[2020] UKFTT 360 (TC)

TC07839

PROCEDURE – adoption of witness statement by other Border Force Officer – that officer unable to connect to the video hearing platform – application for adjournment refused – whether to accept hearsay evidence in representative's written submission – held, no

EXCISE – seizure of trailer – whether Border Force's decision to restore for a fee was reasonable – yes – appeal refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/03636

BETWEEN

EDWARD PANIEC
t/a PAN-POL EDWARD PANIEC TRANSPORT SAMOCHODOWY

Appellant

-and-

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE ANNE REDSTON
MR JOHN ROBINSON

The Tribunal determined the appeal on 1 July 2020.

The Tribunal heard Mr Frank Keddle of Wendt and Company International for the Appellant and Mr William Dean of Counsel for the Respondents.

The hearing was in public using the Tribunal video platform. A face to face hearing was not held because of the difficulties caused by CV19.

DECISION

SUMMARY

1. On 12 October 2018, the Border Force seized a Schwarzmuller trailer belonging to the Appellant ("the trailer"). The Border Force offered to restore the trailer for £6,550.58. The Appellant appealed that decision on the basis that it was unreasonable and that the trailer should have been restored without charge.

2. In restoration appeals such as this, the Tribunal's jurisdiction is limited. We cannot order restoration, but if we decide that the Border Force has made an unreasonable decision, we can direct that it make a new decision taking into account specific findings of fact.

3. However, on the facts of this case, we found that the decision made by Officer Harris of the Border Force was entirely reasonable and we refused the Appellant's appeal. We gave our decision at the end of the hearing, and on 27 July 2020 issued a summary decision. On 30 July 2020 the Border Force asked for a full decision, and this is that full decision.

4. In addition to the substantive issue about the reasonableness of Officer Harris's decision, the Tribunal also made several procedural decisions: we decided to continue with the hearing despite the Appellant's non-attendance; we refused the Border Force's application for an adjournment, and we refused to accept the hearsay evidence included in Mr Keddle's submissions made on behalf of the Appellant.

ATTENDANCE AT THE HEARING

The test hearing

5. The Tribunal's normal practice with video hearings is to list a "test hearing" at least a day before the actual hearing, with the aim of identifying any problems for the parties or the Tribunal panel.

6. The test hearing for this appeal took place at 10am on 30 June 2020, the day before the substantive hearing. Two people, the Appellant and the Border Force's witness, did not connect for the test hearing. The parties had been issued with directions on 22 August 2019 (reissued with typographical corrections on 15 November 2019, which include the following:

> **"Witness attendance at hearing:** At the hearing any party seeking to rely on a witness statement may call that witness to answer supplemental questions (but the statement shall be taken as read) and must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute)."

The Appellant

7. The Appellant had given a witness statement for the hearing. The Tribunal asked Mr Keddle whether he knew why the Appellant had not connected with the video platform. Mr Keddle said that the Appellant was not intending to give oral evidence.

8. The Tribunal referred him to the direction set out above, and pointed out that if the Appellant failed to attend, this would prevent Mr Dean, the Border Force's Counsel, from cross-examining him, and he might invite the Tribunal to refuse to accept some or all of the evidence in the Appellant's witness statement. Non-attendance would also prevent Mr Keddle from asking supplementary questions of his witness. The Tribunal also noted that Mr Keddle's submission contained factual points which were not in the Appellant's witness statement and

for which we had been unable to find other supporting evidence in the Bundle. Mr Keddle said he would reconsider the position and discuss it with the Appellant.

9. The Tribunal then asked whether the Appellant had a sufficient level of English to participate in the hearing without an interpreter, and Mr Keddle said he thought an interpreter might be required. The Tribunal said that if that was the position, Mr Keddle would need to speak to the Tribunal's Service as a matter of urgency, to see if it was possible to locate a professional interpreter; if one could be found, it would then be necessary to check that the interpreter was able to connect with the video platform. If there was no interpreter, or if a test hearing involving the interpreter could not be arranged, Mr Keddle would need to make an application to adjourn the hearing. Mr Keddle said he understood all those points and would consider them together with his client.

The Border Force

10. The decision under appeal was made by Officer Harris. He provided a witness statement with ten relevant exhibits, and dated his statement on 16 July 2019. However, at some point before 12 March 2020, Officer Harris sadly passed away.

