# TC02742

**Appeal number: TC/2012/04305**

***EXCISE DUTY – assessment in relation to excise goods seized from the appellant – jurisdiction of the tribunal – Revenue and Customs Commissioners v Jones and Jones [2011] EWCA Civ 824 considered – application to strike out appeal – application refused***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**B AND G LIQUOR STORE LIMITED** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JONATHAN CANNAN**

**Sitting in public in Manchester on 25 April 2013**

**Mr Talwinder Patara of T S Patara and Co Chartered Accountants for the Appellant**

**Mr Richard Chapman of counsel instructed by the General Counsel and Solicitor for HM Revenue and Customs for the Respondents**

## DECISION

*Background*

1. This is an application by the respondents to strike out the appeal on the grounds either that the tribunal does not have jurisdiction to hear the appeal, alternatively that there is no reasonable prospect of the appeal succeeding.

2. The appeal is in relation to an assessment to excise duty in the sum of £28,317 made on 16 September 2011 ("the Assessment"). The Assessment was made following the seizure of a quantity of beer, wine, spirits and cider from the appellant's shop near Oldbury in the West Midlands. The Assessment was made on the basis that the goods seized had been released for consumption without payment of excise duty. On this appeal the appellant seeks to contend that the goods were in fact duty paid and had been purchased from legitimate sources.

3. Put briefly, the respondents contend that the effect of the decision of the Court of Appeal in *Revenue and Customs Commissioners v Jones and Jones [2011] EWCA Civ 824* precludes the appellant from asserting that the seized goods were duty paid. If it had wished to do so, it should have challenged the legality of the seizure in condemnation proceedings.

4. Given the nature of the application the respondents accept that I should not seek to resolve any issues of fact in this decision. In so far as there are disputes as to fact, and such disputes certainly arise, I should assume for present purposes that the appellant will establish all facts it seeks to rely on.

*Statutory Framework*

5. *The Alcoholic Liquor Duties Act 1979* provides for various rates of excise duties on alcoholic goods either imported into the UK or produced in the UK. By virtue of the *Excise Goods (Holding Movement and Duty Point) Regulations 2010* ("the 2010 Regulations") a duty point arises when excise goods are "*released for consumption in the United Kingdom*". That phrase is defined as when the goods leave a duty suspension arrangement or when they are held outside a duty suspension arrangement. The person liable to pay the duty when excise goods are released for consumption is the person holding the goods at that time.

6. Where goods are released for consumption without payment of excise duty, Regulation 88 of the 2010 Regulations provides that the goods shall be liable to forfeiture.

7. The Customs and Excise Management Act 1979 ("CEMA 1979") provides as follows:

> "*139(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer…*

…

*141(1) …where any thing has become liable to forfeiture under the customs and excise Acts -*

*(a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and*

*(b) any other thing mixed, packed or found with the things so liable,*

*shall also be liable to forfeiture.*

…

*152 The Commissioners may as they see fit –*

*… (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under [the Customs and Excise Acts]…*"

8. *Paragraph 1 Schedule 3 CEMA 1979* provides for notice of the seizure to be given in certain circumstances. *Paragraph 3 Schedule 3 CEMA 1979* then states:

"*Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners …*"

9. Where notice of a claim is given under paragraph 1, condemnation proceedings are commenced in the magistrate's court. Where no notice of claim is given *Paragraph 5 Schedule 3 CEMA 1979* provides:

"*If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with the thing in question shall be deemed to have been duly condemned as forfeited.*"

10. The assessment, review and appeals procedure in relation to the recovery of excise duty is contained in *Finance Act 1994*. In particular section 12(1A) gives the

respondents power to assess excise duty where it appears that a person is a person from whom excise duty has become due.

11. *Section 14 Finance Act 1994* makes provision for a person to require a review of a decision of HMRC under *section 152(b) CEMA* not to restore anything seized from that person. *Section 15A* provides for HMRC to offer a review of a "relevant decision" which includes the Assessment under appeal in the present appeal.

12. *Section 16 Finance Act 1994* sets out the jurisdiction of the tribunal on an appeal against the review carried out by HMRC in the present case. The decision to make the Assessment and confirm it on review is not an ancillary matter. As such the tribunal's jurisdiction is not limited to considering whether the decision of the review officer was reasonable under *section 16(4)*. The tribunal has what is called a full appellate jurisdiction under *section 16(5)*. Hence it can consider whether liability to the assessment is justified as a matter of law and if so whether or not the assessment is excessive.

