

EXCISE DUTY – Restoration of seized car – Whether excise goods imported for non-commercial purpose – No – Appeal dismissed

LONDON TRIBUNAL
CENTRE

MILLS (L J)

Appellant

- and -

THE COMMISSIONERS OF
CUSTOMS AND EXCISE

Respondents

Tribunal: STEPHEN OLIVER QC (Chairman)

PENNY JONAS

Sitting in public in London on 6 June 2002

The Appellant in person

Christopher Mellor, counsel, instructed by the Solicitors for the Customs and Excise, for the Respondents

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DECISION

1. The Appellant, Lynne Mills, appeals against the decision of the Commissioners of 23 May 2001 not to restore excise goods and a N registration Ford Viesta seized on 6 May 2001. The goods in question had been seized from Lynne Mills and from a Mr Barry Perfect and a Mrs Edna Pead. They consisted of 9½ kgs of hand-rolling tobacco, 6000 cigarettes, 100 cigarillos and 168 litres of beer. The decision was deemed to be confirmed by operation of law pursuant to section 15(2) of Finance Act 1994 because the Commissioners failed to conduct a review.

The facts relied on by the Commissioners in support of their decision

2. On Sunday 6 May 2001 a Customs officer at the Channel Tunnel terminal at Coquelles stopped the red Ford Fiesta driven by Lynne Mills. There were two passengers, namely Mr Barry Perfect and his mother, Mrs Edna Pead. The officer asked some questions to the three of them. Mr Perfect explained that they had travelled out that Sunday and they had been to Belgium and their purpose had been to get some tobacco and cigarettes. He said that they had a box of tobacco between them and each had six cartons of cigarettes. He produced a receipt.

3. When the boot of the vehicle was opened the officer found 3 kgs of Old Holborn hand-rolling tobacco and ½ kg of Drum hand-rolling tobacco. There were more cigarettes (Superkings) in the back.

4. Lynne Mills was then interviewed separately. She said that 6 cartons of Benson and Hedges cigarettes and the 6 cartons of Superkings were hers and that they had been bought in Adinkerke in Belgium. She said that she was in receipt of an income of £54 a week in the form of widow's benefit. She paid the car insurance. She had brought £300 with her which she had "saved". She had, she said, last travelled across about three weeks previously and had travelled across twelve times in the last six months.

5. Questioned about her consumption of cigarettes, Lynne Mills stated that she smoked about 20 a day and smoked hand-rolling tobacco very occasionally. She said that she was supplying four cartons of Superkings to her daughter and that her son might have some of the tobacco.

6. Asked if she had had any "previous contact with Customs" she said that she had and that had been in November. She had seen Notice No.1 "ages ago". (Notice No.1 is a leaflet given by the Customs to, among other people, those who have been stopped : it explains the minimum indicative limits and Customs policy towards people who exceed them.)

7. Mrs Pead was then interviewed. She said that she smoked about 30 cigarettes a day and a pouch of hand-rolling tobacco each week. She said that she got 40 cigarettes from each pouch. Her husband, she said, also smoked 15 cigarettes a day. Referring to 6 kgs of hand-tolling tobacco, she is recorded as having said that she was going to use it or and that it should last for a year. She also said that her son had paid for the goods and that she was going to pay him.

8. Then Mr Barry Perfect was interviewed. He said that half of the box of Golden Virginia tobacco was for him as were six cartons of Benson and Hedges cigarettes. He stated that Lynne Mills had bought them and that she had handed the money over for the goods. He stated that he had contributed to the cost. The cigarettes and tobacco were, he said, for him but he would give a few to his sons. Mr Perfect said that he smoked cigarettes all the time, about forty a day and about five pouches of hand-rolling tobacco a week. He said that the tobacco he had bought should last him for about six weeks. He said that he had made about three trips during the last six months and had been stopped by Customs before. That, he said, was "the November trip". He had seen a Notice No.1 before.

9. The goods and the car were seized. The reasons stated at the end of the notes of interview are these –

(1) Excess MILS

(2) Previous opportunity to purchase

(3) Knowledge of law.