11. On 12 March 2020, another Border Force Officer, Officer Summers, signed a witness statement which said:

> "I have not had any previous dealings with the case, but have read the case papers and I am satisfied that the decision not to restore the goods was correct and reasonable. I therefore adopt this case [ref] wholeheartedly, in that, had I reviewed this case I would have come to the same decision."

12. Officer Summers was unable to connect with the video platform during the test hearing. The Tribunal was told by the Tribunals' Video Hearings Team that he was having technical difficulties, but that they would continue to work with him and do their best to ensure he was able to join the hearing the following day. Mr Dean said he would also contact Officer Summers to establish the position.

The Appellant's failure to attend

13. On the day of the hearing the Appellant did not connect with the video hearing platform. Mr Keddle told the Tribunal that he had discussed all the issues raised the previous day with his client, who had confirmed his decision not to attend. Mr Keddle said he did not want to ask for an adjournment, and that he was aware of the possible evidential consequences for his client. Mr Dean's position was also that the hearing should continue.

14. The Tribunal considered Rules 2 and 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules").

Rule 2

15. Rule 2 is headed "Overriding objective and parties' obligation to co-operate with the Tribunal" and it reads

> "(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes–
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it–

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must–

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

16. Rule 33 is headed "Hearings in a party's absence" and reads:

"If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal–

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing."

Our decision on whether to continue without the Appellant

17. In relation to Rule 33, the Appellant had clearly been notified of the hearing. We therefore had to decide whether it was in the interests of justice to continue without him, in the light of Rule 2.

18. If we continued the hearing, the Appellant would obviously be unable to participate. However, it had been his decision not to attend; he had sent Mr Keddle as his representative, and he wanted the hearing to continue in his absence. Adjourning the hearing would cause delay and cost. Both parties wanted to go ahead. We decided it was in the interests of justice to continue.

Officer Summers

19. Officer Summers also did not connect to the video hearing platform for the hearing. The Tribunal was informed that:

(1) Officer Summers' official Border Force laptop contained a block which prevented him from accessing the video platform;

(2) he was prohibited by Border Force rules from using his home computer for official business; and

(3) he had considered going to a Border Force office where he could use a desktop computer, but once there he would not be able to access a private area from which to participate in the hearing.

20. Mr Dean applied for an adjournment to allow the Border Force time to sort out those difficulties. He submitted that as Officer Summers was the Border Force's only witness, it was in the interests of justice for him to give oral evidence at the hearing.

21. Mr Keddle said he was not intending to cross-examine Officer Summers, as he was not the officer who made the decision which was under appeal. Instead, Officer Summers had adopted Officer Harris's decision and said he would have come to the same conclusions.

22. The Tribunal considered whether it was in the interests of justice to allow the application, taking into account the factors set out in Rule 2, including in particular the need to avoid delay, providing that this was "compatible with proper consideration of the issues". In assessing that factor, we considered the status of Officer Summers' witness statement.

The status of Officer Summers witness statement

23. The Tribunal accepts that, generally speaking, one witness can adopt the evidence of another. By way of example, In *RPS v HMRC* [2020] 0150 (TC), in which Judge Redston was also the presiding Judge, RPS had two operations managers at the relevant time, Ms Andrea Snagg and Ms Fay White. Ms Snagg had provided a witness statement, but resigned from RPS before the hearing. Ms White then provided a witness statement which largely adopted that of Ms Snagg. This was possible because their evidence concerned the type of work carried out by RPS; both women had essentially the same role and so could give the same factual evidence from their own experience.

24. However, the position in this appeal was different. Officer Harris had made a particular decision, and his witness statement essentially said that he stood by that decision. The decision and the related exhibits were in the Bundle for the hearing. The issue before the Tribunal was whether the decision *which Officer Harris had made* was unreasonable. We doubted whether it was possible for a witness statement of this type to be "adopted" by someone else.

25. Officer Summers' witness statement said that he was "satisfied the decision…was reasonable" and he "would have come to the same decision" as Officer Harris. However, that is not evidence, but opinion. It is the role of the Tribunal, not the Border Force, to decide whether Officer Harris's decision was unreasonable. In addition, Officer Summers said in his witness statement that he was "satisfied that the decision not to restore the goods was correct and reasonable" (our emphasis), when the decision under appeal was that Officer Harris had decided to restore the trailer for a fee, instead of without charge.

26. We also considered what might happen in the witness box. Had Officer Harris been able to attend the hearing and given oral evidence, he might have been asked questions about the process he went through to make the decision which was under appeal, and the reasons why he placed weight on some factors and not others. No other person could answer those questions, they are personal to Officer Harris.

