

EXCISE – Restoration refusal – Application by Commissioners for direction for further review – Vehicle lent – Owner’s ignorance of trip accepted – Need for proportionality – Appeal allowed – Further review directed.

PRACTICE – Non-appearance by Appellant – Commissioners appeared – Whether "no party ... appears" – No – Trib Rules rule 26(1) – Whether non-appearance constitutes want of prosecution within Rule 18 – Yes – Dismissal not appropriate in circumstances

LONDON TRIBUNAL  
CENTRE

HARINDER SINGH BRAR Appellant

- and -  
THE COMMISSIONERS OF Respondents  
CUSTOMS AND EXCISE

Tribunal: THEODORE WALLACE (Chairman)

BERNARD J COODE FFA

MRS S EDMONDSON FCA

Sitting in public in London on 21 June 2002

The Appellant did not appear

Miss Zoe Taylor, counsel, instructed by the Solicitor for Customs and Excise, for the Respondents

© CROWN COPYRIGHT 2002

## DECISION

1. This was an appeal by the owner of a car against a review decision confirming a decision refusing to restore his Toyota Estima car which he had lent and had been seized at a lay-by on the A228. The car was carrying 70 cases of beer and 10 cases of wine which had been bought on the continent. The Appellant was not aware of the trip.

2. When the appeal was called on the Appellant did not appear. Miss Taylor applied for the appeal to be struck out under Rule 26(1) of the VAT (Tribunals) Rules 1986. Alternatively she applied for the appeal to be dismissed under Rule

18(2) for want of prosecution. In the event that the Tribunal did not grant either application, she asked for the appeal to be adjourned with an order that it be dismissed unless the Appellant notified the Tribunal within 14 days that he wished to pursue the appeal. She asked the Tribunal to consider her application in the Appellant's absence under Rule 26(2), but she opposed the appeal itself being considered under that provision.

3. The Tribunal refused the applications under Rule 26(1) and Rule 18(2). We also refused an adjournment with an unless order but decided to consider the appeal in the absence of the Appellant under Rule 26(2).

4. After a short adjournment, Miss Taylor applied for a direction that the appeal be allowed by consent and that a further review be directed under section 16(4)(b) of the Finance Act 1994. We allowed this application subject to certain further directions.

5. Miss Taylor asked for written reasons for the decision to proceed and for the refusal of the earlier applications. Although she did not ask for reasons for the decision to direct a further review these reasons are difficult to separate.

6. The history of the matter is as follows.

7. On 22 July 2000 Customs officers were called by police to a lay-by on the A228, the Appellant's vehicle having been stopped for being overweight. The officers found 840 litres of beer and 120 litres of wine.

8. They interviewed the driver and passenger. They were told that the vehicle belonged to the Appellant. The officer was not satisfied that the alcohol was for their own use and seized the vehicle.

9. The Appellant's request for restoration was refused. He wrote a letter asking for a review; this was acknowledged on 14 August 2000. The review decision confirming the refusal was dated 7 September 2000. The notice of appeal was received on 10 October 2000.

10. The notice of appeal stated, *inter alia*, "I did not know that he was going to take my vehicle to France to bring alcohol back. I was not aware of any of my friend's actions."

11. The Commissioners' Statement of Case was served on 18 December 2000 after an extension; the Appellant's List of Documents had meanwhile been served.

12. The Tribunal asked for avoid dates from the parties and when neither responded listed a hearing for directions for 15 March 2001. The Appellant responded on 21 January 2001; on 15 March the Respondents provided avoid dates and the directions hearing was cancelled.

13. The hearing was not listed at that stage because Human Rights issues were being considered in other appeals. Another letter from the Tribunal dated 21 August 2001 asked for avoid dates. The Respondents estimated one day and stated that one witness would be called. A hearing was notified for 4 February 2002. This was vacated at the Commissioners' request on the grounds that a Mr Paul Devlin, Review Officer, would be engaged in another appeal : in fact he was not the Review Officer in this case at all. A further letter asking for avoid dates

produced no response from either side and a directions hearing was fixed for 3 April 2002.

14. On 3 April the Appellant did not attend and the Commissioners produced avoid dates at the hearing. The present appeal hearing date was notified to the Appellant at the address on his notice of appeal on 10 May 2002. Unfortunately he had provided no telephone number to the Tribunal. When writing the decision, we found a letter to the Commissioners with his telephone number at page 46 of their bundle. It is unfortunate that this was not drawn to our attention at the hearing, since we would have asked the Clerk to telephone the Appellant.

15. At 10.30am the Appellant had not appeared. Miss Taylor handed in a ten page skeleton argument, a bundle of authorities and a bundle of documents. We read part of these and sat at 11.10am when the Appellant had still not appeared.

