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ROYAL COURT
(Samedi Division) 91.

28th May, 1992

Before: P.R. Le Cras, Esq., Commissioner, and Jurats Vibert and Rumfitt

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Between:	**Finance and Economics Committee of the States of Jersey**	**Plaintiff**
And:	**Jacqueline Heather Bardsley**	**Defendant**

Notice of seizure of a vehicle, pursuant to provisions of Article 57 of the Customs & Excise (General Provisions) (Jersey) Law, 1972.

Preliminary point as to the Court's discretion under Article 57.

Advocate S.C.K. Pallot for the plaintiff.
Advoccate M.C. St. J. O'Connell for the defendant.

JUDGMENT

THE COMMISSIONER: These are proceedings in which the Finance and Economics Committee seek an order of the Court condemning as forfeited a car seized by the Customs as having been used for the carriage of cannabis.

The defendant is the owner of the car which was driven by another person and has, her counsel admits, pleaded guilty to charges of possession of cannabis and importation of cannabis into the Island. There is, we understand, no question but that her car was used for the importation and this with her knowledge and consent.

The Committee, having seized the car, have received a claim from the defendant to the effect that the car in question is not liable to forfeiture, and now bring forward these proceedings to maintain their claim and to request the Court to order the forfeiture.

The instant proceedings come before the Court on a preliminary question which is whether the legislation imposes a mandatory duty on the Court or whether the Court has a

discretion as to whether the forfeiture should be ordered or not. It is common ground that, if the provisions of the law are mandatory, the provisions as to procedure and the grounds on which the Committee have acted are such that they are entitled to their order.

If, on the other hand, there is a discretion then the defendant will seek to put before the Court evidence as to why such a discretion should be exercised in her favour.

The Committee's case is simply put. Under Article 57 of the Customs & Excise (General Provisions) (Jersey) Law, 1972, states:

"....where anything has become liable to forfeiture under the customs of excise Laws -

(a) any .... vehicle .... which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, ...

shall also be liable to forfeiture".

Thus the car which carried the cannabis is, counsel avers, liable to forfeiture. Furthermore, if "use" requires to denote some form of control, then this fits the facts in this case.

Article 56(5) provides:

"(5) The provisions of the said First Schedule shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the customs or excise Laws".

This, counsel maintains, brings us to the First Schedule, the relevant passages being:

"(1) The Committee or Agent of the Impôts shall give notice of the seizure of any thing as liable to forfeiture and of the grounds therefor to any person who to its or his knowledge was at the time of the seizure the owner or one of the owners thereof...".

Then paragraph (3):

"(3) 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 ..... give notice of his claim in writing to the Committee or the Agent of the Impôts ....

> *(6) Where notice of claim in respect of any thing is duly given in accordance with the foregoing provisions of this Schedule, the Committee shall take proceedings for the condemnation of that thing by the Court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited".*

Counsel further refers to paragraphs (15) and (15)(a) of the First Schedule:

> *"(15) Where any thing has been seized as liable to forfeiture the Committee may at any time if it thinks fit and notwithstanding that the thing has not yet been condemned, or is not yet deemed to have been condemned, as forfeited -*
>
> *(a) deliver it up to any claimant upon his paying to the Committee such sum as it thinks proper, being a sum not exceeding that which in its opinion represents the value of the thing, including any duty or tax chargeable thereon which has not been paid ...".*

He contended that the word "shall" in paragraph (1) of the First Schedule is mandatory; and that the same construction must be placed on the same word where it is twice used in paragraph (6). In the first place it is used so as to ensure that the Committee deals with the defendant's claim, and in the second to provide that there is no discretion in the Court to refuse the Committee's request, providing of course that the thing - in this case a car - was at the time of seizure liable to forfeiture.

There was, he contended, no ambiguity here but only the clearest of words.

He referred the Court, first to Stroud's Judicial Dictionary of Words and Phrases (5th ed.) vol. 5: pp. 2403-9, at p. 2404:

> *"(8) Whenever a statute declares that a thing "shall" be done, the natural and proper meaning is that a peremptory mandate is enjoined. But where the thing has reference to-*
>
> *(a) the time or formality of completing any public act, not being a step in a litigation, or accusation; or*
> *(b) the time or formality of creating an executed contract whereof the benefit has been, or but for their own act might be, received by individuals or private companies or private corporations,*
>
> *the enactment will generally be regarded as merely directory, unless there be words making the thing done*

void if not done in accordance with the prescribed requirements".

In this instance he accepted that "shall" in paragraph (3) of the First Schedule might be directory, but that there was no mention about paragraph (6).