13. *Section 16(6)* makes provision as to the burden of proof on an appeal. For present purposes the burden at a final hearing of the appeal would be on the appellant to satisfy the tribunal that the grounds of its appeal are established. For present purposes, as indicated above, I assume that the appellant will satisfy that burden of proof in relation to all the factual matters it seeks to rely on.

*The Appellant's Case on the Appeal*

14. The appellant carries on business as a retailer of alcoholic drinks, food and other goods from a shop near Oldbury. The principal director who runs the business is Mr C S Randhawa. He has been in involved in this type of business for some 20 years. In the years prior to 2011 HMRC had carried out two spot checks on the appellant and had been satisfied on each occasion that all goods on sale had been legitimately purchased. In late 2010 HMRC officers had stopped Mr Randhawa in his van on his way to a cash and carry and again no issues were identified.

15. On 11 February 2011 the same officer who had stopped Mr Randhawa in his van made an unannounced visit to the shop. Mr Randhawa's case is that the officers involved in the visit were abusive to him, treated him unfairly and refused him the opportunity to produce invoices in relation to the alcoholic goods on the premises. He became ill during the visit and had to lie down.

16. HMRC's case is that they discovered alcoholic goods at the shop in respect of which no excise duty had been paid. They contend that Mr Randhawa sought to conceal a store room from the officers conducting the visit. They also contend that Mr Randhawa told them that some of the goods involved had been purchased from an unidentified man. Mr Randhawa denies both these allegations and contends that the goods were purchased from legitimate sources with excise duty paid.

17. During the visit an employee telephones Mr Randhawa's son who came to the shop. By this stage HMRC had decided to seize a large amount of stock because they had formed the view that it was not duty paid. They issued a seizure information

notice ("the Notice") which was signed by Mr Randhawa's son to acknowledge receipt. There was no detailed breakdown of the goods seized. The Notice was prepared by Officer Barn and simply referred to 750 cases of beer, 400 cases of mixed wines and 260 cases of spirits of "various" brands. The Notice on its face indicates that Notice 12A was also issued by HMRC but the appellant denies this. Mr Randhawa's son was reluctant to sign the Notice because he did not know what goods had been seized. He only signed it because of a threat that otherwise "they would empty the shop". He asked for a copy of hand written sheets which had been prepared by officers during the visit detailing the goods which had been seized and was told that HMRC would send him a copy.

18. Notice 12A is headed "*What you can do if things are seized by HM Revenue and Customs*". On its face Notice 12A gives "important advice and information on what you can do following the seizure of anything (including vehicles and other goods) by HMRC". In particular it gives information as to how to challenge the lawfulness of a seizure including the time limit of 1 month to serve a written notice of claim. It emphasises the fact that if the time limit is missed the legality of the seizure is confirmed and states that if the legality of the seizure is established the person would not be able to challenge it in any subsequent request for restoration. It also gives information as to how to ask for restoration of goods which it is accepted were validly seized.

19. Notice 12A does not state that if the legality of a seizure is not challenged then the person will not be able to claim that excise duty on the goods seized was not payable for any reason or had already been paid.

20. In days following the seizure Mr Randhawa rang HMRC to find out what goods had been seized so that he could obtain the invoices that would satisfy HMRC that the goods were duty paid. He wanted to get the goods back from HMRC. Mr Randhawa will say that he was "given the run around". The hand written sheets of the goods seized which Mr Randhawa's son had been told would be sent to the appellant were not provided.

21. On 17 May 2011 Mr Barn wrote to the appellant referring to the visit on 11 February 2011. He referred to the absence of any evidence to establish the provenance of the seized goods. He also indicated that there would be no criminal prosecution arising out of the appellant's possession of the seized goods. However an assessment would be raised in the sum of £28,318.13. The letter purported to enclose a schedule showing how the assessment had been arrived at but the appellant denies that it received such a schedule. Mr Barns gave the appellant 14 days to make representations in relation to the Assessment.

22. Following the letter Mr Randhawa made further telephone calls to Mr Barn asking for details of the goods which had been seized but was unable to obtain any information.

23. On 16 September 2011 Mr Barn of HMRC wrote again to the appellant enclosing a notice of assessment and attaching the schedule referred to in his previous

letter. The letter said that if the appellant did not agree with the assessment it had three options:

(1) within 30 days to send further information which would be considered,

(2) to request an independent review,

(3) to appeal to the tribunal.

24. At this stage Mr Randhawa sought advice from Mr Patara's firm. On 7 November 2011 Mr Patara wrote to HMRC setting out some of the background. It was stated that no list of goods taken had ever been sent to the appellant and requested a copy of the hand written sheets. The letter also questioned whether the goods would be returned to the appellant if the excise duty was paid. At the same time a review was requested.

