[2016] UKFTT 048 (TC)

TC04847

Appeal number:TC/2014/02070

EXCISE DUTY – restoration of tobacco goods – jurisdiction of the tribunal – Revenue and Customs Commissioners v Jones and Jones [2011] EWCA Civ 824 and Revenue and Customs Commissioners v Mills [2007] EWHC 2241 (Ch) considered – application to strike out appeal – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

STEWART CADE **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE JONATHAN CANNAN
MRS GAY WEBB

Sitting in public in Leeds on 12 January 2016

The Appellant appeared in person

Miss Hannah Lynch of counsel instructed by the Home Office Cash Forfeiture and Condemnation Legal Team appeared for the Respondent

© CROWN COPYRIGHT 2016

DECISION

Background

1. This is an application by the Respondent 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 a review decision of the Respondent refusing to restore certain tobacco goods which were seized from the Appellant on 9 December 2013. On this appeal the Appellant seeks to contend that the goods were purchased legitimately for his own use and on that basis they ought to be restored to him.

3. 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 purchased for his own use. The goods were subsequently condemned as forfeit following a hearing before East Kent Magistrates' Court.

4. The Respondents contend that whatever the underlying factual dispute as to the circumstances in which the Appellant came to be holding the goods, we are bound as a matter of law to strike out the appeal.

Statutory Framework

5. 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]…"

6. *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 …*"

7. 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.*"

8. *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.

9. *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 refusing restoration and the confirmation of it on review is an ancillary matter. As such the Tribunal's jurisdiction is limited to considering whether the decision of the review officer was reasonable under *section 16(4)*.

Undisputed Facts

10. *Section 16(6) FA 1994* 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 his appeal are established. The following matters are not in issue.

11. The Appellant was stopped at the port of Dover on 9 December 2013 returning from Belgium. He was driving his own vehicle and travelling with his friend Mr Irving who was a passenger. 11.55kg of hand rolling tobacco and 1,760 cigarettes were in the vehicle. The Border Force officer was not satisfied that those excise goods

were for personal use and they were seized, together with the Appellant's vehicle. The officer decided to restore the vehicle.

12. In broad terms it seems that the Appellant had purchased approximately half the tobacco (5.5kg) and 600 of the cigarettes. The remainder had been purchase by Mr Irving, save possibly for 160 cigarettes which the Appellant maintains were in the vehicle on their way out to Belgium and belonged to the Appellant's sister. We were told by the Appellant that his goods and Mr Irving's goods were in separate carrier bags on the back seat of the vehicle when they were stopped. We make no findings of fact in that regard, but for the purposes of this application only we shall assume these facts.

13. On 13 December 2013 the Appellant challenged the legality of the seizure of his excise goods and at some stage also asked for restoration of the goods. We did not have a copy of any of that correspondence. On 5 February 2014 the Border Force wrote to state that they would commence condemnation proceedings in the magistrates' court. At some stage Mr Irving also challenged the legality of the seizure of his goods and he was a party to the condemnation proceedings.

14. On 29 January 2014 the Border Force apparently refused the request for restoration. On 13 February 2014 the Appellant appears to have asked for a review of that decision. We did not have a copy of those letters.

15. We did have a copy of the decision on review dated 14 March 2014, which is the subject of this appeal. It set out the review officer's understanding of the circumstances and explained that he had not considered the legality or correctness of the seizure which was a matter for the magistrates' court. That included any claim by the Appellant that the goods he was importing were for "own use". He noted that the only ground on which the Appellant had sought restoration was that the goods were for own use, an issue which could only be raised in condemnation proceedings. In applying the Border Force's policy on restoration he therefore assumed that the goods were held in the UK for a commercial purpose.

16. The Appellant's Notice of Appeal against the review decision was filed on 13 April 2014. The grounds of appeal were effectively that goods he wanted restored were for own use and he had not done anything wrong.

17. On 30 April 2014 the Respondent applied to strike out the appeal on the basis that following the Court of Appeal decision in Jones & Jones the Tribunal had no jurisdiction over the issue of own use.

