

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 HCV 00025

BETWEEN	AYE AYE NAING	CLAIMANT
A N D	THE ATTORNEY GENERAL	1 ST DEFENDANT
A N D	COLLECTOR OF CUSTOMS	2 ND DEFENDANT
A N D	FINANCIAL INVESTIGATIONS DIVISION	3 RD DEFENDANT

Mr. Terrence Ballantyne for the Claimant, instructed by Richard Bonner and Associates.

Mrs. Symone Mayhew for the Defendants instructed by the Director of State Proceedings.

ALLEGED BREACH OF CONDITION OF DUTY CONCESSION-SEIZURE OF MOTOR VEHICLE – WHETHER SEIZURE LAWFUL

February 23 & April 5, 2006

BROOKS, J.

Dr. Aye Aye Naing is a District Health Medical Officer assigned to the Hanover Health Department. In that post she is eligible to benefit from a concession on the import duty on a motor car. She duly applied for and was granted the concessionary rate of 20% of the regular import duty on a motor vehicle which she wished to import. The vehicle, a Mercedes Benz, was imported in April 2002 and the duty paid at the concessionary rate.

On 16th December 2004, officers attached to the Financial Investigations Division of the Ministry of Finance, seized the vehicle while it was in the possession of someone other than Dr. Naing. They claimed that Dr. Naing had breached the conditions of the duty concession. Dr. Naing's claim herein is for a declaration that the seizure was unlawful, that the motor vehicle be ordered returned to her and that damages be awarded for its wrongful detention. She has, since filing the claim, discontinued it as against the Commissioner of Customs.

The officers of the Financial Investigations Division insist that the seizure was and is lawful because Dr. Naing did not have exclusive use of the vehicle as was required by one of the conditions of the concession. They have deposed that they observed the operation of the vehicle for a period of four months, and that during that time the vehicle was not used by Dr. Naing, but by another person. That vehicle, they say, was based and used in the Corporate Area, while Dr. Naing lived and worked in Lucea in the parish of Hanover and used other means of transportation there.

The issues to be determined are what conditions, if any, were imposed on Dr. Naing in respect of this motor vehicle, whether they were brought to Dr. Naing's attention and whether there was sufficient evidence of a breach.

The documents which the Defendants rely on as being binding on Dr. Naing are the following:

1. A letter from the Financial Secretary dated April 17, 2002 by which the Commissioner of Customs was informed of Dr. Naing's eligibility in respect of the vehicle. The relevant part of the document is a typewritten note at the foot thereof which was intended for Dr. Naing's attention. It stated:

“Dr. Naing is reminded that in the event that he (sic) leaves the Government Service or disposes of the vehicle within a period of three(3) years after receiving this concession, then full duties become payable.”

2. A Supplementary Import Entry (C78A Form) which is used by the Commissioner of Customs as part of the documentation for the importation of the vehicle. The document contains a number of declarations typed thereon, including, under the heading “Description of Goods and Special Declarations”, the following:

“I Dr. Aye Aye Naing, Medical Officer in the Ministry of Health
HEREBY DECLARE THAT I HAVE BEEN GRANTED A 20%
CONCESSIONARY RATE OF DUTY VIDE MINISTRY OF
FINANCE LETTER NO. 564/014 DATED 17th April, 2002
APPROVED BY THE MINISTRY OF FINANCE....

“I FURTHER DECLARE THAT THE VEHICLE SHALL BE USED
EXCLUSIVELY FOR THE PURPOSE OF DR. NAING AND
FURTHER DECLARE THAT THE VEHICLE MENTIONED ON

THIS LICENCE SHALL NOT BE OFFERED FOR SALE OR
COMMERCIAL EXCHANGE.

(sgd.) Aye Aye Naing

.....

Dr. Aye Aye Naing”

I think that it is obvious that the former document would not have brought to Dr. Naing’s attention any requirement of exclusive use by her; which is the condition which the Defendants have alleged that she has contravened. Nor, in my judgment, would Dr. Naing be fixed with any knowledge of such a condition by virtue of Section 32 (1) of the Customs Act, as that section only speaks to the requirement of forfeiture in the event of breach of conditions which have been imposed. The section does not seek to itself impose any conditions. It states as follows:

“32. (1) If any goods which are ordinarily liable to duty at a given rate are allowed by law to be, and are in fact, entered at a lower rate of duty, or free of duty, on any special conditions, or for use for some special purpose, or because they are the property of or intended for use by some particular person or functionary, and if such conditions are not observed, or the goods are at any time within three years of the date of importation thereof used for any other than the specified purpose, or being goods entered as aforesaid because they are the property of or intended for use by some particular person or functionary, are sold or transferred to any other person, such goods, unless the full duties thereon shall have been paid, shall be forfeited, and the importer and any person who shall be knowingly concerned in the use of such goods contrary to such conditions, or for some purpose other than that specified, or in any way contrary to this section shall each incur a penalty of not less than treble the import duties payable on the goods nor more than treble the value of the goods.”