He referred us, secondly, to 4 Halsbury 41 at p.468:

"Upon the general principle that words are to be construed in their ordinary and natural sense, provisions which are prima facie imperative cannot without strong reason be held to be directory".

And then refers us further down the page:

"It has been stated that the word "shall" is not always absolutely obligatory and that it may be directory".

And at p.471:

"It has often been stated that certain classes of Acts are to be construed liberally or benevolently, while others are to be strictly construed. Where, however, the words of an Act are plain and admit of only one meaning, that meaning must be followed and it is immaterial whether the Act is subject to a liberal or a strict construction. It is only where there are alternative meanings that the question of liberal or strict construction can arise...".

Finally, he referred the Court to the case of de Keyser -v- British Railway Traffic and Electric Company, Limited (1936) 1 KB 224, a case where, unbeknown to the owner, a vehicle was used to convey goods liable to forfeiture under the then Customs Acts. Although the provisions are not precisely the same as they are here, he suggested that the reasoning would be of assistance.

In that case the Court, despite the use of the word "may" took the view that the Justices had no discretion.

The reasons of Lord Hewart CJ are set out at p.230:

"There may be, where the owner of the property or other person authorised by him gives notice of a claim, an inchoate forfeiture which is to be completed by the combined forfeiture and condemnation contemplated by s. 226. What is it that is open to the claimant on such proceedings? In my opinion, nothing more is open to him than to contend, and, if need be, to offer evidence to prove, that, on a true view of the facts, the conveyance

in question does not come within the class of things which, by s. 202, are forfeited. He may contend with success, for instance, that through error or otherwise a conveyance not liable to be forfeited has been seized. He may say in whatever form is suitable to the relevant facts that the conveyance does not come within the class of things forfeited. But once it is established that the conveyance does come within that class, this undoubtedly rigorous statute gives the claimant no opportunity of asking the Court to take into consideration mitigating circumstances with the effect of removing the conveyance from that class. There is no opportunity for mercy with regard to a conveyance which has been forfeited, although there may be grounds for contending that the conveyance does not come within the class of forfeited property".

We were referred also to the comments of Humphreys J at p.232, where he says:

What is the question which the justice has to decide? As the statute clearly says, it is whether the property is liable to forfeiture. That is the only question which the justice is called on to decide".

And finally to the words quoted by Singleton J of Lord Blackburn in Julius v. Oxford (Bishop of) (5 App. Cas. 214, 241) where he says:

"If the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it for the benefit of those who have that right, when required on their behalf. Where there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it".

In his answer, counsel for the defendant put his case on several grounds.

First, he claimed that Article 57 failed to operate the schedule, as this was referred to only by Articles 56 and 59. We find that the provisions of Article 56(5) are sufficient to find against him on that ground.

He then went on to urge that the Court could not say that at the time of seizure the car was at that point liable to seizure. We have to say that we do not think that there is, on the admitted facts before us, any substance on that ground.

He submitted that if Article 56(5) was to be of general application it should have said so. Again we have to find against him on that point. In our view the words are perfectly clear.

Finally, turning to de Keyser, he submitted that, there, the innocent owner of a car - or to be more topical, it might be an aeroplane (for ships have special provisions) - had a right of appeal to the Commissioners of the Inland Revenue. Under the present law, if Mr. Pallot's construction is correct, the only discretion resides in the hands of the Committee, who are thus Judge and Jury in their own case and, furthermore, as elected politicians, more subject to potential pressure from large and influential corporations whose planes may have been "used" than from poor people whose cars have been used. There was, he urged, no sufficient check on the Customs whose power might be effectively unsupervised and unassailable. In these circumstances, he submitted, there must be a judicial check at some point and hence the Court must have a discretion.

In reply to this point Mr. Pallot submitted that the law is clear and that in such circumstances the Court, whether it likes it or not, may not remake the law.

The Court has no hesitation in accepting the submissions of Mr. Pallot. The words are plain and in the view of the Court admit of only one meaning. The result is that the article as drawn is clearly mandatory.

The Court, therefore, has no discretion in dealing with the present application and makes the order sought by the Committee.

We should add that the legislature has decided that it is the Committee that should have the discretion as to whether and within limits on what terms any thing which has been seized is liable to forfeiture should be returned, and in our view it is to the Committee therefore that the defendant, if she wishes to pursue the matter, should put the statement which Mr. O'Connell put to us this morning.

Authorities

Stroud's Judicial Dictionary of words and phrases: (5th Ed.)
Vol. 5: pp 2403-9: "shall".

4 Halsbury 41: pp. 444-471.

de Keyser -v- British Railway Traffic and Electric Company, Limited (1936) 1 KB 224.