18. Meanwhile the condemnation proceedings of the Appellant and Mr Irving were continuing in the magistrates' court. On 18 June 2014 the Respondent applied to stand over this appeal pending the outcome of the condemnation proceedings and a direction to that effect was made.

19. The condemnation proceedings were heard in the magistrates' court on 11 June 2015. The Appellant provided us with a copy of an order made by the East Kent Magistrates' Court to the effect that the 11.55kg of hand rolling tobacco and 1,760

cigarettes were condemned as forfeit. On the same date the court ordered that the Appellant and Mr Irving should be jointly and severally liable to pay costs of £2,610.

20. We understand that Mr Irving did not attend the magistrates' court hearing because of illness. The Appellant did attend. He made certain criticisms of the hearing before the magistrates' court but we are not concerned with those criticisms for present purposes, nor indeed does it seem to us that they would be relevant to this appeal generally.

21. On 22 September 2015 the Respondent renewed the application to strike out. The Appellant has maintained his opposition to that application on the basis that the goods he had purchased were for his own use.

Discussion

22. The Respondents' application to strike out the appeal was made pursuant to Tribunal Rule 8(2)(a). In opening Ms Lynch who appeared as counsel for the Respondent applied in the alternative to strike out under 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 –*
>
> …
>
> *(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.*"

23. Rule 8(3)(c) is the equivalent of summary judgment. In appropriate cases summary judgment 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. See for example *Revenue & Customs Commissioners v Nicholas Race [2014] UKUT 331 (TCC)*.

24. The Respondents rely in particular on the judgment of Mummery LJ in Jones & Jones 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."

25. As Mummery LJ stated at (7) above, "d*eeming something to be the case carries with it any fact that forms part of the conclusion*". It does not carry with it any fact that does not necessarily form part of the conclusion. The Respondents accepted that

proposition most recently in the Upper Tribunal in *Revenue and Customs Commissioners v Shaw [2016] UKUT 0004 (TCC)* at [23] to [28].

26. There is further authority to support that proposition in *Revenue and Customs Commissioners v Mills [2007] EWHC 2241 (Ch)*. In that case Mann J was concerned with an appeal from a decision of the VAT & Duties Tribunal. Mr Mills and Mr Kerry were stopped at the Customs control zone at Coquelles. A large quantity of tobacco found in several boxes was seized on the basis that it was not for own use. Mr Mills and Mr Kerry each claimed ownership of half the tobacco. The vehicle was also seized.

27. Mr Mills gave notice challenging the legality of the seizure and condemnation proceedings were commenced by HMRC. However Mr Mills later withdrew from those proceedings. At the same time he sought restoration of the vehicle which was refused, a decision which was confirmed on review. He appealed to the Tribunal and his appeal was allowed following a full hearing. Part of the Tribunal's reasoning was that the deemed forfeiture did not necessarily carry with it the implication that Mr Mills' tobacco was for commercial use. Mr Mills' goods could have been lawfully seized pursuant to section 141(1)(b) and condemned as forfeit on the basis that they were mixed with Mr Kerry's goods. The review officer therefore erred in failing to consider the issue of own use in relation to Mr Mills' goods.

28. Mann J endorsed that approach. At [35] to [38] he stated:

> *35. … If Mr Mills had decided to challenge the forfeiture in the magistrates' court it would have been open to him to try to prove that Mr Kerry's goods were not in fact liable to forfeiture. He would not himself have been bound by Mr Kerry's failure to apply within time. That emerges from the decision of Lightman J in Fox v HMCE [2002] EWHC 1244 (Admin). However, a similar point to the Tribunal's point can be made. If Mr Mills had applied to the magistrates' court he might still have failed to prove that Mr Kerry's goods were for his (Mr Kerry's) own use; if he had so failed then Mr Kerry's goods would have been properly forfeited, and so would Mr Mills' (with which they were mixed) and the car which carried them. The result is the same as the Tribunal's decision - in those circumstances one cannot say that a deeming of a proper forfeiture arising out of a failure to apply for forfeiture proceedings inevitably carries with it an assumption or inference of own use on the part of Mr Mills.*
>
> *36. Accordingly, while it would be an abuse to challenge the forfeiture, one cannot identify other underlying facts which must also be assumed against Mr Mills. The abuse point therefore does not run, or at least not in the same way. One can test the matter in this way. Had there been a debate in the correspondence about whether own use could be argued in the restoration proceedings at the outset, and had HMRC sought to say that if he wanted to take the point then Mr Mills should go through condemnation proceedings so that it could be determined there, the correct stance for Mr Mills to have taken would have been to have said that the point would not necessarily be decided*

there because of the mixing with Mr Kerry's goods. He would therefore have been entitled to require HMRC to consider it as part of the restoration exercise, and to do so would not have been an abuse. By the same token, inviting the Tribunal to consider it on appeal would not have been an abuse.

