



TC02863

Appeal number: TC/2012/10831

*EXCISE DUTIES – seizure of vehicle found to be carrying fake cannabis –
was the owner an innocent third party – on the facts, yes – hardship – appeal
allowed – re-review ordered*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SANDRA SHAKESPEARE

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL : JUDGE LADY MITTING
TERENCE BAYLISS**

Sitting in public at Birmingham on 18 July 2013

The Appellant appeared in person

**Rupert Davies, Counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondent**

DECISION

1. The Appellant, Mrs Shakespeare, was appealing against the review decision of the Respondent, dated 7 November 2012, to refuse restoration of her Burstner Elegance Camper Van, DX58 OVA (“the Vehicle”) which had been seized on 14 March 2011. Mrs Shakespeare was not in the vehicle at the time and her case was, in effect, that as an innocent third party, the vehicle should have been restored to her.

2. The review officer, Mrs Deborah Hodge, was not available to give oral evidence as she was recovering from a serious illness. The Respondent had made a pre-hearing application for the hearing to be adjourned. The application was objected to by Mrs Shakespeare and subsequently refused by the duty judge. The application was not renewed before us. The evidence from Mrs Hodge was there in the form of her very brief witness statement to which she exhibited the review letter and the documents upon which she relied in making her decision. We heard oral evidence from Mrs Shakespeare.

The background

3. On 14 March 2011, the vehicle was intercepted at Plymouth Ferryport. Driving it was Mrs Shakespeare’s husband, Mr David Cox, and he was accompanied by Mrs Shakespeare’s daughter, Sian Shakespeare.

4. Loose in the rear of the vehicle, officers found a plastic bag containing blocks of a substance which the officers believed to be cannabis. The vehicle was subsequently searched. At the rear of the vehicle was a storage area (“the boot”) which could not be accessed from the living area but only from doors at either side. The boot ran beneath the bedroom and was thus only about 4ft high, in width was the width of the vehicle and in depth about 8ft. The rear wall of the boot was found to be covered by three wooden panels. The panelling consisted of a stud frame attached to the bodywork of the vehicle onto which the three plywood panels had been screwed. The panelling protruded into the boot by some 8 inches, thus leaving an 8 inch deep gap between the panelling and the rear bulkhead. Onto the outer surface of the panelling, an extensive number of hooks had been fixed which held in place a set of poles for an awning. When officers removed the panelling, they found concealed behind it 422 kilograms of what they believed to be cannabis resin.

5. On initial questioning by Border Force officers, Mr Cox informed them that the vehicle belonged to his wife, Mrs Shakespeare, and that she had owned it since September 2008. He stated everything in the vehicle belonged to him and he was not carrying anything for anyone else.

6. On discovery of the concealed packages, Mr Cox and Ms Shakespeare were arrested and taken to Plymouth Police Station where they were interviewed. Ms Shakespeare denied all knowledge of everything, insisting she and her stepfather were not into drugs. Mr Cox admitted sole responsibility for the importation denying any involvement by Ms Shakespeare. Ms Shakespeare, he said, knew nothing about the drugs and she thought that it was only tobacco that was being imported. She had only ever been in trouble once before, he said, for stealing garden gnomes. Mr Cox went on to explain that he was only doing this drug run because his son was in trouble with a dangerous gang of drug dealers to whom he (the son) owed a lot of money. Mr Cox

was to be paid €25,000 for this importation which would be used to settle his son's debt. He did say that he had constructed the concealed area himself and he had used it previously for the importation of tobacco. At all times, Mr Cox denied any involvement in the importation by his wife.

7. Despite the denial by both Mr Cox and Ms Shakespeare of any involvement by Ms Shakespeare, her fingerprints were found on the packaging and interrogation of her mobile phone messages revealed a clear involvement by her and beyond that that she had clear knowledge that it was a drug importation. It was also to be later established that far from her having only one previous conviction for stealing garden gnomes, she had in the past been convicted of theft, burglary and possession of amphetamines. When her property was raided, post-seizure, a cannabis farm was discovered in one of her outbuildings.

8. Upon testing the substance was found to be fake, but this had not been known by Mr Cox. Both Mr Cox and Ms Shakespeare were charged with and convicted of the improper importation of Class B controlled drugs and both are currently serving prison sentences.

9. On the day of the interception, the vehicle was seized under Section 139(1) Customs and Excise Management Act 1979 as being liable to forfeiture under Section 141(1)(a) because it was used for the carriage of goods liable to forfeiture and by virtue of Section 88 because it was adapted for the purposes of concealing goods. The legality of the seizure was never challenged and the vehicle was therefore duly condemned as forfeit to the Crown by the passage of time under paragraph 5, Schedule 3.

