

EXCISE DUTY – Restoration of car – Decision not to restore to 3<sup>rd</sup> party owner car deliberately used for commercial smuggling – Reasonable to conclude that owner knew of that use – Appeal dismissed

LONDON TRIBUNAL  
CENTRE

Appellant

RITA HEGARTY

- and -

THE COMMISSIONERS OF  
CUSTOMS AND EXCISE Respondents

Tribunal: STEPHEN OLIVER QC (Chairman)

LEON WILKINSON FCIB

SHEILA WONG CHONG FRICS

Sitting in public in London on 20 May 2002

Michael Edmonds, counsel, for the Appellant

Aidan Robertson, counsel, instructed by the Solicitor for the Customs and Excise,  
for the Respondents

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## DECISION

1. Rita Hegarty appeals against a decision of the Commissioners not to offer for restoration a Ford Scorpio motor car (N Reg). The car had been seized by the Commissioners on 11 April 2001. The Commissioners failed to conduct their review of the original decision not to restore the car. Consequently the decision appealed against is a deemed review decision.

The facts

2. The primary facts leading up to the seizure are not in dispute.

3. On 11 April 2001 officers of the UK Control Zone in Coquelles, France, stopped Rita Hegarty's car. Its occupants were Mr Michael Hegarty (her husband), Tracey Hegarty (her daughter) and two grandchildren.

4. In response to initial questions it was established that the occupants had been to Calais and Belgium "to buy some beer and shopping". Mr Hegarty told the officer that he had purchased "8 cartons of Benson and Hedges and 8 cartons of Superkings" (i.e. 3,200 cigarettes). Mr Hegarty then handed the officer the receipts, which tallied with the goods declared. Mr Hegarty stated that he had not

bought any hand-rolling tobacco. He stated that the car belonged to his wife. The officer was shown the 16 cartons of cigarettes declared by Michael Hegarty.

5. On opening the rear door of the car, the officer noticed that the two grandchildren were sitting on a green blanket. The officer found black bin bags containing 100 50gram pouches of tobacco under the green blanket. When asked, Mr Hegarty said that there were a total of 300 pouches. His reason for them being under the blanket was that there was "No room in the boot, I just put it there for them to lie on".

6. The rear seat area was then searched resulting in the discovery of a box of 5000 Benson and Hedges cigarettes and a black bin liner containing tobacco. These goods were found behind the passenger seat.

7. When asked, Michael Hegarty handed the officer receipts for 440 pouches of tobacco and 25 cartons of cigarettes. When asked why he had not declared the excise goods, Mr Hegarty replied – "Well I just didn't, its one of those things, a mate just asked me to get him some gear – so I do".

8. Michael Hegarty signed the officer's notebook as a true and accurate account. The goods seized totalled : 22 kilos of hand-rolling tobacco, 8,200 cigarettes, 36 litres of wine and 60 litres of beer.

9. The car was also seized.

10. By letter of 13 April 2001, Rita Hegarty appealed against the confiscation of her vehicle and requested its restoration. She explained that, on the day in question, she had been at work. She had been dropped off at work by her husband because he, Tracey Hegarty and the grandchildren were going out for the day. She stated that unknown to her they had been on a day trip to France. She stated that she needed her vehicle for work purposes because she was a bus driver and her shifts involved starting at 4.00am and finishing at 2.00am. She pointed out that the car had been bought with a bank loan and that there were 20 months payment left on the loan. To lose the car would, she said, cause great hardship.

11. On 9 May 2001 an officer of the Customs (Karen Booth) gave her decision not to offer the car for restoration. Her letter reads as follows:

"Thank you for your recent letter in which you request the restoration of your vehicle ...

I have considered all the factors in the case and recommend that the vehicle, on this occasion, is not offered for restoration.

The Departments' efforts are directed towards deterring and detecting fraud, failure to pay excise duty that is due, irregularities and to encouraging compliance with procedures established to control movements of excise goods. ...

There are no exceptional circumstances in this case which would justify a departure from this policy."

12. A letter of 21 June 2001 from Rita Hegarty's solicitor contained a copy of the vehicle registration document and a copy loan agreement. The letter repeated that Michael Hegarty did not have his wife's permission to take the vehicle abroad

and that she was concerned that she was being penalized for his actions, over which she had no control.

13. By letters dated 27 September and 11 October 2001, the Commissioners informed Rita Hegarty that the decision not to restore had been deemed upheld.

14. On 30 November 2001, an officer of the Commissioners (Raymond Brenton) conducted a (non-statutory) review of the contested decision.

