

No Special
Consideration

13/7
IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

444

NO. M.29/79

IN THE MATTER of the Customs Amendment
Act 1974 First Schedule
Part 2 Concession 27 1(b)

AND

IN THE MATTER of the Exercise by the
Collector of Customs
Dunedin of a Statutory
Power of Decision within
the meaning of Section 3
of the Judicature Amendment
Act 1972 in respect of the
refusal of a concession under
the above statutory provision
of the duties payable upon
the import of a motor
vehicle to New Zealand by
the Applicant hereinafter
named.

BETWEEN

ROGER HAMILTON SMAILL

Applicant

A N D

THE ATTORNEY GENERAL sued in
respect of COLLECTOR OF
CUSTOMS at Dunedin.

Respondent

Hearing: 5 May 1981

Counsel: R.V. Duell for Applicant
J.B. Robertson for Respondent

Judgment: - 8 JUL 1981

JUDGMENT OF COOK J.

This is an application for the review of a decision of the Collector of Customs at Dunedin; that the applicant is not entitled to import a certain BMW motorcar free of duty, pursuant to the provisions of the Second Schedule Part II Ref. 27 1(b) of the Customs Act 1966, and must pay normal duty thereon.

In brief, the facts are as follows - in June 1975 the applicant and his wife left New Zealand and did not return until the 15th May 1977. During their time overseas the applicant worked in London until about the 8th April 1976, his employment during this period being broken by a period of approximately 14 weeks during which he and his wife travelled in Europe. On the 10th of August 1975 he agreed to purchase the car in question from the manufacturers in Munich. A deposit was paid on the 10th August 1975 and the balance of the purchase money on the 5th January 1976; in each case, payment was made in Deutschmarks direct to the German vendor. Delivery of the vehicle was to be at the factory in Munich. Rather than drive on the Continent himself he arranged with a firm in London, for a fee, to collect the car in Munich and drive it to London. In this manner delivery of the car was taken on 26th January 1976 and it appears that, if the property in the car had not passed at an earlier date, it did then. It arrived at Dover on the 28th January and, after being checked and cleared, actual personal possession was taken by the applicant on the 30th January.

The vehicle was purchased for the personal use and convenience of the applicant and his wife with the intention of using it in England and eventually shipping it to New Zealand. It was in fact driven a total distance of 4228 miles. On the 27th January 1977 it was handed over for shipment to New Zealand and this date was selected as it was just short of the anniversary of the day upon which the vehicle arrived in England. Had he retained the vehicle in his possession in England after that date he would have had to pay duty there. As he explained in his evidence, an importer of a car into the United Kingdom is given a limited period free of duty. If this period is exceeded or the car is not off the road in the hands of shippers, duty would be incurred. His problem was that the period commenced on the 28th January 1976 when the vehicle was unloaded at Dover. The practical aspect of this was that the last day it was in his personal possession in England was the 26th of January.

The Schedule to the Customs Act in force at the

time when the car was imported into New Zealand is the Schedule introduced by the 1974 Amendment Act. Part II deals with concessions and the relevant portion of reference No. 27.1 is as follows:-

"Passengers' baggage and effects:

Passengers' baggage and effects in respect of which the Collector is satisfied that they are not intended for any other person or persons or for gift, sale or exchange:

(a)

(b) Motor vehicles (including motor cycles) and ships and aircraft, subject to such conditions as the Minister may prescribe (whether generally or in any particular case), which are imported by a person who -

- (i) Satisfies the Collector that he has arrived in New Zealand to thereupon take up permanent residence; and
- (ii) Satisfies the Collector that for the whole of the period of 21 months preceding his arrival he has resided outside New Zealand or has been domiciled outside New Zealand; and
- (iii) Satisfies the Collector that, in respect of every such vehicle, ship, or aircraft, he has personally owned and used the vehicle, ship, or aircraft for at least 1 year before the date of his departure for New Zealand or the date of shipment of the vehicle, ship, or aircraft (or, where the ship or aircraft is imported otherwise than as cargo, the date of its departure for New Zealand), whichever is the earlier;
....."