37. Of course, that did not happen in the present case, and judging from the evidence that degree of subtlety did not occur either to HMRC or to Messrs Mustoe Shorter. The latter firm did not insist on HMRC considering the own use point on the footing that the magistrates' court would not decide it. They merely indicated that they did not wish to apply to the court and then put forward all their submissions to HMRC. It is therefore necessary to decide whether that makes a difference.

38. I do not consider that it does. Mr Mills did not clearly acquiesce in an assumption being made against him on the own use point - the correspondence does not show that, and Notice 12A only makes it plain that forfeiture, and not all conceivable bases of forfeiture, will be assumed against him. Since the logic of the procedure does not mean that Mr Mills must be taken to have conceded the own use point, I do not see why it should be an abuse of the process for him to take it. Absent some clear act of acquiescence on the part of Mr Mills, it would be unfair to conclude that he is debarred from running a point when a proper appreciation of the situation would have meant he would have been entitled to run it in the restoration proceedings anyway because HMRC could not have "insisted" that it be determined in the magistrates' court.

29. The relevance in this appeal arises from the fact, or assumed fact, that the Appellant's goods were "found with" the goods of Mr Irving. They were therefore liable to forfeiture and seizure by virtue of section 141(1)(b) CEMA 1979 even if they were for the Appellant's own use.

30. It makes no difference that in this appeal Mr Irving also initiated condemnation proceedings but his goods were condemned as forfeit, whereas in Mills the passenger had not initiated condemnation proceedings. Nor for the reasons given by Mann J does it make any difference that the goods were condemned as forfeit following a hearing before the magistrates' court. In the present case the magistrates' court simply made an order condemning as forfeit all the goods in the vehicle. We were not taken to any finding that the Appellant's goods were for not own use or indeed that Mr Irving's goods were not for own use. In those circumstances it is not a necessary part of the the magistrates' finding that the Appellant's goods were not for own use.

31. We are not satisfied therefore on the undisputed or assumed facts of this appeal that the Appellant is barred from contending that the goods he had purchased were for his own use. The Tribunal does have jurisdiction over that issue. Having said that we accept that the Appellant cannot challenge the legality of the seizure. That was determined by the East Kent Magistrates' Court. He can assert that his goods were for his own use, but he cannot at the same time assert that Mr Irving's goods were for Mr Irving's own use.

32. That conclusion deals with the Respondents' written notice of application. However as we have indicated Ms Lynch also invited us to strike out the appeal on the ground that it had no reasonable prospect of success. She contended that even if the goods were for the Appellant's own use, there were no exceptional circumstances that would justify restoration of those goods to the Appellant.

33. We have not heard any evidence in relation to the policy of the Respondents in those circumstances or how a review officer would apply the policy in those circumstances. What is clear is that the review officer's letter proceeded on the assumption that the Appellant's goods were not purchased for his own use. If the Tribunal having heard the evidence were to find that assumption was wrong then prima facie the appeal would succeed, subject only to the Respondents arguing that despite failing to take into account that the goods were for own use the result of a new review would inevitably be the same (see *John Dee Ltd v Customs and Excise Commissioners [1995] STC 941*).

34. On the material we have, and without hearing evidence, we cannot say that the result of a re-review would inevitably be the same. As a result we are not prepared to strike out the appeal on the basis that it has no reasonable prospect of success.

Conclusion

35. For the reasons given above we refuse the Respondents' application to strike out the appeal. The Respondents should serve their Statement of Case within 60 days from the date on which this decision is released.

36. 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: 29 JANUARY 2016