15. We were read witness statements provided by Karen Booth setting out the circumstances of the seizure and concluding with her view that there were no exceptional circumstances that warranted a departure from the current Departmental Policy, from Gerry Dolan (explaining the Commissioners' policy) and from Raymond Brenton (summarizing the circumstances of his out of time review and concluding that there were no exceptional circumstances that would warrant a departure from the Commissioners' policy). We were also provided with a witness statement of a Mr David Luckhurst (officer of the Customs). This said that photo-records showed that the car had made twelve trips to France since 4 August 2000, i.e. up to and including the trip of 11 April 2001. Mr Brenton's statement referred to there having been 18 recorded trips by the car across to Coquelles during the previous 18 months. Of the trips referred to by Mr Luckhurst, five of these had been over and back in the same day. These had lasted for 3-4 hours from the time of departure from England until the time of departure from Calais.

The nature of our jurisdiction

16. Our jurisdiction is conferred by Finance Act 1994 section 16(4). It is limited to a power, where we are satisfied that the Commissioners or other person making the decision in question could not reasonably have arrived at it, to (among other things) quash the decision and to require the Commissioners to conduct a further review of the original decision. The Commissioners will not arrive reasonably at a decision if they take into account irrelevant matters or fail to take into account all relevant matters: see *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1981] AC 22 at 60 per Lord Lane.

Policy

17. The evidence of Gerry Dolan, officer with the Commissioners, explains the background to the Commissioners' campaign to tackle tobacco and alcohol smuggling. It contains this passage:

"The current policy introduced on 13 July 2000 means that vehicles will be seized and not restored on the first attempt they are detected being used in smuggling. The message for fraudsters now using their vehicles to commit excise fraud is very simple, use it and you will lose it : there will be no second chances. The policy applies to all types of motor cars and light commercial vehicles, except those which are rented, such as vans, pickups, transits and similar vehicles. Vehicles which belonged to owners who are not present at the time of detection will also not have their vehicles restored, unless they can demonstrate that the decision not to offer the vehicle for restoration is unreasonable."

That is the policy that was in force at the time of the seizure of Mrs Hegarty's car on 11 April 2001.

18. The decision in *Lindsay v Commissioners of Customs and Excise* [2002] EWCA Civ 267. In that case the Master of the Rolls (Lord Phillips of Worth Maltravers) observed ( in paragraph 18) that there was –

"... a very significant distinction between a man who is bringing cigarettes into England to distribute to members of his family against reimbursement, and a man who is bringing cigarettes into England in order to sell them at a profit."

That was a relevant consideration that had not been taken into account in reaching the decision appealed against (in *Lindsay*). On that basis the decision was quashed and the matter was remitted to the Commissioners to conduct a further review in the light of the decision of the Tribunal and of the judgment of the Court of Appeal.

19. In paragraph 63 of the *Lindsay* decision the Master of the Rolls observed as follows:

"... I would not have been prepared to condemn the Commissioners' policy had it been one that was applied to those who are using their cars for commercial smuggling, giving that phrase the meaning that it naturally bears of smuggling goods in order to sell them at a profit. Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars will be rendered liable to forfeiture cannot reasonably be heard to complain if they use those vehicles. Nor does it seem to me that, in such circumstances, the value of the car used need be taken into consideration. Those circumstances will normally take the case beyond the threshold where that factor can carry significant weight in the balance. Cases of exceptional hardship must always, of course, be given due consideration."

That passage, as we read it, endorses the Commissioners' policy so far as it relates to "commercial" bootleggers as distinct from those going shopping for their friends and family.

20. Staying with the *Lindsay* decision, the contents of paragraph 26 are in point. This records the observation of the Tribunal that the reason for the trip "is not in dispute" – to purchase cheap cigarettes, tobacco and alcohol for themselves and other members of their immediate family. The Master of the Rolls went on to say that –

"Had it been considered material whether the purchase had been for members of the family or for commercial resale, I consider that it would have been surprising if the former had been accepted without question. Mr Lindsay had made four previous trips on the shuttle to purchase cigarettes, tobacco and alcohol in the previous three months. He had stated that he had only purchased 400 cigarettes on each occasion, but the Tribunal does not appear to have accepted this part of his evidence. The cigarettes and tobacco in Mr Lindsay's car on 23 July would have kept him and his immediate family going for many months, however hard they puffed. It seems to me that, had the issue been raised, the tribunal could properly have concluded that Mr Lindsay was using his vehicle for commercial smuggling."

The case for Rita Hegarty

21. Michael Edmonds, representing Rita Hegarty, attacked the Commissioners' decision on four grounds. In the first place he argued that the policy stated by Mr Dolan was a blanket policy and was not compliant with the decision of the Court

of Appeal in Lindsay. Lindsay established that it was a relevant consideration to determine whether the excise goods were being transported for purposes of commercial smuggling on the one hand or for friends and family on the other. The policy statement made no provision for "friends and family" importations. On that basis, it was said, the decision was flawed.