25. It was only following this letter that the appellant received the hand written sheets detailing the goods seized by HMRC. These comprise 16 pages setting out a detailed description of the goods seized.

26. The appellant seeks to establish on this appeal that the seized goods were from legitimate sources and that the Assessments are not justified. The appeal is concerned solely with the Assessment. There has been no request for restoration of the seized goods and there is therefore no appealable decision in relation to restoration.

*The Respondents' Case on the Strike Out Application*

27. The application to strike out the appeal is made pursuant to Tribunal Rule 8(2)(a), alternatively Rule 8(3)(c). These rules provide as follows:

> *"8(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal –*
>
> *(a) does not have jurisdiction in relation to the proceedings or part of them*
>
> ...
>
> *(3) The Tribunal may strike out the whole or part of the proceedings if –*
>
> …
>
> (b) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

28. Rule 8(3)(c) is the equivalent of summary judgement. In appropriate cases summary judgement can be given even where there is a factual issue but the appellant has no reasonable prospect of establishing the facts necessary to support an appeal. However that is not how the respondents put their case on this application. The respondents say that the appeal has no reasonable prospect of success because as a

matter of law the appellant cannot assert that excise duty had been paid on the seized goods.

29. The basis on which the respondents seek to make good that submission is, they say, to be found in the decision of the Court of Appeal in Jones and Jones. In that case Mr and Mrs Jones were stopped at Hull Ferry Port with a large amount of tobacco, wine and beer which was seized on the basis that is was for commercial use. The seizing officer reached that view following a detailed interview with Mr and Mrs Jones. They were informed of their rights to challenge the legality of the seizure and request restoration of the goods. Initially they challenged the legality of the seizure by serving a notice of claim pursuant to Paragraph 1 Schedule 3 CEMA 1979. They were also notified by HMRC that if they decided to withdraw from the resulting condemnation proceedings they would have to accept that the goods were legally seized, for example that they were imported for commercial use. Subsequently Mr and Mrs Jones, who had at that time instructed solicitors, withdrew from the condemnation proceedings and pursued restoration of the goods.

30. HMRC refused to restore the goods and Mr and Mrs Jones appealed to the First-tier Tribunal ("the FTT"). The FTT made findings of fact that the goods were for personal use and allowed the appeal. The Upper Tribunal upheld this decision. HMRC appealed to the Court of Appeal maintaining that the FTT was not entitled to make findings of fact inconsistent with the deemed forfeiture of the goods from which it was implicit that the goods were not for personal use.

31. Mr Chapman relies in particular on the judgment of Mummery LJ at [71] which I shall set out in full:

> *" I am in broad agreement with the main submissions of HMRC. For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.*
>
> *(1) The respondents' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UTT are statutory appellate bodies that have not been given any such original jurisdiction.*
>
> *(2) The respondents had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not for commercial use.*
>
> *(3) The respondents in fact exercised that right by giving to HMRC a notice of claim to the goods, but, on legal advice, they later decided to withdraw the notice and not to contest condemnation in the court proceedings that would otherwise have been brought by HMRC.*

*(4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned and to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.*

*(5) The deeming process limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.*

*(6) The deeming provisions in paragraph 5 and the restoration procedure are compatible with Article 1 of the First Protocol to the Convention and with Article 6, because the respondents were entitled under the 1979 Act to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods. The notice of claim procedure was initiated but not pursued by the respondents. That was the choice they had made. Their Convention rights were not infringed by the limited nature of the issues that they could raise on a subsequent appeal in the different jurisdiction of the tribunal against a refusal to restore the goods.*

*(7) I completely agree with the analysis of the domestic law jurisdiction position by Pill LJ in Gora and as approved by the Court of Appeal in Gascoyne. The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to "reality"; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion.*

*(8) The tentative obiter dicta of Buxton LJ in Gascoyne on the possible impact of the Convention on the interpretation and application of the 1979 Act procedures and the potential application of the abuse of process doctrine do not prevent this court from reaching the above conclusions. That case is not binding authority for the proposition that paragraph 5 of Schedule 3 is ineffective as*

*infringing Article 1 of the First Protocol or Article 6 where it is not an abuse to reopen the condemnation issue; nor is it binding authority for the propositions that paragraph 5 should be construed other than according to its clear terms, or that it should be disapplied judicially, or that the respondents are entitled to argue in the tribunal that the goods ought not to be condemned as forfeited.*