16. Miss Taylor first applied under Rule 26(1) which empowers the Tribunal to dismiss or strike out an appeal "when no party thereto appears in person or by his representative." She said that the reference to "his representative" indicated that the reference to "no party" covered one party only and the reference to "dismiss or strike out the appeal" showed that it referred to the Appellant. She pointed out that the Appellant could always apply for reinstatement.

17. We reject her submission which we find impossible as a matter of syntax. The words of the Rule clearly refer to neither party appearing. The Commissioners did appear. Furthermore the power to dismiss or strike out covers applications as well as appeals. Even when neither party appears it will only be in a very exceptional case that it will be appropriate to use the power, see *Hazelacre Ltd v Commissioners of Customs and Excise* [2000] V&DR 185.

18. Miss Taylor then invited the Tribunal to apply Rule 18(2) stating that the Appellant's failure to attend constituted want of prosecution. She said that the notice of hearing of the appeal sufficed for Rule 18(3). She said that the Appellant would still be able to apply for re-instatement under Rule 26(3). She submitted that a County Court would normally dismiss a claim when a claimant does not appear and that the Tribunal should do so also. She said that it would not be a judicious use of Court time for the Tribunal to consider the appeal under Rule 26(2).

19. In the judgment of the Tribunal, although failure to attend can amount to want of prosecution, Rule 18(3) is not directed at this. It is primarily directed to failure to perform earlier matters necessary to prosecute an appeal such as to list documents or provide copies of documents listed. Failure to appear at a hearing is specifically covered by Rule 26; it is that rule which primarily applies on non-attendance. Rule 26(2) specifically empowers the Tribunal to consider an appeal in the absence of a party: that is the appropriate course in a normal case. The use of Rule 18(2) for non-attendance is an extreme step only to be used after a series of matters constituting want of prosecution.

20. When considering its use the Tribunal will look at the whole history of the case including the question whether the Appellant has no prospect of success and is only delaying the appeal. We do not accept Miss Taylor's submission that the underlying merits are not relevant.

21. We did not consider this to be a case where the Appellant had no prospect of success. Indeed our view was that the Review had many of the defects of that in *Lindsay v Customs and Excise Commissioners* [2002] STC 588. No consideration

was given to proportionality. The review officer stated and applied the policy that privately owned vehicles would not be restored even on the first occasion and that the absent owner had to show that the vehicle had been stolen. Furthermore from the words of the Review the officer applied other incorrect legal tests. We stress that we did not hear legal submissions as to this aspect. However put at its lowest the Appellant had an arguable case on the face of the Review Decision.

22. Furthermore many of the delays in this appeal were not attributable to the Appellant. He put in his list of documents before the Statement of Case and he gave avoid dates in January 2001. The hearing on 4 February 2002 was vacated at the Commissioners' request on a false basis and they twice failed to supply avoid dates when requested. Dismissal under Rule 18(2) would be wholly inappropriate in this case as would an adjournment coupled with an unless order.

23. The Tribunal concluded that the Appellant's case on this appeal did not depend in substance on his attendance because we had to consider whether the Review was defective in law. This was possible without any evidence by him especially since his lack of knowledge of the trip to France was not challenged on the papers before us. Accordingly we decided to proceed under Rule 26(2). We then adjourned for an early luncheon break.

24. After luncheon Miss Taylor said that in the light of the Tribunal's decision to proceed under Rule 26(2) the Commissioners conceded the appeal and invited the Tribunal to direct a further review. This concession involved an acceptance that the Review was defective.

25. She agreed on instructions that the further Review should be on the basis of the Appellant's assertion in the notice of appeal that he did not know of the trip to France.

26. We direct that the Review should be on that basis. The Review should also take account of proportionality, of the length of time that the car which is still in the Queen's Warehouse has been denied to the Appellant, that itself having a deterrent effect and should take account of any written representation made within 21 days to the Commissioners at Review Team, Clarkson House, Rhodaos Town, Canterbury, KT1. The Review should be carried out within 28 days thereafter and in any event by 30 August 2002. If the Review is adverse to the Appellant or if any conditions are imposed, it should set out clearly the facts on which it is based, the matters considered and the reasons. The Review itself will give rise to a further right of appeal. The Review should be by an officer not previously concerned with this matter.

27. Miss Taylor applied for costs because of the Appellant's non-attendance. We do not consider this an appropriate case. The Appellant has in effect succeeded in the appeal. The Respondents' applications did not succeed and had little prospect of success. If the Appellant had attended the hearing would probably have taken more not less time.

THEODORE WALLACE

CHAIRMAN

RELEASED:

LON/00/8040-BRAR.WAL