10. By letter dated 5 May 2001, Lynne Mills wrote to the Commissioners giving them details of the trip. In this she said that all the tobacco bought was to be shared between them. She said that this was the only time that Mr Perfect travelled with her. She also mentioned that her son had "morfars syndrome" which made excessive walking an effort. He had just paid the vehicle insurance so that he could learn to drive and the vehicle was essential for his well being. At the end of the letter Lynne Mills asked for the return of the car. The Customs did not construe this as a request for the institution of condemnation proceedings. They construed the letter as a request for a decision to restore the car to Lynne Mills in pursuance of section 152(b) of Customs and Excise Management Act 1979.

11. On 23 May 2001 a Mr Dave Smith (a review officer with the Law Enforcement division of Customs and Excise) wrote to Lynne Mills in response for her request for the restoration of the excise goods and the Ford Fiesta. The letter says "I have considered all the factors in this case and recommend that the goods, on this occasion, are not offered for restoration, for the following reasons." The reasons are directed entirely at the Commissioners' efforts to deter bootlegging. The letter states that there are no exceptional circumstances in Lynne Mills' case that would justify departure from the normal policy to refuse to restore seized goods. As already noted the Customs failed to carry out a review. The original decision of 23 May becomes the deemed review decision.

12. The jurisdiction of this tribunal is contained in Finance Act 1994 section 16(4). This directs that the powers of the tribunal are to be confined "to a power, where the tribunal is satisfied that the commissioners or other persons making the decision could not reasonably have arrived at it," either to direct that the decision remains in force or quash it (with or without a requirement for the Commissioners to conduct a further review). We should mention that the decision in question falls within a description specified in Schedule 5 to Finance Act 1994. It is therefore a decision as to an ancillary matter. Our jurisdiction is consequently supervisory as set out in section 16(4) referred to above. This means that our function is to consider whether the Commissioners could not reasonably have arrived at the decision on review. Consequently the Commissioners' decision can only be found to be unreasonable if Lynne Mills can show that they have acted in a way in which no reasonable panel of Commissioners could have acted, that they have taken into account some irrelevant matter or disregarded something to which they should have given weight or made some other error of law.

Reasonableness of the decision : the Commissioners' case

13. The officer who took the decision not to restore, Mr Dave Smith, provided a witness statement and gave evidence. He first referred to the questioning that took place just after the vehicle had been stopped and all three passengers were together. On that occasion Mr Perfect had, as noted above, said that they had "a box between us" and asked about cigarettes, he had said "six cartons each". He had then handed the officer a receipt which included one box (120 pouches) of tobacco and ten cartons of cigarettes. Neither Lynne Mills nor Mrs Pead had, he observed, corrected this information. He then drew our attention to the fact that when the boot area had been examined a further 3½ kgs of tobacco and 2,400 cigarettes had been found. Mr Smith had inferred from this that there had been a deliberate attempt to mislead the officer who had first questioned the three passengers.

14. Mr Smith then referred to the interview of Lynne Mills where she had claimed that six cartons of Benson and Hedges cigarettes and four cartons of Superkings cigarettes were hers. Referring to the interview of Mr Perfect, who had claimed ½ a box of Golden Virginia tobacco and 6 cartons of Benson and Hedges cigarettes and to that of Mrs Pead who had claimed 10 cartons of Superkings cigarettes and a box of Golden Virginia tobacco, Mr Smith observed that this left the Drum and the Old Holborn tobacco unclaimed. Moreover 800 cigarettes were left unclaimed and there was only one box (120 pouches) of Golden Virginia tobacco and not the 1½ boxes that Mr Perfect and Mrs Pead, between them, had claimed. These facts, he inferred, called into question which goods were owned by whom and whether the goods had really been purchased for the three passengers.

15. Mr Smith then referred to Lynne Mills' claim that she had handed £300 to Mr Perfect whereas Mr Perfect had stated that he had given some money to Lynne

Mills to pay. And Mr Perfect had stated in his interview that it had actually been Lynne Mills who had handed over the money for the goods. This had appeared to him to be inconsistent with Lynne Mills' explanation that she had handed her £300 over to Mr Perfect. These facts also called in question who had paid for the goods and who actually owned them.

16. Mr Smith said that it had struck him as significant that Lynne Mills had stated that she had an income of only £54 a week and yet had managed to save £300 and had been able to finance very regular trips to the continent.