27. We accepted that in a situation where the decision-making Officer is unable to attend a restoration hearing, the Border Force may wish to put forward evidence as to their policies and practices. But that is not the position taken by Officer Summers' witness evidence. Instead, he sought to adopt evidence as to the *specific* decision-making process carried out by a *different* officer in relation to the *particular* facts of the Appellant's case.

28. We also accepted that had Officer Summers participated in the hearing, Mr Dean could have asked the Tribunal's permission for him to give evidence about the Border Force's policies and practices generally. However, no such application had been filed and served. Had an application been made orally at the hearing, Mr Keddle might reasonably have objected on the basis that the new evidence was not contained in a written witness statement and so would have taken him by surprise.

Weighing the factors

29. We are required by Rule 2 to avoid delay, so far as compatible with proper consideration of the issues. If we allowed the adjournment, this would clearly cause delay: the hearing would need to be relisted following checks to the availability of all parties. Delays do not only impact on those involved in this hearing: as Davis LJ said in *Chartwell Estate Agents v Fergies Properties* [2014] EWCA Civ 506 at [28], the interests of justice include:

> "the interests of other court users: who themselves stand to be affected in the progress of their own cases by satellite litigation, delays and adjournments occurring in other cases..."

30. In relation to the "proper consideration of the issues", we had Officer Harris's decision, his witness statement, and the 10 exhibits which set out the documents and policies he had taken into account in coming to that decision. The absence of Officer Summers' evidence would not prevent us from properly considering whether to uphold the decision under appeal. Mr Keddle was not intending to cross-examine Officer Summers.

31. Rule 2 also requires us to deal with the case "in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties". The subject matter of this appeal was a decision to restore the trailer for a fee of £6,550.58. Although that is not an insignificant sum to the Appellant, it is relatively small in the context of the cases dealt with in this Tribunal. As to complexity, the issues raised by the appeal are not novel, but straightforward. A further hearing would incur costs for the Appellant, who would have to instruct Mr Keddle to attend on another occasion, and to prepare afresh for that second hearing. Even if the Border Force were to cover Mr Keddle's extra fees, the Ministry of Justice would incur irrecoverable costs. These would include the fees of the Tribunal panel; the costs of the administration team who would need to set up the new hearing, and the costs of the video hearing team who would have to arrange a new test hearing, and to attend a new substantive hearing.

32. Taking into account all relevant factors, we decided it was in the interests of justice to refuse the application to adjourn and continue with the hearing.

THE EVIDENCE

33. The Tribunal had the benefit of a hearing bundle prepared by the Border Force, which was provided electronically. This contained the correspondence between the parties, and between the parties and the Tribunal.

34. As already noted, we also had:

(1) the witness statement from Officer Harris, which essentially introduced his review letter and the supporting documents. Mr Keddle did not challenge the facts in that witness statement, though he naturally took issue with the decision itself;

(2) the witness statement from Officer Summers, which did not add anything material for the purposes of our decision;

(3) A witness statement from the Appellant, which was unchallenged other than a passage which read:

> "At no time was I or the driver informed that the goods transported contained alcohol…the driver had no reason to doubt that he was transporting anything else other than soft drinks."

35. Again as noted above, Mr Keddle provided a submission dated 11 June 2020, which contained a number of factual statements. Mr Dean asked the Tribunal to ignore any statements for which there was no support in the documents provided, and he listed them. He submitted that it had been the Appellant's choice not to attend the hearing, so there was no witness who could be cross-examined on the matters of alleged fact set out in Mr Keddle's witness statement, and against that background it was not interests of justice for the Tribunal to make factual findings on the bare assertion of the Appellant's representative.

36. In Reply, Mr Keddle did not take issue with Mr Dean's submissions, either by identifying supporting documents, or by putting forward reasons why the Tribunal should rely on his hearsay evidence.

37. Rule 15(2)(a) of the Tribunal Rules allows us to "admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom", and we thus would be have been able, as a matter of law, to admit the hearsay evidence provided by Mr Keddle. However, we agreed with Mr Dean that it was not in the interests of justice to admit that evidence, for the reasons he gave. As a result, we have not taken it into account in making our findings of fact.