Then follows a requirement for a written undertaking but that is not material to the present question. The words which are relevant are those underlined in (iii).

While the applicant realised that, if personal ownership and use did not commence until the 28th January, at least one year would not have elapsed on the day when he handed the vehicle to the shippers, but he relied indirectly on a statement in an information sheet given out by the

New Zealand Customs Department in relation to the importation of motor vehicles into New Zealand by persons arriving for permanent residence. This contained a statement as follows:-

"(b) It is appreciated that the owner may be required to surrender the vehicle to the docks, or to the motor dealer or forwarding agent arranging shipment for a few days before loading date. Provided the period between the surrender of the vehicle and loading date does not exceed that required for the purpose of shipment it will count towards fulfilment of the condition of one year's ownership and use."

He could not claim that the vehicle was with the shippers for a time sufficient only for the purpose of shipment as in fact the vehicle was not shipped until some time later, until the 17th May 1977. During part of this period the applicant and his wife made a trip to Scandinavia before leaving to go to New Zealand and the shipping was delayed as they wished to be in this country when the vehicle arrived.

For the applicant it was submitted that ownership vested in him as from the 26th January 1976, the date upon which his agent took delivery in Munich and, so far as ownership outside New Zealand is concerned, continued up until at least May when the vehicle was shipped from the United Kingdom. There was no dispute on that aspect and accordingly from the point of view of ownership, he complied with the concession requirement.

It was further submitted that personal use of the vehicle by the applicant extended from the time of delivery in Munich until delivery to the shipping agent, i.e. from the 26th January 1976 until the 27th January 1977. From a practical point of view, the question is, should the Collector have been satisfied that, on the 26th, 27th, 28th and 29th January, ~~that~~ is, from the time on which delivery was taken in Munich, while it was being driven across Europe, shipped to Dover and then checked and serviced, the applicant "personally used the vehicle".

The term, "personal use" was first considered in New Zealand by Wild CJ in Handiside v. Attorney-General (1969) NZLR 650. In that case the plaintiff in the proceedings had purchased a motorcar in England on 8th July 1966 and shipped it to New Zealand on 10th July 1967. For all practical purposes, in order to obtain a concession, the same requirement applied as in the present case. The Plaintiff drove the car during the first few days, 100 miles or so, but then left England for Scandanavia and Europe on a supervised compulsory study tour on the completion of which he remained in Europe for a short period. He returned to England on the 29th of August and resumed use of the car. His car had been locked away in a private garage during his absence but, on his return, he used it extensively. On the car's arrival in New Zealand, the Comptroller of Customs took the view that he could not be satisfied that the plaintiff had complied with the requirement of the Schedule. Having defined the question to be answered, Wild CJ proceeded as follows:-

" What is required for the concession to apply is that the vehicle must be 'personally owned and used for at least one year'. Personal ownership is not in question in this case. The important word is therefore 'used' which, as any dictionary will show, has a wide area of meaning. Its meaning must be taken from the context. The thing that is spoken of as being 'used' is a vehicle. A vehicle is not a thing that is used continuously, even over a short period. Therefore the word 'used' does not connote continuous use. That point gains emphasis from two other features of the context. The use must be by the owner 'personally'; and it must extend 'for at least one year'. Even over a short period of time and in the hands of the keenest owner a vehicle needs to be parked, serviced and garaged. Over a period of a year it might well in addition require extensive repairs. Moreover, its owner would normally require to leave it out of action while he is ill or while he goes away on business.

Reading the whole phrase with such considerations in mind, I am of the opinion that the word 'used' connotes use normal to the kind of vehicle in question, and that normal use does not cease merely because the vehicle is in fact out of action at times and for reasons incidental to normal personal ownership and use. An owner who, choosing

deliberately not to use his vehicle, leaves it locked away in a garage for months on end could not be said to be using it. But I do not think that 'personal use for at least one year' is broken by the fact that the vehicle is stored in a garage for a period during which the owner is unable for normal reasons to use it. How long that period may be is a question of degree, and that is a question of fact that depends on the circumstances of the case."