22. We do not consider that the Commissioners have reached an irrational decision on that ground. It is clear to us from the evidence that they looked at all the circumstances leading up to the seizure of the car and took them all into account. They took into account that the same car had been across the channel for short trips on many occasions during the previous twelve months. They took into account the fact that Michael Hegarty had not been frank with the officer when first questioned about the contents of the car. They took into account the fact that tobacco had been packed and had been placed underneath a blanket on which the grandchildren were sitting. They took into account the fact that, when the tobacco was found Michael Hegarty was asked why he had not declared the goods and he replied "Well, I just didn't. Its one of those things. A mate asked me to get him some gear – so I do". If "friends and family" had been the purpose of the importation of these excise goods, why did Mr Hegarty not say so at the start? His answer could reasonably have appeared to the Customs officer as evasive and wholly implausible. Then the officer considered the position of Mrs Hegarty's knowledge of what her husband was doing. The officer (Karen Booth) inferred that Rita Hegarty's statement that she was unaware that her husband was taking her daughter and grandchildren to France, even though he had taken her to work in the vehicle before departing for France, was implausible. That seems to us a reasonable conclusion. Coupled with the fact that the car had been across the channel on many occasions in the last twelve months, the inference that Rita Hegarty knew that it was being used for bootlegging is, we think, irresistible.

23. Putting the issue in the context of the Lindsay distinction, it seems to us that the deciding officer did in fact address herself to the possibility that the car had been used to bring cigarettes back for friends and family. She was aware of Michael Hegarty's statement about buying them for his mate. It was, in the circumstances, reasonable for her to have dismissed that possibility and proceeded on the basis that the car was being used for bootlegging on a commercial scale. Moreover, even if the Commissioners' policy, as interpreted at the time, did not allow for restoration of a car even where it has been used to go shopping for friends and family, Lindsay validates a decision not to restore where, as here, it is based on the reasonable conclusion that it has been used for commercial bootlegging and that the 3<sup>rd</sup> party owner was aware of that.

24. Mr Edmonds' second contention was that the policy statement left no room for the doctrine of proportionality as required by article 1 of the First Protocol to the Convention on Human Rights. We note, in this connection, that the policy statement explained by Gerry Dolan states that vehicles belonging to third party owners will not be restored "unless they can demonstrate that the decision not to offer the vehicle for restoration is unreasonable." The Commissioners are not, as we read that, shutting out the possibility of considering that it would be disproportionate not to restore the car to the third party owner. In any event, as we noted above, paragraph 62 of the Lindsay decision states in terms that, where a car has deliberately been used for commercial smuggling, "the value of the car used need (not) be taken into consideration." Here we do not know the exact value of the car. Nor do we know the value of the goods being carried in the car at the time of the seizure. The value of the latter cannot have been inconsiderable. Of course, this is a case where the car was not being used by its

owner. Nonetheless, having regard to our conclusion that the deciding officer could reasonably have inferred that Rita Hegarty knew that the car was being used for bootlegging and allowed it to be used for that purpose, we see nothing disproportionate in the decision not to return the car.

25. Mr Edmund's third ground for challenging the decision was that the deciding officer had not taken hardship into account. It will be recalled that, when Rita Hegarty wrote to the Commissioners on 13 April, she pointed out that she needed the car to get to work at unsocial hours and that she had raised a bank loan to buy the car and 20 instalments were still outstanding. That letter was duly received by Karen Booth. Karen Booth acknowledges the letter in her reply on 9 May. Her reply is silent as to what weight, if any, she put on those two factors. It is, we think, unlikely that Karen Booth overlooked the contents of Rita Hegarty's letter of 13 April. That was, after all, Rita Hegarty's first communication and really set out the grounds on which she sought recovery. In any event, there is nothing in the policy statement set out above that precludes the Commissioners taking such factors into account. It seems to us that they are eminently factors which can be taken into account in deciding whether the decision not to offer the vehicle for restoration is reasonable.

26. Finally, Mr Edmonds attacked the original decision on the grounds that the existence of the policy precluded the deciding officer from considering any alternatives. One obvious alternative would have been to restore the car on condition that Rita Hegarty made a payment to the Commissioners. We do not consider this to be a sustainable objection. It is, we think, implicit in the concluding words of Gerry Dolan's summary of policy that, if it is unreasonable not to restore the car, it will be reasonable to adopt some other course such as restoring it in return for a payment equal to the excise duty on the bootlegged goods. Taking a step back from the details, we think that the decision not to restore was reasonable. It cannot be criticized on the basis that it is a decision that no reasonable body of commissioners could have reached.

27. For all those reasons we dismiss the appeal.

STEPHEN OLIVER QC

CHAIRMAN

RELEASED:

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