10. Post-seizure, police raided Mrs Shakespeare's home and seized her computer and mobile phones. All were returned to her, nothing having been found which in any way incriminated Mrs Shakespeare and she has not been subsequently troubled.

The evidence before the Review Officer

11. When Mrs Hodge carried out her review, she had before her all the seizure documentation and the transcripts of the interviews with Mr Cox and Ms Shakespeare by both the Border Force and the police. She also had extensive correspondence between Mrs Shakespeare and the Border Force which we summarise below. Initially Mrs Shakespeare had thought that it was to be alleged by the Border Force that the vehicle had been purchased out of the proceeds of criminal activity and a substantial amount of her correspondence went to demonstrate how the vehicle had been purchased quite legitimately from her own and her family funds. This was accepted by Mrs Hodge who expressly stated that this was not a factor in her decision. We therefore do not include here any reference to this element of the correspondence.

12. Initially in her correspondence, Mrs Shakespeare had denied all knowledge of the concealed area in the boot of her vehicle. In later correspondence (letter 22 October 2012), Mrs Shakespeare clarified her position. When she was initially told of the seizure and that drugs had been found in a concealed area, she was led to believe that some adaptation had been made to the vehicle of which she was unaware – hence her denial. It was only later that she realised that the area of concealment which had been used and to which reference was being made was in fact created as a result of an adaptation of which she had full knowledge. In November 2008, Mrs Shakespeare

had purchased a 6m x 3m awning which would be attached to the vehicle by means of 20 plus poles of varying lengths up to 8ft. Initially these poles had been stored loose inside the living area of the vehicle but they constantly got in her way and, given her immobility, she was unable to get around them and was constantly stubbing her toes. It was at the suggestion of the suppliers of the awning that Mr Cox and Mrs Shakespeare decided that they would suspend the poles off the floor by means of steel clips down the side of the boot. The back wall where the clips were to be fitted is curved and the wooden panelling was therefore inserted to provide the flat surface which was needed to accommodate the poles. Mr Cox had been a carpenter and he therefore carried out the work himself. Mrs Shakespeare did not see him do it and at no time did she realise how far into the boot space the panelling protruded. The boot had been adapted on purchase of the vehicle by the fitting of straps to hold her wheelchair in place.

The review

13. In her review letter, Mrs Hodge summarised the evidence which was before her from the seizure documentation and interview notes and she also summarised the contents of the correspondence which she had received from Mrs Shakespeare. She set out the Respondent's policy on the restoration of vehicles used for the importation of drugs. A vehicle adapted for the purposes of smuggling would not normally be restored. Neither would a vehicle be restored to a third party where to do so would be tantamount to restoring it to the person responsible for the smuggling attempt. However in certain circumstances, the Border Force may allow restoration to an innocent third party for a fee. The fee would be decided by consideration to the degree of recklessness of the third party.

14. Mrs Hodge's starting point was that the seizure had been legal in that the intention had been to smuggle drugs in a vehicle which had been adapted for that purpose. Both the husband and daughter of Mrs Shakespeare had been found to be complicit in the importation which, if genuine, would have had a street value in excess of £1million. She described the Camper Van as having been "meticulously modified in order to conceal the cannabis". Mrs Hodge did not accept that Mrs Shakespeare was completely oblivious to the activities of her husband and daughter. She therefore did not see Mrs Shakespeare as an "innocent third party". She pointed out that although Mr Cox had stated in interview that Mrs Shakespeare was not involved, he had said exactly the same for Ms Shakespeare who was very clearly involved. Any support she gained from him was therefore unreliable.

15. Mrs Hodge pointed out that this had been no casual concealment and that the whole length of the storage area had been boarded off, glued and screwed. She didn't think it credible that Mrs Shakespeare would not have noticed the significant reduction in size of the storage area.

16. She pointed out that Mr Cox clearly had free access to the vehicle and that he was insured to drive it. From this she concluded that Mr Cox was involved in the ownership of the Camper Van and that to restore it to Mrs Shakespeare would be tantamount to restoring it to him, the person involved in the attempted smuggling.

17. She referred to the "various medical problems and terminal illness" which Mrs Shakespeare had described but whilst sympathising pointed out that Mr Cox owned another vehicle which could just as easily be used. The hardship being experienced

was not, in the view of Mrs Hodge, exceptional. She did not regard the inconvenience to Mrs Shakespeare or the expense in replacing the vehicle as exceptional hardship over and above what one should expect. She also added the following sentence: “Your husband chose to become involved in a smuggling attempt: if you find that the consequences of those actions put you in a difficult financial position, that was something you both should have considered before choosing to become involved”.