This demonstrates that, of necessity, a reasonably wide meaning must be given to the word "use" and that each case is best decided upon its own facts, no precise yard-stick being available against which any particular situation can be measured to determine whether it constitutes "personal use" or not. The case is not otherwise of direct help in the present situation.

In Buckingham v. Attorney-General (unreported, Invercargill A.1586.) White J. considered the situation where the plaintiff purchased a landrover in England on 20th April 1976, used it until November 1966 when he left England for a tour of Africa, a trip he had not envisaged making when he made his purchase. He was absent from England for approximately five months and during his absence the vehicle was left in the care of friends, who, from time to time, used it with the plaintiff's authority. It was taken to the London docks on the 16th of May 1967 for shipment to New Zealand. White J. reached the following conclusion:-

"In my opinion the reasonable view of the circumstances of the case is that the plaintiff bought the car for his personal use. He had used it for 10,000 miles and would have continued to use it himself but for a change in plans brought about by having the opportunity to go on the trip to Africa. It seems to me that the reason for not using the car for this period was the kind of genuine reason which can arise when a person is abroad on a working holiday and that this reason distinguishes this case from a case where an owner does not buy the vehicle to use it normally but deliberately chooses to lock it away while time runs. The reasoning that 'normal use does not cease merely because the vehicle is in fact out of action at times and for reasons incidental to normal personal

ownership and use' implies, I think, the test of a genuine use of the vehicle as compared with a user which can be regarded as no more than a device."

This again is a case where there was no dispute as to the date upon which personal use commenced, and it is interesting to note the distinction drawn in the last few lines. The only other case to which I was referred is Van Loghem v. Collector of Customs at Auckland (also unreported, A.1134/78). Unlike the two cited above of which one was brought by way of originating summons and ^{the} other for a declaration under the Declaratory Judgments Act, this was an application for a review pursuant to Part I of the Judicature Amendment Act 1972. The applicant had taken delivery of a car on the 19th April 1977 and used it extensively in various European countries for almost 12 months. It appears that the date upon which the vehicle has first been licensed in Germany - in a manner which relieved the owner from paying duty there - was the 15th April and this certificate subsisted for one year only. As he did not wish to renew the certificate he handed over the vehicle to the Royal Dutch Touring Club on the 14th April 1978 to enable that Club to make final arrangements for shipment of the car to New Zealand. There was no suggestion that that date allowed only sufficient time for shipping, in fact this did not take place until the 28th April and the Club could have received the vehicle for that purpose as late as the 26th. While there were steps the applicant could have taken, possibly coupled with the payment of duty, to keep the car on the road, he chose to allow the German duty free registration to expire and delivered the car on the 15th April in order to avoid taking out new registration plates for the short period remaining; he could not drive the car legally in Holland without new registration and he chose not to obtain this.

The matter was complicated by the fact that the Collector relied on two grounds for his decision to refuse a concession - first, that he did not consider the applicant to be the true owner of the car and, secondly, that he had not personally used the vehicle for the full twelve months. While concluding that he would not interfere with the conclusio

reached by the Collector of Customs in saying that he was not satisfied that the car was not intended for another person, Speight J., in coming to his decision, relied on the other ground upon which refusal had been given. He said:-

"Mr. Van Loghem took delivery and his personal use commenced on the 19th April, 1977. He parted possession with it, albeit with a power to regain it should he change his mind, on the 15th April, 1978. Mr. Collings argued that even though it was in the possession of the Royal Dutch Touring Club it was in their possession on his behalf. That is true. He could, if he had wished, commanded them to return it to him, but that is not what he did. He had given it to them as his agent to ship it to New Zealand, and he had finished with it as far as use in Europe was concerned. He did not intend to re-use it until he returned to New Zealand. It is clear that he had elected not to re-license the vehicle, and had abandoned any intention of using it in the sense that one uses a motor vehicle, in Holland."