17. Then Mr Smith referred to his difficulty with Lynne Mills' assertion that, while she would be giving away 4 cartons of Superkings cigarettes to her daughter, the remainder of her purchases would last her about two weeks. Given her claim to consume at the rate of 20 cigarettes a day, this left 920 cigarettes unaccounted for. Mr Perfect had stated that his consumption of tobacco was five pouches a week and that his purchases would last him six weeks; on that basis there would have been sufficient tobacco for twelve weeks. Mrs Pead had stated that members of her family would pay her for some of the goods. She said that she would smoke all of her 6kgs of tobacco herself and it would last her a year. Mr Smith noted that, given her asserted consumption rate of one pouch per week, her tobacco would actually last for more than two years. These inconsistencies caused Mr Smith further doubts as to whether the tobacco had really been purchased for the purposes stated by the three passengers.

18. Then Mr Smith turned to Lynne Mills' statement that she had seen a "Customs Notice 1" and had said "Yeah, ages ago" and that her previous contact with the Customs had been in November. Mr Perfect had stated that his last trip abroad had been in November and that they have been stopped and issued with a Customs Notice 1. Mr Smith was aware, from information available to him, that Mrs Mills and Mr Perfect had in fact been intercepted on 4 February 2001. On this occasion they had purchased, between them, 8½ kgs of hand-rolling tobacco and 30 cartons of cigarettes and had been issued with a Customs Notice 1.

19. The Commissioners' information about other journeys by the seized red Ford Fiesta to and from Coquelles was derived from the evidence of Mr J Barnard, an authorised operator of the automatic number plate readers that operate at both ends of the tunnel. These records showed that the car had made 17 previous trips back to the UK from Coquelles between 30 January 2001 and 23 April 2001. The records show none of the visits to the continent were for longer than three hours. Three visits had taken place in February, seven in March and six in April.

20. We also heard evidence from Caroline Hunter, the officer of Customs who intercepted the red Ford Fiesta on 6 May 2001, questioned the three passengers together, and then separately interviewed Lynne Mills.

21. Mr Kenneth Ogilvie, the Customs officer who interviewed Mrs Pead, gave evidence. Lynne Mills had stated, as part of her case before us, that Mrs Pead understood that she could be facing a seven year prison sentence. That explained, Lynne Mills said, some of the inconsistent and unlikely answers given by Mrs Pead in the course of her interview. Mr Ogilvie's response was that he had not told her that she could face up to seven years in prison. He stated that at the end of the interview he had issued her with a Customs Notice 1 which says that if you get caught selling smuggled goods, you could get up to seven years imprisonment. He had not, he said, given her this before the interview.

22. Reverting to Mr Smith's evidence, he said that he had taken into account the Commissioners' policy on the restoration of excise goods and vehicles. This was that they should not be restored save in exceptional circumstances. He had not been provided with any exceptional circumstances that warranted the restoration. It was pointed out to us that the Commissioners are entitled to adopt a policy through which their discretionary power under section 152 of the Customs and Excise Management Act 1979 is to be exercised and that the officer is entitled to take this into account. The policy, it was said, pursues the legitimate aim of deterring the importation of goods for commercial purposes without payment of duty and encourages compliance. The Commissioners will have acted properly so long as they do not allow the existence of the policy to prevent them from going through a proper decision-making process. In the present circumstances, it was contended, they had gone through a proper decision-making process. They had taken into account the policy after due consideration of all the facts and matters surrounding the seizure and the representations made by Lynne Mills. Mr Smith had considered all relevant matters in coming to his decision and, it was contended, he had reasonably concluded that there were no exceptional circumstances. On that basis the decision should be upheld.

The case for Lynne Mills

23. Lynne Mills explained in evidence that she frequently visits Calais. Some two years ago she met a Frenchman and she has regularly visited him. She had not mentioned this at the time when she was stopped because her partner, Mr Barry Perfect, was with her at the time. Often she said, she went across the Channel with a particular friend who travelled with her as "her cover". She would then visit the Frenchman in Calais.

24. Lynne Mills conceded that Mrs Pead may have made unlikely and inconsistent answers in the course of her interview. The reason for that, as already noted, had been that Mrs Pead had (Lynn Mills asserted) been told, at the start of the interview, that she could go to prison for seven years and she had become very frightened.

