BEFORE CUSTOMS APPEAL AUTHORITY

CAA 015/17

[2019] NZCAA 01

UNDER THE	Customs and Excise Act 1996 ("the Act")
Between	**XXXX**
	Appellant
AND	**Chief Executive of the New Zealand Customs Service**
	Customs

DATE OF DECISION **Friday, 18 January 2019**

INTERIM DECISION

The background

[1] This is an interim decision, as the parties have invited the Authority to decide the appeal on the papers under s 258 of the Customs and Excise Act 1996. Taking that approach leaves a risk that the parties may not have been heard adequately, particularly where only one party is represented by a lawyer.

[2] The appeal relates to a vehicle being a Nissan NV200 Vanette 2012 (the vehicle). It was imported into New Zealand and seized on 14 March 2017 on the basis that under s 225(1)(n) of the Customs and Excise Act 1996 (the Act) it was a good that had "been unlawfully imported into New Zealand", and was accordingly forfeit.

[3] The illegality related to s 54(2) of the Act which provided for Orders in Council relating to importation. The Customs Import Prohibition Order 2014 prohibited the importation of motor vehicles "with an odometer reading that does not record correctly the distance the vehicle has been driven".

[4] In short, Customs say the vehicle in 2014 had an odometer reading of 116,700 and in 2017, when it was imported, the reading was 63,517.

It was accordingly imported with an incorrect reading, the restriction was breached, the vehicle's importation was unlawful, and the vehicle was forfeit.

[5] Customs undertook a formal review of the seizure and forfeiture, which it considered necessary and appropriate as the appellant did not take all reasonable steps to ensure the vehicle was imported lawfully. Therefore, under s 233(1)(a) of the Act the vehicle was condemned to the Crown.

[6] Accordingly, the appeal involves the relatively straight forward question of whether this vehicle is properly forfeit due to it having a false odometer reading, and in addition the issue of whether any relief should be provided if it is.

Issues

The appellant's position

[7] The appellant did not initially challenge Customs' claim that the odometer had an incorrect reading, the foundation for the appeal concerned the surrounding facts and a claim for relief. The key elements of the original position are:

[7.1] The appellant imports used vehicles into New Zealand from Japan.

[7.2] It uses a Japanese company (the Japanese company), and the director of the appellant (the director) has visited that company's facilities in Japan.

[7.3] The director briefed the Japanese company on its requirements. The director overlooked the significance of odometer integrity and did not include that in his briefing to the Japanese company. The New Zealand importation regime does not have a check point for odometer readings.

[7.4] The Japanese auction system which the appellant used to source imported vehicles was closed to outsiders, and it was necessary to rely on a Japanese agent.

[7.5] In relation to the vehicle, before importation the director got a verbal description, it was impossible for him to check Japanese records. The Japanese company has no access to vehicle records, only large companies with several years in trade can do that. An odometer check costs about NZD 25.

[7.6] The appellant would not sell the vehicle if released without forfeiture.

[7.7] The appellant is under financial pressure, due to the competitive nature of its business, the high costs involved, and the onerous regulatory requirements.

[7.8] Any lack of care was due to naivety, and an understanding that a third party would ensure the risk was managed. The risk was unforeseen, and a rare situation.

Customs' Position

[8] Customs say the records showing the discrepancies in the odometer records are from a commercial online information database based in New Zealand. It provides vehicle information and history checks for New Zealand and Japanese vehicles. In respect of the vehicle, it shows the vehicle had the following odometer readings in total kilometres:

[8.1] 16/12/14 — 116,700

[8.2] 15/12/15 — 22,600

[8.3] 25/1/17 — 63,517

[9] Customs say there has been no challenge to the legal basis for seizure, namely the incorrect odometer reading. Accordingly, the only issue is whether in all the circumstances relief should be granted under s 232 of the Act.

[10] Customs say there are no grounds for relief as:

[10.1] Historic checks can be made in New Zealand quite readily for vehicles imported from Japan, at a proportionate cost.

[10.2] The appellant has had some 6 years' experience and had imported about 100 vehicles, so could not have failed to understand the risk of odometer tampering.

