

EXCISE DUTY – Restoration – Third party owner – Tractor and trailer used by lessee for bootlegging – Tractor and trailer seized on entry to UK – Restoration offered to lessor (Appellant) on payment of £5000 fee – Whether reasonable – Finding that Appellant had not acted with lack of care – Appeal allowed – Re-review directed

LONDON TRIBUNAL CENTRE

WHITEHEAD MACHINERY (PARTNERSHIP) - Appellant
- and -
THE COMMISSIONERS OF CUSTOMS AND EXCISE - Respondents

Tribunal: STEPHEN OLIVER QC (Chairman)

RACHEL ADAMS FCA ATII

Sitting in public in London on 12 November 2002

T Whitehead, partner, for the Appellant

Jeremy Hyam, counsel, instructed by the Solicitor of Customs and Excise, for the Respondents

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DECISION

1. The Whitehead Machinery (Partnership) appeals against a decision contained in a letter of 2 August 2001 in which the Commissioners have offered to restore a tractor and trailer to Whitehead Machinery for a "fee" of £5000.
2. This appeal has been heard before the release of the Court of Appeal's decision in *Commissioners of Customs and Excise v Hoverspeed*. The Commissioners asked for the appeal to be vacated to enable them to re-review the decision under appeal pursuant to Finance Act 1994 section 16(4)(b) in the light of the *Hoverspeed* appeal. Mr Whitehead has opposed this. We decided to go ahead and hear the appeal, essentially as it was directed at the reasonableness of the Commissioners' decision not to restore the tractor and trailer unless Whitehead Machinery paid the £5000 fee. In these proceedings Mr Whitehead took no point about the lawfulness or otherwise of the actual seizure.

Facts appearing to deciding officer

3. We start with the statement of the facts appearing to the Commissioners and apparently taken into account in reaching the decision not to restore the tractor and trailer. That decision was communicated in the letter of 2 August 2001 which contained no reasons. A review was required by Whitehead Machinery. The Commissioners were unable to complete their review within the 45 days statutory period. The decision was therefore deemed to be upheld.

4. The tractor and trailer had been stopped by a Customs officer in the inward freight lanes at Eastern Docks at Dover. It was being driven by a Mr Duncan Bown of Folkestone. Mr Bown had given the following information. He had said that he had not loaded the trailer but he had swapped it in a service station in Italy having picked the trailer up from another English driver whose name he did not know. Mr Bown had said that he did not know where the load had originated from but he understood it to be going to an address in Barking. He said that he had been working for "K J International" but he did not really know if they existed. He had been provided with expenses and expected to be paid on arrival in Barking. He told the Customs that the trailer had been hired from Whitehead Machinery. When the trailer was opened it was found to contain 12,600 litres of Vodka.

5. The tractor and trailer were detained by the Commissioners pending further checks. The "impex" team determined that the goods were not expected to be deposited in a bonded warehouse and seizure was recommended.

6. By letter of 16 July 2001 the Commissioners advised Whitehead Machinery that the vehicle and the trailer had been seized under section 141(1)(a) of the Customs and Excise Management Act 1979 ("the CEMA"), as they had been used in an attempt to smuggle goods liable to excise duty in the UK. In particular, the letter stated that the vehicle was found to be carrying excessive amounts of excise goods.

7. On 17 July 2001 Mr Whitehead requested restoration of the tractor and trailer and, as noted, the Commissioners refused this in their letter of 2 August 2001.

8. We heard no oral evidence from the Commissioners as to the making of the decision. For the record, we set out the following passage in the Statement of Case:

"In reaching (their) decision the Commissioners applied their policy concerning the restoration of heavy goods, which had come into effect on 16 July 2001. That policy states that when the Commissioners have evidence that the driver and/or the hauler are unknowingly involved in smuggling excise goods, on the first detection the vehicle will be seized and not restored. However, where the Commissioners are simply not satisfied that basic reasonable checks have been carried out by the driver of the vehicle as to the nature of what he or she is carrying, on the first occasion the vehicle will be seized and offered for restoration at a fee of 20% of the revenue evaded or the trade value of the vehicle, whichever is the less. On a second detection the vehicle will be seized and not restored. In cases where all reasonable steps have been taken by the driver, the vehicle will be seized and restored free of charge. The new policy is designed to tackle cross border smuggling and to significantly disrupt the supply of excise goods into the illicit market. It also tackles those who, whilst not actively

involved in the importation of illicit goods, have not carried out reasonable checks into the nature of their load.