18. This therefore was the review decision against which Mrs Shakespeare was appealing.

Mrs Shakespeare’s oral evidence

19. A deal of Mrs Shakespeare’s oral evidence repeated what she had already said in correspondence and which we have outlined above. She did however add that because of her disability she very rarely went near the boot. It accommodated her wheelchair and that was really the extent of her concern. The vehicle was always loaded and unloaded by Mr Cox. The poles remained in situ at all times and therefore if and when Mrs Shakespeare did ever look into the boot space all she would notice were the poles.

20. Mrs Shakespeare said that the vehicle was never stored at her own home due to a Council prohibition. It was kept at a nearby farm and if they were going to use it they would drive to and from the vehicle by other means. This meant that not only did she not witness the work on the vehicle being carried out by Mr Cox but she would not have seen him take the vehicle on the day of the trip in question. He would have driven to it in his own car.

21. Mrs Shakespeare went into some detail regarding her relationship with her daughter from whom she said she was effectively estranged. She rarely visited her daughter’s home and because her daughter kept a number of dogs, Mrs Shakespeare never ventured into the outbuildings. She had no idea or any reason to suspect the use to which at least one of the outbuildings was being put and she was completely unaware of her daughter’s criminal conviction for possessing amphetamines. She was not aware of her daughter ever having had any involvement in drugs. She was also unaware that Mr Cox’s son had any involvement in drugs. She knew he had recently been attacked with a machete but did not know why. She told us that she and Mr Cox, to whom she had only been married for a couple of years at this time, by mutual agreement did not discuss their own or each other’s children. They were each aware that there were problems but it was implicitly agreed that neither of them would probe. Mrs Shakespeare was utterly against any form of drugs, her own 15 year old niece having died as a result of a drug overdose. She would have been furious and would have done whatever she could to prohibit it had she known of Mr Cox’s plans.

22. Mrs Shakespeare also told the Tribunal that Mr Cox was suffering serious health problems in prison and had had several TIAs and it was unlikely he would survive his sentence. In the remote chance he did, he would not be returning to live with her as she had been totally betrayed by the trust which she had placed in him. She had only married him as a marriage of convenience anyway as she had needed a carer and she would now be moving away to live with her son.

23. Mrs Shakespeare had, in her correspondence to the review officer, set out brief details of a number of medical conditions from which she was suffering including

pulmonary fibrosis, a collapsed lung and severed nerves. She had attached some medical letters which gave brief details but nothing substantial. She was registered disabled and in constant and severe pain. She described herself as terminally ill although this is not a phrase which is taken from any of the reports. She was dependent upon her husband and his help. Although she did have another car which could be used for shorter distances she could not make any longer journeys and could certainly not undertake holidays in any vehicle other than the Camper Van because of the personal facilities with which it provided her. She has a bowel condition for which she is awaiting surgery.

The jurisdiction of the Tribunal

24. As we pointed out to Mrs Shakespeare, the Tribunal's jurisdiction is limited. The Tribunal has to decide whether the decision was reasonably arrived at. If it was not we can direct that the decision ceases to have effect and require the Respondent to carry out a further review in accordance with directions. We therefore consider whether Mrs Hodge took into account all the factors which were relevant and which should have been given consideration and whether she gave these due weight. We ask whether she took into account anything which was not relevant and which should have been disregarded or whether she made any error in law.

Our conclusions

25. Although we are judging the reasonableness of Mrs Hodge's decision, it is also incumbent upon us to find the facts. We therefore begin by looking at the evidence both documentary and oral which we had before us. The only oral evidence was that of Mrs Shakespeare and we accepted her evidence in the main but not in its entirety. Where we found her evidence to lack credibility was in her denial that she had any knowledge of the involvement of both her own daughter and her son-in-law in drugs. She may well not have known the extent in either case but, especially in relation to her daughter, it is not credible that she was completely oblivious to her daughter's past criminal record. It also seems most unlikely that she and Mr Cox did not discuss the problems which his son was having. However, these misgivings do not detract from what we believe to be the veracity of the remainder of her evidence.

26. We accept and find as a fact that Mrs Shakespeare had no knowledge of the concealed area behind the panelling in the boot. She was not present when the work was carried out and rarely went near the boot area, being physically unable to assist in the loading and unloading. We also accept that it would not have occurred to her to question why the panelling appeared to protrude into the boot. As far as she was concerned the work had been done in order to stow the awning poles safely and she had no knowledge or suspicion of any ulterior motive.

27. We also accept her evidence that she had no knowledge of the purpose of this trip. We believed her when she spoke of her total abhorrence of drugs and we do not for one moment believe that she would have been a party to her husband's criminal intentions. We also accept Mrs Shakespeare's denial that she knew her husband was to be taking her vehicle. The vehicle was not kept at her home address. Mrs Shakespeare herself was bedridden and did not witness Mr Cox's departure and we are quite certain her husband would not have informed her of his plans.