The name “Aye Aye Naing” is written below the declarations on the C78A Form, as if by way of signature. At paragraph 3 of her affidavit sworn to on 5th April, 2005, Dr. Naing deposed that:

“I have never signed that document nor was it ever drawn to my attention by the broker who handled the paperwork relative to the importation of the motor vehicle”.

This assertion has not been contradicted by the Defendants. It should be noted however that the section for the insertion of the importer’s name and address on the C78A Form is completed as follows:

“AMV Imports Limited
12 Kingslyn Avenue, Kgn. 10
for Dr. Aye Aye Naing, Medical Officer
in the Ministry of Health

Name of Signatory and Status
Dr. Aye Naing Owner”

On an Import Entry Form also used by the Customs Department in this transaction, the importer’s name and address is stated as set out above, but under the heading “name of signatory and status” is typed: “S. Johnson – Mng. Dir.”

Mr. Ballantyne on Dr. Naing’s behalf submitted that in the absence of positive proof that Dr. Naing did sign that C78A Form she cannot be bound by its contents. He submitted that as these were declarations which only affected her, they would have had to have been brought specifically to her

attention. A signing on her behalf by a customs broker or an agent would neither bind her nor estop her from denying knowledge of same. No authorities were provided in support of those propositions.

Mr. Ballantyne further submitted that even if Dr. Naing had signed the declarations the conditions contained therein would have been of no effect. He based this startling submission on the proposition that the condition was not lawfully imposed, it not having been imposed by the Minister responsible. He relied on the judgment of Beswick J. in the case of *Elma Stennett v. Attorney General* HCV 00790/2003 (delivered 11/11/2005).

In *Stennett* the circumstances leading to the seizure of a vehicle were materially identical to those in the present case. Beswick J. ruled in favour of the owner of the vehicle, declaring the seizure unlawful. Mr. Ballantyne therefore relied heavily on the judgment of my learned sister.

On the point of whether the condition concerning exclusive use was properly imposed Beswick J. stated at p. 16-17:

“There is no evidence as to the genesis of this added condition concerning use of the vehicle nor is there evidence of the Minister authorizing its inclusion or even being aware of its inclusion on the Form signed by Mrs. Stennett.

“The Provisional Collection of Tax (Customs Tariff) (Revision) Order 1991 was modified by the Provisional Collection of Tax (Miscellaneous Duties) (Confirmation and Extension) Resolution 1991. It now provides that the grant of the reduced rate of duty shall be subject to terms, conditions or restrictions as the Minister may *in writing* direct (my emphasis)

“The Minister, having been so empowered to make directions, cannot, without more, delegate that power to anyone else. It follows that any conditions imposed by some authority other than the Minister could not have validly been imposed.

“It is therefore my view that the additional condition on the Import Permit Form concerning use of the vehicle is of no legal effect as against Mrs. Stennett as it was not added in writing by the Minister nor was Mrs. Stennett properly informed of its presence and meaning.”

Mrs. Mayhew on behalf of the Defendants reminded me that I am not bound by the judgment of Beswick J. She also submitted that Dr. Naing cannot properly deny knowledge of the condition requiring exclusive use, because in paragraphs 3 and 4 of her affidavit sworn to on 27th December 2004, Dr. Naing states:

“3.It was condition (sic) of this concession that the vehicle should not be sold, pledged or transferred or disposed of, for a period of three (3) years and further the vehicle “shall be used exclusively for the purposes of Dr. Naing.”

4. I have observed these conditions continuously since I became the owner of the vehicle.”

In addressing the point concerning the validity of the condition, Mrs. Mayhew at paragraph 7 of her written submissions stated:

“...Furthermore, the import entry, which was signed by or on behalf of the Claimant, notes the terms on which the vehicle was imported and special conditions. The declarations recites (sic) that the concession was granted because of the Claimant’s employment with the government. It is clear that the concession was granted to facilitate her duties as a travelling officer... Additionally the declarations on the import entry specifically provides (sic) that the vehicle will be used exclusively for the purposes of the Claimant.”

I regret that I cannot agree with Mrs. Mayhew's submission that there is evidence of a condition as to the exclusive use of the vehicle. Like Beswick J. I also find that there is no evidence of the genesis of this so-called "condition". I so style it, because the C78A Form does not contain a condition for the concession, but a declaration by the importer. Nowhere on the C78A Form does the term "conditions of duty concession" or anything of like effect, appear. It is my view that the only evidence of a condition being imposed on Dr. Naing is that contained in the letter of April 17, 2002 from the Financial Secretary.