The excise duty value of the seized goods was £92,421. Twenty per cent of that value is £18,484. The restoration fee was therefore set in accordance with the policy at the lesser of the two amounts, that is, the value of the vehicle as determined by the Post Seizure Unit on the basis of trade guidelines."

9. Anticipating a review of the 2 August 2001 decision against Whitehead Machinery, Mr Whitehead wrote, on 3 August 2001, explaining that the tractor and trailer, when seized, were on hire to a third party and were not in the care and control of Whitehead Machinery. Mr Whitehead claimed that Whitehead Machinery could not be held responsible for the misuse of vehicles by the person to whom they were hired.

The present hearing

10. The issue before us was whether, as the Commissioners contended, Mr Whitehead had acted with insufficient care in making the hiring. The Commissioners had power, by reason of section 152(b) of CEMA to restore the seized tractor and trailer subject to such conditions as they might think proper. In all the circumstances it had (so they contended) been reasonable for them to have imposed the £5000 fee as the "price" of restoration. The factors that should and, indeed, may have put Mr Whitehead on notice that the tractor and trailer would be used for a bootlegging run were, so argued Mr Jeremy Hyam for the Commissioners, as follows. Mr Whitehead, through Whitehead Machinery, had never hired to Mr Bown before; nor had he hired to K J Trucking (the outfit to whom, according to the hiring agreement, the tractor and trailer had been hired). He had taken no deposits and received no payment in advance; and he had invoiced K J Trucking only after the period of hire, by which time the tractor and trailer had been seized. Generally, he could have done much more, in these suspicious circumstances, to have checked on the genuineness and *bona fides* of the people to whom he hired the tractor and trailer.

11. We now turn to the documents relating to the hiring. The hiring agreements for the seized tractor and trailer, dated 28 June 2001, was between Whitehead Machinery and K J Trucking. K J Trucking was to pay £500 plus VAT each week. The hire period was for one week minimum and might be extended. The person to whom the hiring was made was to pay insurance and show proof of insurance before commencement of the hire and was to indemnify Whitehead Machinery for any "losses, costs, damage etc.". It was signed by Mr Bown and by Mr Whitehead. Then there appeared an invoice dated 30 June 2001 relating to Whitehead Machinery's purchase of the tractor. An invoice relating to the purchase of the trailer had a June 2001 date. Finally, on the paperwork, Whitehead Machinery had invoiced K J Trucking for a hiring for the two week period starting on 2 July 2001; the invoice is dated 31 July 2001.

12. Mr Whitehead was not with the tractor and trailer when they were seized. There is no suggestion that he went on the trip to Italy or had any financial interest in it.

13. The matter was not (as already noted) given a statutory review. But during the 45 day review period, Mr Whitehead wrote two letters to the Commissioners. In a letter of 3 August 2001 (after the decision not to restore had been issued) Mr Whitehead said:

"Would you please note that the above vehicles were on hire to a third party when they were seized and not in our care and control. We buy, sell and hire out used commercial vehicles as part of our business and cannot be held responsible for the misuse of vehicles by a hirer."

A letter of 31 August 2001 contains this passage:

"Our invoice to K J Trucking ... for hire of the tractor unit and trailer, has been returned by a third party who lives at that address and has never heard of this firm. It appears that Mr Bown gave use a false address when he hired the vehicles."

(Mr Whitehead stated in evidence that the address that Mr Bown had given him was the address that he (Mr Whitehead) recognized as the K J Trucking address. By the time of the hiring, however, the proprietors of K J Trucking no longer operated from there.)

Mr Whitehead's explanation

14. Mr Whitehead gave evidence. The hiring, he explained, had been through Mr Bown whom he understood to be driving for K J Trucking. Mr Bown had come from the same village as Mr Whitehead and his mother still lived there. Mr Bown had moved away to Folkestone but, over 25 to 30 years, he had continued to do business with Whitehead Machinery, regularly but not frequently, i.e. about once a year. From time to time Mr Bown had bought commercial vehicles from Mr Whitehead. Mr Bown had always paid and had presented no problems throughout their trading relationship. Mr Whitehead said that he had never had any reason to check up on Mr Bown or his activities.