*(9) It is fortunate that Buxton LJ flagged up potential Convention concerns on Article 1 of the First Protocol and Article 6, which the court in Gora did not expressly address, and also considered the doctrine of abuse of process. The Convention concerns expressed in Gascoyne are allayed once it has been appreciated, with the benefit of the full argument on the 1979 Act, that there is no question of an owner of goods being deprived of them without having the legal right to have the lawfulness of seizure judicially determined one way or other by an impartial and independent court or tribunal: either through the courts on the issue of the legality of the seizure and/or through the FTT on the application of the principles of judicial review, such as reasonableness and proportionality, to the review decision of HMRC not to restore the goods to the owner.*

*(10) As for the doctrine of abuse of process, it prevents the owner from litigating a particular issue about the goods otherwise than in the allocated court, but strictly speaking it is unnecessary to have recourse to that common law doctrine in this case, because, according to its own terms, the 1979 Act itself stipulates a deemed state of affairs which the FTT had no power to contradict and the respondents were not entitled to contest. The deeming does not offend against the Convention, because it will only arise if the owner has not taken the available option of challenging the legality of the seizure in the allocated forum.*"

32. Mr Chapman submits that the present appeal is being pursued on the footing that the appellant had no opportunity to provide invoices to establish that duty had been paid on the seized goods. That, he says, goes behind the deeming provision in Schedule 3 CEMA 1979. In short, he says that the appellant's opportunity to raise such questions was in condemnation proceedings and not before the tribunal. Hence he argues that the tribunal has no jurisdiction to consider the issues being raised by the appellant and the appeal should therefore be struck out pursuant to Tribunal Rule 8(2)(a). Alternatively because the appellant has no right to raise the issue as to whether duty had been paid on the seized goods the appeal has no reasonable prospect of success and should be struck out pursuant to Tribunal Rule 8(3)(c).

*Discussion*

33. Mr Patara on behalf of the appellant said at the outset of his submissions that the appellant's case was "purely on the legality of the seizure". He said that the appellant had been objecting to the legality of the seizure from the very beginning. He also submitted that HMRC had effectively prevented the appellant from challenging the legality of the seizure.

34. I assume for present purposes that the appellant will make good its account of the seizure and its dealings with HMRC in the days and months following the seizure. Against that background it is notable that:

(1) Notice 12A was not provided to the appellant. It is this notice which sets out in detail the rights of a person who has had goods seized by HMRC, in particular the right to challenge the legality of the seizure or to request restoration of goods seized.

(2) Schedule 3 CEMA 1979 provides that a notice of claim challenging the legality of the seizure must be served within 1 month of the seizure and there is no provision to extend the time limit.

(3) The appellant was seeking to obtain a detailed schedule of the goods seized in order to establish that the goods had been obtained from legitimate duty paid sources.

35. Mr Chapman submits that all the facts and matters raised by the appellant go to the legality of the seizure, in particular whether or not duty had been paid on the goods. There is force in his submission that Jones and Jones establishes that the appellant can only challenge the legality of a seizure in condemnation proceedings and that the appellant is therefore bound to lose its appeal..

36. I had cause to deal with a similar issue in the case of *Peter Taylor v Commissioners for HM Revenue and Customs [2012] UKFTT 588 (TC)*. That case concerned a back duty assessment following the seizure and restoration of a tractor found to be using red diesel. Mr Taylor contended that the vehicle was an excepted vehicle and there was no power to make the assessment. HMRC contended that Jones and Jones applied and because Mr Taylor had not challenged the legality of the seizure he could not argue before the tribunal that the vehicle was an excepted vehicle.

37. I found that Mr Taylor was not challenging the seizure or the terms on which the vehicle had been restored to him. He could not have done so because of the deeming effect of Schedule 3 CEMA 1979. However, whilst the deeming provision meant that the vehicle was deemed to have been lawfully seized on the date of seizure, it did not have the same effect for the period of 3 years prior to the date of the seizure. At [51] I said this:

> " *The position can be contrasted with an individual unlawfully importing tobacco and alcohol for commercial use. The question of restoration which comes before the FTT in that context is concerned only with goods or vehicles seized at a particular time. The tribunal cannot go behind the deemed forfeiture because it is implicit that those particular goods on the occasion of the particular importation were intended for commercial use.*"

38. I referred in that paragraph to the question of restoration coming before the tribunal. That was the position in Jones and Jones. The question to be answered on the present application is whether Jones and Jones operates in the same way in the context of an assessment to duty on the specific goods which have been seized. The issues

which arose in the case of Peter Taylor do not arise on the present application. They would only have arisen if in that case HMRC had been seeking to assess duty on red diesel actually in the tank of the vehicle at the time of seizure.