[10.3] It was negligent not to properly check the odometer readings.

[10.4] Mitigation was not appropriate or possible as consumer protection was the overriding factor.

[10.5] The consequence of forfeiture was proportionate, given the vehicle's value of NZD 3,119.

Reply from the appellant

[11] The appellant replied to Customs' position. The key elements were:

[11.1] The appellant now challenged the unlawfulness of the importation, saying Customs should provide the online report regarding the odometer from the New Zealand website. It claimed that Customs' position was implausible.

[11.2] New Zealand officials could not provide the information required regarding the process to check odometers for offshore vehicles.

[11.3] The appellant could not obtain the information regarding the vehicle from the New Zealand database that Customs used.

[11.4] The appellant reiterated the financial effect of the forfeiture, and said that in addition to the cost of the vehicle the shipping and importation costs, legal costs and health impacts were relevant.

[11.5] It was Customs' responsibility to check odometers, or provide facilities to do so.

The issues

[12] There can be no dispute that the Customs Import Prohibition Order 2014 in cl 4 prohibits the import of motor vehicles with an odometer that does not correctly record the distance the vehicle has driven.

[13] This appeal requires the Authority to apply the grounds contained in s 231(3) of the Act which provides:

> An application under this section may be made on either or both of the following grounds:
>
> (a) that there was no legal basis for the seizure of the goods:
>
> (b) that the applicant should, in all the circumstances, be granted relief.

[14] Section 233(1)(c) of the Act, as applied by s 255, provides that the Authority is to consider its discretion to provide relief against forfeiture, having regard to the factors set out in section 234.

[15] The appellant now seeks to have the appeal allowed on both grounds — that there was no legal basis for seizure, and that it should be granted relief. The first factor was first introduced in the reply to Customs' position.

Discussion

Onus of proof

[16] In *Chief Executive of the New Zealand Customs Service v Jury*,[1] the Court of Appeal determined that the approach is that an appellant must prove their case in an appeal against seizure and forfeiture before this Authority on the balance of probabilities. That is directly applicable to this case, which concerns the disputed factual question as to whether the vehicle's odometer is accurate.

The statutory framework

[17] This proceeding is a de novo appeal pursuant to s 255 of Customs and Excise Act 1996 (the Act), and the Authority has the same powers and duties as the Chief Executive held when making the decision from which the appeal lies. Accordingly, the Authority treats the matter as a fresh decision on the facts before it, which may be different from the facts before the Chief Executive when she made her decision.

[18] If the facts alleged are correct, then the vehicle is a prohibited import as its odometer does not show a correct record. It is the Customs Import Prohibition Order 2014 that prohibits importation. Section 54 of the Act provides it is unlawful to import into New Zealand goods that are prohibited under an Order in Council.

[19] This seizure arose under Part 14 of the Act, which provides generally for forfeiture and seizure. The seizure of the vehicle is provided for by s 225(1)(n), which relates to goods unlawfully imported into New Zealand.

[20] Sections 231–235A provide a regime for the review of the seizure and forfeiture of goods. The Chief Executive first considers the application and then this Authority considers appeals against the Chief Executive's decision on a de novo basis. The Appellant commenced that process, and this Authority is required to make its decision under those sections of the Act.

Was the seizure and forfeiture lawful

[21] As noted, it is the appellant that must prove the vehicle was lawfully imported. Customs have taken the position that it has a false odometer reading. The appellant has provided no positive evidence as to the correct reading.

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[1] *Chief Executive of the New Zealand Customs Service v Jury* [2017] NZCA 356.

[22] This appeal is determined on the balance of probabilities. In short, the question is does the vehicle probably have a correct odometer or a false odometer? On the evidence, I am satisfied the odometer was probably false. The factors taken into consideration are:

[22.1] Customs have provided evidence that the records in Japan show the odometer in the vehicle at one point recorded it had been driven 116,700 km, and then its reading reverted to 22,600 km.