But what of Dr. Naing's admission in paragraphs 3 and 4, quoted above, concerning her knowledge of the existence of the condition; does it cure the evidential gap in the Defendant's case? I am uncomfortable with the concept which asserts, despite the absence of clear evidence of the existence of an imposed condition concerning a vehicle, that there may yet be a seizure of a vehicle on the basis of a breach of such condition. It is, in my view, untenable to claim that such a seizure may be legitimized by a later admission by the owner of the vehicle of the existence of such a condition. It is for the Defendants to show that the provisions of Section 32 of the Customs Act apply, that there were special conditions which were imposed for the vehicle or its use, and that there was a breach of those conditions or

any of them. It is clear that the officers attached to the Financial Investigations Division acted on the basis that there was a departure from the terms of the declarations made by Dr. Naing, but I find that that departure is not sufficient to justify forfeiture under Section 32(1).

I now turn to the other relevant part of Section 32(1) which speaks to the element of the liability to forfeiture of “goods entered as aforesaid because they are the property of or intended for use by some particular person or functionary, (being) sold or transferred to any other person”, as mentioned in Section 32 (1). This is directly connected to the earlier part of the section which speaks to goods which are allowed the special duty rate “because they are the property of or intended for use by some particular person or functionary”. For this aspect, to quote Beswick J. in *Stennett*; “(t)he focus is on restricting disposal”. It is not disputed that there has been no sale or transfer of the vehicle by Dr. Naing, and therefore there is no evidence of a breach of that element of the section.

It is not that I do not agree that the factual situation would not have warranted a seizure if there had been such a condition of exclusive use. The evidence is that the officers had the vehicle under surveillance on different days for a period of almost four months (9/8/04 – 16/12/04). During that time it was always seen in the Corporate Area, was never under the control

of Dr. Naing, nor was she ever seen in it as a passenger. It was frequently seen being driven by Dr. Thitar Mindin, and on several occasions it was seen parked at either the home or offices of Dr. Mindin. There was also evidence that, at all material times, Dr. Naing lived and worked in Lucea. She had two Toyota Caldina motor vehicles registered to her. It was one of those vehicles that Dr. Naing was said to have identified to her employer as the vehicle which she used for the purposes of her duties and for which she claimed payment for travelling expenses incurred. This latter evidence was deposed by Rediverse Johnson in an affidavit sworn to on 11th March 2005. That affidavit was said to have had exhibited to it, copies of the claims. It in fact did not, but Dr. Naing has not denied that she made such claims. She did admit, in an interview with the officers, that she did own two Caldina motor cars. Not once, during the period November 5, 2003 to December 16, 2004, did the officers, upon visits to Dr. Naing's home and office respectively, see the Mercedes Benz.

Dr. Naing for her part stated that she took the vehicle (as she does on occasion) to her sister Dr. Mindin for the latter take the vehicle to "Motor Sales" to be serviced. She does not say in her affidavit the date on which she did so, but Dr. Mindin in her affidavit sworn to on 29th December 2004, deposed that she was away from the island from 13th November to 12th

December, and that it was on her return to the island that she discovered that during her absence the vehicle had been left for it to be sent to be serviced.

I do not believe Drs. Naing and Mindin. The evidence from the surveillance, which I believe, reveals their deceit in respect of the presence of the vehicle in the Corporate Area and the reason therefor. The surveillance revealed that the vehicle was seen in the Corporate Area on eight occasions on seven separate days in October 2004, and on two separate dates in November, prior to the 13th, which is when Dr. Mindin says she left the island. On each of these occasions the vehicle was seen either at one or other of Dr. Mindin's premises or being driven by her.

Because of this deceit, I considered the judgment of Cooke J. (as he then was) in the case of *R. v. The Minister of Finance and Planning and anor.* (M. 150 /1998 delivered 8th February, 2000). That was also a case involving a duty concession with respect to a motor vehicle. In that case the owner's application for the discretionary orders of Mandamus and Certiorari were refused, because of the owner's complicity in deceit. I do not have that discretion as Dr. Naing has not asked for such orders and indeed the issues discussed here were not argued before Cooke J.

Conclusion

I find that there was a regular use of the vehicle by Dr. Mindin and that the statements by both Dr. Naing and herself, that the vehicle was only in the Corporate Area to be serviced, were untrue. There however, being no proof of the imposition of a condition restricting the use of the vehicle exclusively to Dr. Naing, nor any proof of a sale or transfer of same by her, I find that there cannot be said to have been any breach justifying a forfeiture of the vehicle pursuant to Section 32 (1) of the Customs Act. In light of, Dr. Naing's untruthfulness I shall not grant her any costs in the matter.

The orders of the court are therefore:

1. The seizure of the vehicle Mercedes Benz registration no. 5585DU is hereby declared unlawful.
2. The said motor vehicle should be returned to Dr. Aye Aye Naing forthwith.
3. Damages for the unlawful detention to be assessed.
4. Each party is to bear its own costs.