15. K J Trucking, Mr Whitehead had been told by Mr Bown at the time when the hire of the trailer and tractor were being arranged, was a new haulage business owned by Keith and Julie Baigent. Mr Whitehead had known Keith Baigent for five years or more. Mr Baigent lived in Folkestone and had been a lorry driver for a company for which Whitehead Machinery had regularly carried out vehicle inspections and repairs. Mr Whitehead knew that Mr Baigent's old employer company had become insolvent and he said that he was not surprised to learn that Mr Baigent had set up his own trucking business. As it happened, Mr Whitehead told us, both Mr Bown and Mr Baigent had left their old addresses some months before the hiring. Mr Whitehead had been given an address for K J Trucking which (as already noted) he subsequently learnt to have been Mr Baigent's previous address.

16. Whitehead Machinery's usual activity, apart from repair work, had been to buy and sell commercial vehicles. Many of these were used vehicles and were sold to African buyers. At an earlier stage Whitehead Machinery had done a lot of hiring out. By 2001 it had no vehicles dedicated to hiring and rarely hired them out.

17. In June 2001, Mr Whitehead said, Mr Bown had phoned saying that he wanted a lorry. He had been interested in buying one for what he described as international work in Italy. Mr Bown came and inspected the vehicle. He said that he would start off by hiring and Mr Whitehead agreed to this. The hiring agreement was typed up by Mr Whitehead's wife. Mr Whitehead did not telephone K J Trucking to check up on it because, he said, he recognized the address and knew Mr Baigent from past dealings. Mr Whitehead accepted Mr Bown's insurance

as proof of cover. Mr Whitehead's understanding was that if K J Trucking's business worked out successfully, it would extend the hire. Mr Whitehead was asked why he did not demand a deposit. He said that this had not mattered to him in view of his long association with Mr Bown and Mr Baigent.

18. The tractor that Whitehead Machinery had hired out had been newly purchased. Mr Whitehead said that he had bought and paid for it some two to three weeks earlier and he received the invoice at the month-end. The trailer likewise had been bought two to three weeks earlier.

19. Asked why Whitehead Machinery had invoiced only after the trailer and tractor had been seized, Mr Whitehead explained that when he had heard about the seizing from Mr Bown who had phoned him, he had been hopeful that the vehicle would be returned to him. The invoice duly made up at the month-end.

20. Asked why Whitehead Machinery had not tried to recover the value of the tractor and trailer or the fee charged by Customs and Excise in return for restoration from K J Trucking, Mr Whitehead said that he very soon realized that neither Mr Bown nor Mr Baigent were good for the money. He had learnt from Mr Bown of the fact that both had moved and, he discovered, Mr Baigent was by then living on social security. Mr Whitehead admitted that he had not contacted Mr Baigent; to have done so would, he reckoned, have been waste of time.

21. It was suggested to Mr Whitehead that he had been knowingly taking a risk that the tractor and trailer would be used for bootlegging and consequently losing them; he had exposed himself to that risk by taking Mr Bown and K J Trucking on trust. Mr Whitehead did not accept this. If he had thought that they would be misused, he would not, he said, have let the vehicles to them. As it was, he had been comfortable with both Mr Bown and Mr Baigent as the result of their long trading relationship.

22. We have had the advantage of hearing Mr Whitehead give evidence and of considering the answers he gave and the course of a careful and searching cross examination. We both formed the immediate impression that he is a truthful, responsible and careful person and that he has conducted his business on that basis. We accept his account of what happened. We are satisfied from his evidence that, when he leased the tractor and trailer to K J Trucking through Mr Bown, he had no reason whatever to suspect that it would be used for any unlawful purpose, let alone the Italian bootlegging project. We think it was reasonable for him to have checked Mr Bown's insurance cover but not to have gone further and to have carried out checks on K J Trucking for the latter's *bona fides* and credit worthiness. They all knew each other through long standing trading relationships. It was enough for Mr Whitehead to have checked Mr Bown's insurance cover, particularly as he was to be the driver.

23. For those reasons we allow the appeal and quash the decision contained in the letter of 2 August 2001. We direct that the matter should go back for a further review and that the facts found by us in this Decision be taken into account as relevant considerations. We would expect that the review should be capable of completion within six weeks of the release of this Decision. We recognize that the Commissioners may need to consider the implications of the decision of the Court of Appeal in *Hoverspeed*. Accordingly, we direct that the re-review be conducted within six weeks of the release of the Commissioners' decision in *Hoverspeed*.

24. Regarding costs, Mr Whitehead made no application. We would be prepared to entertain an application on his part for the costs incurred by him in relation to the present appeal.

STEPHEN OLIVER QC

CHAIRMAN

RELEASED:

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