In the present case the circumstances which led to the handing over of the BMW for shipping were not dissimilar and this decision certainly precludes the possibility of any argument that, while the vehicle was in the hands of the shippers in London, it was still being personally used. By handing it over, the applicant put it out of his power to do this.

This does not help, however, so far as the few days at the commencement of the ownership are concerned and they must be considered in the general light of what constitute "personal use". It is clear that the word "use" is of broad import and that in any particular case, it must be regarded in the context the facts of that case provide; that in order to have "personally used" a vehicle for a given length of time it is not necessary to have driven it every day; that there may be quite substantial gaps of time when the vehicle is not being used at all, as witness Handiside's case, or it may be out of the possession of the owner and used by others, as in Buckingham's case. One must consider each case in its own light.

In the present case the applicant purchased the car for his personal use and the ownership of the vehicle passed to him on the 26th January in Munich. It was no good to him there; he wanted the car and he wanted it in England. He had the option of collecting the car on that day and driving it to England. Had he done so, it could hardly have been disputed that he was personally using the car. Is it any less personal use of the vehicle that he engaged someone else to do this for him? I think not. Further, it seems that the purpose of the relevant portion of the Schedule must be to ensure that, before a person becomes entitled to a concession he must not only have owned the car but actually used it as his own vehicle over the period of time in question so that what he is importing into New Zealand is a car which has had the normal use that a car bought for the owner's own purposes would be likely to have over that period, not a vehicle which has been preserved in an unused condition for most, or much, of that period so that it arrives as a relatively new car. One may gain some assistance from the fact that the Comptroller is prepared to interpret the expression with a degree of liberality, as is apparent from the information sheet mentioned above.

In this case there is no suggestion of a device to defeat the purpose of the legislation and, on the evidence, I would be satisfied that the car was "personally used" by the applicant from the 26th January 1976 onwards.

Mr Robertson for the respondent submitted that, upon a review, the Court should rarely interfere because it might have reached a different decision from that of the Controller and he posed the question whether the decision was one that no reasonable Collector would come to. I was referred to Associated Provincial Picture Houses v Wednesbury Corporation (1948) 1 K.B. 223, but it seems to me that that dealt rather with the exercise of a discretion by a local authority and the principles there expressed are not helpful in the present situation. I note that in Van Loghem v. Collector of Customs at Auckland Speight J., after considering certain authorities, approached the matter on the basis:-

"but for the present purposes I propose to adhere to the somewhat more conservative view, namely, that if there was such evidence upon which the Collector of Customs could reasonably make the factual conclusion that he did I would not interfere."

In the present case, however, there is really no dispute as to the facts. The question is, in the context of the particular facts, what construction is to be put upon the expression in the Schedule - what is meant by the expression "personally used the vehicle". If I come to the conclusion that the Collector appears to have been wrong in the interpretation he placed upon this expression, I see no reason why his decision should not be reviewed.

Clearly it is a matter involving the exercise of a statutory power and consequently capable of review under the Judicature Amendment Act 1972. The decision by the Collector at Dunedin was that the applicant was not entitled to a concession and, on the view of the matter which I take, this decision was wrong and the applicant is entitled to relief.

It would seem proper to make an order under Section 4(5) and, accordingly, it is ordered that the Controller of Customs at Dunedin reconsider the application of Roger Hamilton Smaill for a concession from duty under the Second Schedule of the Customs Act, Part II, Ref. 27 1(b), (as then in force) in respect of the BMW car which he imported in June 1977, and determine the question whether he is entitled to such concession, the reason being that, upon the evidence and within the meaning of the said Reference, the applicant "personally owned and used" the said vehicle from the period from 26th January 1976 to 27th January 1977.

If it is thought that anything further should be included in the order, leave is reserved to apply. The applicant is entitled to costs which I fix at \$250.

Solicitors:

Messrs Anderson Lloyd Jeavons & Co., Dunedin, for Applicant
Agents: Messrs Castle Pope & Partners, Wellington.
Crown Law Office, Wellington, for Respondent.