

Searching for proof

Customs decisions to seize cars found carrying excess 'own use' goods have come under fire in the courts. But the battle is still not over, as **Paul Tapsell** reports

HAVING GOT my name into print (*Forfeit Fags* (2001) 145 sj 1052, 16 November 2001) it was perhaps inevitable the courts would re-visit the law relating to the seizure by Customs of excise goods imported by individuals for personal use, but three times in six months? Ignoring the adage 'once bitten, twice shy' I propose to summarise recent developments in this active area.

Lindsay: a fair balance?

In February the Court of Appeal gave judgment in *Lindsay v Commissioners of Customs and Excise* [2002] EWCA Civ 267. Mr Lindsay's "beautiful new ... yellow ... Ford Focus" (Lord Phillips MR's words, not mine) had been seized as forfeit by a customs' officer at the Channel Tunnel terminal, together with the 18,500 cigarettes and 10 kilos of hand rolling tobacco he was bringing into the UK. Lindsay challenged the seizure pursuant to the procedure under ss 14 to 16 of and Sched 5 to the Finance Act 1994. Customs confirmed the decision to forfeit the car, quoting their Restoration Policy, which states:

"Privately owned vehicles used for the improper importation of excise goods ... will not be restored, even on the first occasion they are so used".

Lindsay appealed to the VAT and Duties Tribunal who allowed his appeal on the grounds that the strict application of the Policy did not represent a fair balance "between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights" (*Air Canada v UK* (1995) 20 EHRR 150 at para 36, at para 42 of *Lindsay*) and was disproportionate. The court ordered the return of the seized vehicle. Customs appealed and the Court of Appeal remitted the matter for a further review, but held:

"The Commissioners' policy does not ... draw a distinction between the commer-



■ 'Own use' guidelines

- 800 cigarettes,
- 400 cigarillos,
- 200 cigars,
- One kilo hand rolling tobacco,
- 10 litres of spirits,
- 20 litres of fortified wines,
- 90 litres of wine (only 60 litres may be sparkling wines),
- 110 litres beer – see the Schedule to the (soon to be replaced) Excise Duties (Personal Reliefs) Order 1992).

cial smuggler and the driver importing goods for social distribution to family or friends in circumstances where there is no attempt to make a profit. Of course even in such a case the scale of importation, or other circumstances, may be such as to justify forfeiture of the car. But where the importation is not for the purpose of making a profit, I consider that the principle of proportionality requires that each case should be considered on its particular facts, which will include the scale of importation, whether it is a 'first offence', whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture. There is open to the Commissioners a wide range of lesser sanctions that will enable them to impose a sanction that is proportionate where forfeiture of the vehicle is not justified" (Lord Phillips MR at paras 64 of the decision).

Fox: liability to forfeiture

In June and July further consideration was given to the subject in *Fox v H M Customs and Excise* [2002] EWHC 1244 (Admin) where the thorny issue of s 141 of the Customs and Excise Management Act 1979 (CEMA) was considered. The section had been interpreted strictly, so where there is more than one person in a vehicle and one or more of the travellers has goods in excess of the personal guideline levels, the goods of the other travellers and the vehicle (regardless of whether or not it belonged to the importer of excess goods) were also liable to forfeiture. Further, if any of the travellers did not appeal the seizure and attend the condemnation hearing, the Dover Magistrates' Court would take the view that: "The failure of [one traveller, B] to serve a notice of claim under para 3 of Sched 3 to the 1979 Act or to give evidence on oath at the hearing before the justices in these proceedings required or entitled the justices as a matter of law to hold that, if the goods owned by [the appealing traveller, A] were mixed, packed or found with goods owned by [B], the goods owned by

[A] were for that reason alone liable to forfeiture".

The High Court said this view was wrong. Furthermore, it went on to confirm:

"... To establish by operation of s 141(1)(b) [of the 1979 Act] that the goods owned by [A] are liable to forfeiture, it is necessary to prove as a fact that the goods owned by [B] are liable to forfeiture." (Lightman J's conclusions at para 18 of the decision).

Hoverspeed: reasonable grounds

The matter came again before the High Court in July in *R (Hoverspeed) v Commissioners of Customs and Excise* [2002] EWHC 1630 (Admin) and generated much interest in the media, albeit with considerably more heat than light. The decision states, inter alia:

- i) The Excise Duties (Personal Reliefs) Order 1992 is incompatible since it reverses the burden of proof by requiring the traveller to establish that goods over the guideline levels were imported for personal use;
- ii) Exceeding the guideline levels cannot give rise to a presumption of commerciality, rather it is one factor to be weighed in the balance when determining (to the civil standard and with the burden of proof on Customs) whether the goods were in fact for commercial use;
- iii) Customs officers must have "reasonable grounds to suspect one or other of the matters set out in ss 163 and 163A of CEMA [eg either the vehicle is carrying 'goods which are chargeable with duty which has not been paid' (163(1)(a)) or 'dutiabie alcoholic liquor, or tobacco products, which are chargeable with any duty of excise, and liable to forfeiture under the customs and excise acts' (163A(2)(a) and (b))]. They are not entitled to rely on generalities or trends: there must be reasonable grounds to suspect the person(s) whom they are checking." (Brooke LJ at para 180); and
- iv) "...Officers must follow principles of proportionality when determining whether or not to restore goods and vehicles they have seized to their owners" (from the summary).

Dealing with the facts of the travellers involved in the case, the court held that because Customs:

"... have not proved to us that there were reasonable grounds for stopping this car and questioning its occupants, the goods in it should not have been seized. Nor should the car. Furthermore, and quite independently, we consider that the Commissioners' refusal to return the car ... without even considering whether it might be restored to [the traveller] on payment of an appropriately proportional sum (given all the circumstances of the case) represented a response which was just as disproportionate as their similar response in the case of Mr Lindsay [see above]".

Customs have leave to appeal the decision in *Hoverspeed* (so watch this space).

How does the situation stand?

Despite the wild media speculation and the Customs' comments about 'smugglers' charters', Brooke LJ stated the reality of the situation at para 173 of *Hoverspeed*:

"Whether [the finding of incompatibility of the presumption of commerciality from Art 5(3B) of PRO] will make much difference as a matter of practice is open to question. After all, as Lord Woolf pointed out in *Goldsmith* [[2001] 1 WLR 1673, see also the November 2001 article], no one is in a better position to know whether the goods are to be used for private or commercial purposes than the person in possession of them, and if Customs Officers do not believe him, there is in practical terms not much difference between his failing to satisfy them that they are not being held for personal use (the PRO test) and them being satisfied that they are held for 'commercial' use (the test under the directive). In a borderline case, however, the location of the burden of proof may well make a difference" ■

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■ Practice points

So what does one say to a client who, having read in his morning paper that customs officers have no right to stop him and cannot seize any goods he brings in as long as he says they are for his own use, travels across to France on a cut-price ticket provided by the same paper and then is stopped and has his goods and car seized by customs officers?

- Firstly, appeal and/or seek a review of the seizure under one or both of the two schemes mentioned above, but be aware of the relevant time limits.
- Secondly, ensure any co-travellers either do the same or are willing to come to court to give evidence on his behalf.
- Third, gather any available evidence to show all the goods involved, not just the client's, were for personal use (thank you, Lord Brooke).
- Finally, gather evidence regarding (a) the value and (b) the effect of the loss of the goods and the vehicle; and finally, prepare for a fight!