25. Lynne Mills referred to the answer she had given in the interview that she smoked twenty cigarettes a day. She said that her consumption was more like thirty. She said that the cigarettes and tobacco that had not been bought for her were also for her daughter, her son-in-law and her own son. Asked about the .5kg of Drum tobacco that had been unclaimed in the course of the interview, she said that this had been for her son. Regarding the unclaimed 3kgs of Old Holborn tobacco and 800 cigarettes, she said that this was "probably going to my family". She had not thought to explain this at the time of the interview.

26. She explained that, although she only received £54 a week as income, her daughter gave her money and she was going to give four cartons to her daughter. She said that she had genuinely forgotten that she and Mr Perfect had been stopped in February 2001 and given copies of Customs Notice 1; her answer that it had been in November and "ages ago" had been an oversight and her answer that she had only travelled twelve times in the last six months had been guesswork.

Conclusions

27. It seems to us that it was reasonable for the Commissioners to reach the conclusion that they did and, therefore, to decide not to restore the Ford Fiesta car and the excise goods to Lynne Mills. It was, in the circumstances, reasonable

for Mr Smith to have inferred that there had been an attempt to mislead the officer at the time when all three passengers were questioned together. Mr Perfect had not made a full disclosure of the goods (which appeared when the boot was opened). Lynne Mills had not corrected Mr Perfect's misdeclaration. An examination of the three separate interviews caused a legitimate doubt as to which goods were owned and by whom. Furthermore, as some of the goods were left unclaimed, it was a reasonable inference that the goods were not being imported for the consumption of the three passengers and their immediate friends and family. There were other inconsistencies in the answers given in the course of the interview which called into question who had paid for the goods. Mr Smith was, we think, entitled to reject Lynne Mills' claim that she would be giving away some of the goods (4 cartons of Superkings cigarettes) despite managing on an income of only £54 a week. Her explanation that she had saved £300 to finance the purchases was hardly credible, particularly in view of the numerous trips that she had made to France over the previous three months. It was only at the present hearing that we were told that she had received money from her daughter and son-in-law. Had that really been the case, we would have expected her to have mentioned it in the course of the interviews.

28. There were moreover answers given by all three passengers in relation to the amount of time the goods would last which were not credible.

29. We think that Mr Smith was entitled to infer a commercial purpose for the purchase of the excise goods and their transportation back into the United Kingdom. The fact that the car had made so many visits to France over the last 3-4 months was a relevant factor. We do not accept Miss Lynne Mills' explanation that her visits had only or mainly been to spend time with the gentleman living in Calais. It is significant in this respect, that both she and Mr Perfect had been stopped on 4 February 2001 when they had been found to have purchased 8½kgs of hand-rolling tobacco and 30 cartons of cigarettes between them and they had been issued with a Customs Notice 1. Neither had mentioned this very recent event in the course of their interview. It is, we think, unlikely that she or he would have forgotten this.

30. In all the circumstances we think that Mr Smith had reasonable grounds for concluding that Lynne Mills was involved in importing the excise goods for a commercial purpose. It was, we think, reasonable for him to have inferred that they were to be sold on at a profit and not simply supplied, at cost, to friends and family.

31. We do not think that there were any other features that the Commissioners should have taken into account as exceptional circumstances in reaching their decision not to restore the red Ford Fiesta to Lynne Mills. It is correct that, in her letter dated 5 May 2001, she explained that her son suffered from a condition that made walking an effort and that he had just paid the car insurance so that he could learn to drive. We recognize that the car might be valuable for the son's well being. But first he had to learn to drive. It was not, we think, a compelling reason to restore the car on that ground. We recognize that Mrs Pead was old and might have found it difficult in travelling back to the UK. This was not mentioned to the officer at the time. Even if it had been, the fact is that Mrs Pead was not obviously disabled and managed to get home by other means.

32. For all those reasons we are satisfied that there was nothing unreasonable in the decision of the Commissioners not to restore the Ford Fiesta and not to restore the excise goods to Lynne Mills. We therefore dismiss the appeal.

STEPHEN OLIVER QC

CHAIRMAN

RELEASED:

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