38. The next part of our decision sets out the facts found on the basis of the evidence which we did accept.

The facts

39. On 8 October 2018, Kühne & Nagel Ltd ("K&N"), based in Newcastle, contracted with LKW Walter Internationale Transportorganisation AG ("LKW") to transport 22kg of goods from a "loading point" at Krynica Vitamina SA, based in Poland on 9-10 October 2018, to be delivered to Morton Group Ltd in the UK on 12 October 2018.

40. The order described the goods as "Food" and "Saft". It was accepted by both parties that "saft" meant soft drinks, The order did not specify what percentage of the goods were food and what percentage was saft.

41. LKW subcontracted the carriage of the goods to the Appellant, a small family business based in Poland. It was not insured to carry alcohol. It contracts regularly with LKW. The Appellant allocated this contract to Pawel Prokop, an employee and one of its drivers, using a tractor and the trailer. The trailer had been leased for a total cost of €23,900 and regular €600 instalments were payable each month for 36 months from 1 March 2018.

42. Mr Prokop drove the tractor and trailer to the loading point. Here, 24 pallets of goods were loaded. The goods were wrapped in clear plastic film. Mr Prokop was given a CMR which describes the goods as "beverages" and states that there are 24 pallets, weighing 23,472kg. He was also handed a loading list which states that the goods were Navigator Pink Gin & Tonic and Navigator Gin and Diet Tonic. Mr Prokop read the loading list.

43. He drove the loaded trailer to the UK where it was intercepted by Border Force officers at Killingholme in Humberside. It was found to be carrying 20,736 litres of gin and tonic. When alcohol is imported into the UK for commercial purposes, the law requires that an Administrative Reference Code ("ARC") travels with the vehicle. There was no ARC with this load.

44. The Border Force seized the goods, the tractor and the trailer, and gave Mr Prokop a Seizure Information Notice and Notice 12A. The tractor was later restored free of charge. On 18 December 2018, the Appellant applied for the restoration of the trailer. There was some further correspondence, including a delay while documents were translated. On 24 January 2019, a Border Force Officer decided that the trailer would be restored for a fee of £6,550.58.

45. On 27 February 2019, the Border Force received a letter asking for a review of that decision. The review was carried out by Officer Harris. He upheld the decision on 11 April 2019. In his review letter:

(1) he summarised the Border Force policy on restoration. This treats seizures where the operator and/or the driver were responsible for, or complicit with, the illegal transportation differently from those where neither the operator nor the driver were responsible or complicit. In the latter situation, the vehicle would be restored:

(a) without payment, if both the operator and the driver had carried out basic reasonable checks on the load; or if not

(b) on a first offence, for 20% of the revenue involved in the importation of the seized goods, or 100% of the value of the vehicle, if lower;

(2) he accepted that neither the Appellant nor Mr Prokop were responsible for or complicit with the breach, but said that they had not carried out basic reasonable checks. In particular, he relied on the fact that the driver did not check the CMR and so did not notice that this said the goods were "beverages" rather than the "food and saft" he had been told to expect; and

(3) he considered the degree of hardship caused by a refusal to restore the vehicle without charge. He noted that there will always be some hardship, and that there was no evidence here that the hardship was exceptional; and

(4) the trailer was thus to be restored for a fee of 20% of the duty, namely the £6,550.58 in the original decision letter .

46. Attached to the review letter were appendices setting out the relevant legislation, extracts from the CMR and a note on the Border Force's view of "reasonable checks".

47. The Appellant appealed that review decision to the Tribunal, but decided to pay the fee in order to have the vehicle back. The Appellant's purpose in appealing is to recover the £6,550.58 already paid to the Border Force. Mr Keddle told the Tribunal that the Appellant had not sought to recover this amount from its customer, but might consider asking for this if the appeal failed.

The law

48. In restoration appeals, the Tribunal's jurisdiction is limited. We cannot order restoration, but if we decide that the Border Force has made an unreasonable decision, we can direct that it make a new decision taking into account specific findings of fact.

49. In C*&E Commrs v Corbitt* [1980] 2 WLR 753, Lord Lane said that a decision would not be "reasonable":

> "if it were shown [the decision maker] had acted in a way which no reasonable [decision maker] could have acted; if [he] had taken into account some irrelevant matter or had disregarded something to which [he] should have given weight."

50. In *Gora v C&E Comms* [2003] EWCA Civ 525, Pill LJ accepted that the Tribunal could decide the facts and then go on to decide whether, in the light of those findings, the restoration decision made by the Officer was reasonable. Thus, in making our decision, we consider the facts we have found, which may be additional to, or different from, those which were known to the Officer.