39. I have to consider on this application whether in the present circumstances the appellant is subject to the deeming provision in Schedule 3 CEMA 1979 in the same way as the Court of Appeal held that Mr and Mrs Jones were bound by the deeming provision.

40. I acknowledge that the Court of Appeal held that this tribunal must take it that the goods had been duly condemned as illegal imports. Further, that deeming something to be the case carries with it any fact that forms part of the conclusion. On that basis the tribunal must take it as a fact that no excise duty had been paid on the seized goods.

41. It does strike me however that there may situations where a breach of Convention rights under the European Convention on Human Rights leads to a different conclusion. In particular if the circumstances are such that there would be a breach of the requirement for procedural fairness implicit in Article 1 of the First Protocol.

42. Article 1 provides as follows:

*Article 1*

> " *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*"

43. Article 1 does not on its face refer to any procedural requirements. However in *Jokela v Finland (2003) 37 EHRR 26* the European Court of Human Rights considered that procedural safeguards were implicit in Article 1. At [45] it said:

> "*45. Although Article 1 of Protocol No. 1 contains no explicit procedural requirements, the proceedings at issue must also afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures (see, for example, AGOSI v. the United Kingdom, judgment of 24 October 1986, Series A no. 108, p. 19, § 55, and Hentrich v. France, judgment of 22 September 1994, Series A no. 296-A, p. 21, § 49).*"

44. Factually, on the basis of the appellant's case, this appeal is very different to Jones and Jones. The procedural safeguards in place in the case of the tobacco and alcohol seized on the importation from Mr and Mrs Jones included the issuing of Notice 12A informing them of their rights to challenge the legality of the seizure. Mr and Mrs Jones were also expressly advised by HMRC that if they withdrew from the condemnation proceedings which had been commenced they would have to accept that the goods were legally seized.

45. In Jones and Jones, Mummery LJ considered at [71(6)] that the condemnation proceedings and deeming provisions in Schedule 3 CEMA 1979 were compliant with the Convention. Arguably however that finding cannot be viewed outside the context to which he specifically referred, namely that Mr and Mrs Jones had initiated but not pursued condemnation proceedings. Nor can it be viewed outside the context that Mr and Mrs Jones had clearly been made fully aware of their rights in Notice 12A. It was against that background that the Court of Appeal found that their Convention rights had not been infringed.

46. If the appellant in the present case makes good its factual case, it had been trying immediately following the seizure to obtain information necessary for it to challenge the seizure but this had not been provided by HMRC. It had not received Notice 12A and it had not been advised by HMRC that there was a time limit of 1 month for the bringing of condemnation proceedings which could not be extended. It had not been informed that if it did not pursue condemnation proceedings then the grounds on which it could resist an assessment to excise duty on the seized goods would be severely limited.

47. In my view it is arguable that on those facts there would be a procedural unfairness and possible infringement of the appellant's Convention rights under Article 1 if it is not entitled to put its case that the goods were duty paid.

48. Mr Patara did not oppose the application to strike out with specific reference to the appellant's Convention rights. He is not a lawyer and one would not necessarily expect him to do so. However the underlying issue raised by the appellant appears to be one of procedural unfairness. I am conscious that Mr Chapman has not had an opportunity to address me in relation to these arguments. However this is an application to strike out and it might be said that it raises a novel point. I do not consider that it would be appropriate for me to decide the underlying issue without hearing the evidence, together with full argument in the light of that evidence.

49. I consider that in the particular circumstances of this case it is arguable that the appellant is entitled to contend that excise duty had been paid on the seized goods. The reason being that if the appellant were to be denied that opportunity its Convention rights may have been infringed. At this stage of the proceedings I do not consider that it can be said that the appellant has no reasonable prospect of succeeding in the appeal. In those circumstances I have come to the conclusion that the appeal should not be struck out.

50. It is not appropriate for me to give any indication as to the strength of the appellant's case in this regard, beyond saying that it is at least arguable. Nor indeed should this decision be taken as indicating any view at all on the likelihood that the appellant will make out its factual case when the evidence is tested at a final hearing.

51. I invite the parties to agree directions for the further conduct of the appeal. In default of agreement each party shall serve on the tribunal within 28 days from the release of this decision the draft directions which it considers appropriate.

52. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JONATHAN CANNAN**
**TRIBUNAL JUDGE**

**RELEASE DATE: 7 June 2013**