after the movement, of an irregularity occurring during the movement. An irregularity which brings the movement to an end occurs during the movement.

(iv) Evidence to be used under the first or the second paragraph of Article 10(4) to show that goods have in fact arrived at the specific tax warehouse of destination, so that the movement has come to an end under Article 20(2), must be evidence emanating from or endorsed by the competent authorities of the Member State of destination.

(v) Under the second paragraph of Article 10(4), if the guarantor wishes to show that the movement of goods ended in accordance with Article 20(2), that must be shown to have occurred before the end of the four month period from the date of dispatch.

(vi) It is not open to Logfret to contend on this appeal that Article 10(5) applied in relation to either of Movements 3 and 4, on the basis that it had been ascertained by the end of the three year period there mentioned that the irregularity actually occurred in France, because that point was not taken before the FTT.

68. For these reasons I would dismiss Logfret's appeal.

Lady Justice Rose:

69. I agree.

Lord Justice Coulson:

70. I also agree.