Submissions on behalf of the Appellant

51. Mr Keddle submitted that the trailer should be restored free of charge, because basic reasonable checks had been carried. He said that::

(1) there was no reason to think, from the order, that the goods were alcohol;

(2) the order was from a reputable and long-standing customer;

(3) having read the loading list, it was reasonable for the driver to think from the word "tonic" that the goods were soft drinks; and

(4) it was the responsibility of the consignor to provide the driver with the correct documentation: CMR Article 11(2) reads:

> "The carrier shall not be under any duty to enquire into either the accuracy or the adequacy of such documents and information. The sender shall be liable to the carrier for any damage caused by the absence, inadequacy or irregularity of such documents and information, except in the case of some wrongful act or neglect on the part of the carrier."

52. He added that the seizure of the trailer created hardship for the Appellant because:

(a) during the time it remained in the custody of Border Force it was unavailable for use, but the Appellant had to continue to pay the monthly lease payments to the leasing company; and

(b) the restoration fee of £6,550.58 was an additional burden, especially in Poland where the income of workers was lower than in the UK.

53. In Reply, Mr Keddle added the further submission that the Border Force had only established that the correct documentation had not travelled with the vehicle; they had not shown that duty had not been paid. He said that it could be inferred from the fact that the parties involved were well-known international firms that they had in fact paid the duty, and Officer Harris should have taken that factor into account.

Submissions by Mr Dean on behalf of the Border Force

54. Mr Dean submitted that it was clear from the documentation provided that the driver did not carry out basic reasonable checks. These would have included calling the Appellant when he noticed that the CMR referred to beverages rather than to the "food and saft" which the business had been contracted to transport. At a minimum this was an "ambiguity" which the driver should have clarified.

55. Even more importantly, the driver had read the loading list, but having done so, he took no action, despite the loading list clearly stating that the cans were of gin as well as of tonic. This would have been relevant and reasonable to any carrier but was even more important here given that the Appellant was not insured to carry alcohol.

56. The pallets were covered in clear plastic, and it would have been a basic reasonable check to look through the plastic to see what was being shipped.

57. Finally, there was no evidence that the driver asked the loading staff what was on the load. This was the most basic of reasonable checks.

58. Mr Dean also pointed out that the CMR deals with the obligations which apply to the parties, and that the Border Force guidance as to reasonable checks is additional. It may be the case that the Appellant can recover the restoration fee from LKW under CMR Article 11(2), but if so that would only emphasise the lack of any exceptional hardship in the Appellant's case.

59. Turning to Officer Harris's decision, Mr Dean said it was clear from the above that it was well within the range of possible reasonable decisions. It was also reasonable for the Border Force to have a policy on dealing with restoration; that policy was itself reasonable, and Officer Harris had applied that policy correctly. There was no reason for him to depart from the policy, and the Tribunal should uphold his decision.

60. In response to Mr Keddle's new submission in Reply as to whether or not the duty had in fact been paid, Mr Dean said that the trailer had been seized, the seizure had not been challenged in the magistrates court, and thus the Tribunal had to find that the seizure was legal, see *Jones and Jones v HMRC* [2011] EWCA Civ 824.

The Tribunal's decision

61. The Tribunal is only able to allow the appeal if we were to find that Officer Harris had not made a reasonable decision. We agree with Mr Dean for the reasons he gives that his decision was entirely reasonable.

62. Basic reasonable checks should have included in particular:

(1) the driver checking with the Appellant when the CMR said beverages when he was expecting the load to include at least some food; and

(2) the driver informing the Appellant that the list described the goods as "gin and tonic".

63. The Appellant cannot rely on the CMR. Article 8 allows the carrier to check the contents of the packages, and this step would clearly be indicated where there is no match between the goods described on (a) the packing list, (b) the CMR and (c) the original order. In any event, as Mr Dean said, the CMR regulates the relationship between the contracting parties, and the obligation to make basic reasonable checks when importing goods to the UK is additional.

64. We also agree with Officer Harris and Mr Dean that there is no exceptional hardship in this case, and we agree with Mr Dean that any challenge to the legality of the seizure had to be made at the magistrates court. .

Decision and appeal rights

65. We therefore refuse the Appellant's appeal. It is a matter for him whether he can now recover some or all of the £6,550.58 from LKW.

Appeal rights

66. 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.

67. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 10 SEPTEMBER 2020