28. Looking therefore at Mrs Shakespeare's evidence we find as a fact that she was innocent of the plans and activities of her husband and daughter on this trip. We find as a fact that she had no knowledge of their planned importation or any reason to suspect what they were about to do. We find that she was an innocent third party. This contrasts totally with Mrs Hodge's view who expressly concluded that she was not an innocent third party and indeed in the sentence which we have quoted above in paragraph 17, she refers to them "... both ... choosing to become involved". We cannot say that this was a totally unreasonable view in the light of what Mrs Hodge knew and bearing in mind, of course, that she had not heard Mrs Shakespeare's oral evidence. Mrs Hodge quite rightly dismissed Mr Cox's assertions that his wife was not involved as totally unreliable. Mrs Hodge, not unreasonably, believed that Mrs Shakespeare would have to have noticed the loss of her boot space but we heard Mrs Shakespeare's evidence that the boot was not an area she would ever take any notice of or visit.

29. Mrs Hodge also believed that to restore the vehicle would have been tantamount to restoring it to Mr Cox. Again, this a view for which she cannot be criticised. As far as she was concerned, Mr Cox and Mrs Shakespeare were married and when he was released from prison he would return to the marital home. Mrs Shakespeare quite clearly had no control over the whereabouts of where her vehicle was kept and it was not unreasonable to believe that life would go on as it had before with Mr Cox having free access to the vehicle and able to use it for whatever purposes he had in mind. Mrs Shakespeare told us that Mr Cox would not be returning to the marital home and that the marriage was effectively at an end. However, there is no guarantee that this will happen and there was certainly no indication by Mrs Shakespeare that she was going to divorce her husband. The only matter which we were told about which could alter this view was Mr Cox's medical condition. Mrs Shakespeare told us that he was terminally ill and would not survive the time he was to spend in prison. There was no medical evidence in support of this and we cannot criticise Mrs Hodge for, in effect, ignoring it.

30. We finally looked at Mrs Hodge's conclusion that although Mrs Shakespeare would suffer hardship from the loss of her vehicle, it would not be *exceptional* hardship. Mrs Hodge was aware of most of Mrs Shakespeare's medical problems and indeed that Mrs Shakespeare had described her condition as terminal. However, the various brief medical letters that had been before Mrs Hodge and indeed were before us do not bear out Mrs Shakespeare's oral evidence. In her evidence to us, it would appear that Mrs Shakespeare's condition was significantly more serious than portrayed in the documents. If Mrs Shakespeare's condition is as serious as she described it then the hardship caused by the loss of the vehicle would, in our view, be exceptional. If one is terminally ill and physically immobile, a holiday is not a luxury and the only means by which such a holiday could be made could not therefore be considered a luxury. Mr Davies in his submissions defined exceptional hardship as that which "interferes with the necessities of life". This is a good and apt description. To a terminally ill patient, the ability to take and enjoy a holiday has to be seen as approaching a necessity. The bowel condition described by Mrs Shakespeare would mean that she would be unable to travel any distance without the facilities offered by the Camper Van. To enjoy or take a holiday the Camper Van would therefore be a necessity. We do not therefore see the vehicle, in the context of Mrs Shakespeare's described medical condition, as being something which merely made life more pleasurable. However, the views which we hold all rely upon Mrs Shakespeare's evidence being factual. We have no means of judging how serious her condition is, as

indeed neither did Mrs Hodge. On the basis of what she knew, Mrs Hodge's view was not unreasonable.

31. Given our findings of fact, we cannot allow the review decision to stand. The position turns out not to have been as Mrs Hodge had believed it to be. In particular we have found that Mrs Shakespeare was an innocent third party. For this reason we have to allow the appeal and direct that a further review be carried out by an officer not previously involved in the case. Mrs Shakespeare must be given the opportunity to obtain much fuller medical evidence if she so wishes. When the new reviewing officer comes to consider hardship, consideration should be given in the light of the medical condition as it really is. We would therefore invite Mrs Shakespeare to obtain such medical evidence and place it before the Respondent before the review is carried out. We therefore make the following directions:

- (i) Within 28 days from the date of release of this decision, Mrs Shakespeare is to have put before the Respondent any further medical evidence which she wishes the new review to take into account.
- (ii) Within 28 days of the receipt of such medical evidence or the expiration of the previous 28 days a new review is to be carried out by an officer with no previous involvement, such review to take into account the findings of fact contained in this decision.

32. The appeal is therefore allowed.

33. 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.

**JUDGE LADY JUDITH MITTING
TRIBUNAL JUDGE**

RELEASE DATE: 16 August 2013