[22.2] It can only be speculation as to the reasons for the apparent discrepancy. The evidence from Customs could point to tampering with the odometer, replacement of a failed odometer without setting the reading to the distance the vehicle had been driven, electronic or mechanical fault in the odometer, or human error that resulted in an incorrect recording in the database relied on. However, the last mentioned is not a preferred explanation. There is an anomaly between the 2014 and 2015 record in Japan, and in addition the reading in 2017 is lower than the 2014 reading. Human error would potentially have been corrected.

[22.3] The record in a database would carry little weight compared with direct evidence. However, the position is that there is no evidence explaining the anomalies Customs have identified. It is the appellant that is responsible for proving that the odometer is accurate, Customs has provided sufficient evidence to place a clear evidential onus on the appellant. I am left with the database evidence Customs provided as the only evidence regarding the odometer's history, and it is sufficient to show the reading on importation was probably false. That is enough to find the vehicle was a prohibited import, and was properly seized and forfeited.

Relief against forfeiture

[23] As noted, the decision under s 233 for review of seizure may allow relief by a determination under s 235, if it is equitable to do so, having regard to the matters specified in s 234.

[24] Section 235 of the Act permits orders for the return of goods, and the sale of goods with all or part of the proceeds paid to the applicant.

[25] Section 234 provides, without limitation, that the following factors may be considered:

(a) the seriousness and nature of any act or omission giving rise to the seizure:

(b) whether or not the person who is alleged to have done any act or omitted to do any act giving rise to the seizure has previously engaged in any similar conduct:

(c) whether the seizure has arisen from, or is related to, a deliberate breach of the law:

(d) the nature, quality, quantity, and estimated value of the seized goods:

(e) the nature and extent of any loss or damage suffered by any person as a consequence of the seizure:

(f) whether or not granting relief would undermine the purpose or objective of any import or export prohibition or restriction imposed by this Act:

(g) the effect of any other action that has been taken or is proposed to be taken in respect of any offending related to the seizure.

[26] In many cases, goods are forfeited when they are prohibited imports such as proscribed drugs, and there can be no justification for releasing them as there is no lawful use for them. However, other cases such as this case involve a vehicle that can be imported; the issue does not lie with the nature of the item, only one attribute of the item.

[27] Each case must turn on its facts, with a full consideration of the circumstances.

[28] Customs' main concern is that releasing the vehicle would leave consumers vulnerable. Potentially, the vehicle could be released in circumstances that mitigate those concerns, such as release only allowing the sale for parts, and potentially other orders.

[29] It is necessary to put this importation into perspective. Some years ago, there was widespread concern that odometers on imported vehicles were regularly altered to show false and lower readings than the true reading. Those concerns adversely affect the industry that imports vehicles by causing reputational risk thereby decreasing the value of vehicles. Consumers factor in the risk of faulty odometer readings for a class of vehicle if they carry that risk. Further, to the extent the concerns are true, it adversely affects consumers. That is the reason for the prohibition in the Customs Import Prohibition Order 2014, false odometers adversely affect importers and consumers. The regulatory approach has been successful, to the extent that as a person who has been in the industry for some six years the director considers the risk of a false odometer reading is very low, and indeed suggests he need not be concerned about it.

[30] While the appellant says it is too hard to check odometers, and that Customs or another Crown Agency should take responsibility, that is not realistic. For obvious reasons, the responsibilities of importation generally lie with the importer, it is the importer that is in the best position to obtain necessary information regarding importations. It is a legal requirement to do so. As it happens, there are effective mechanisms to verify odometer histories, and if an importer chooses to import a vehicle without using them, they are at risk, and appropriately so. In my view, failure to verify involves a high level of negligence. It is notorious that there are harsh consequences for importing goods where the importer has not adequately investigated the nature of the goods.

[31] I must, nonetheless, consider whether total loss of the vehicle is appropriate and proportionate. I have had regard to the factors in s 234 of the Act. Dealing with each of the points, my view is:

[31.1] The omission to make adequate inquiries is serious.

[31.2] There is no evidence of similar conduct in the past. However, in my view, it is relevant that the appellant had imported about 100 vehicles and claimed not to know of the requirements and had no mechanism in place to carry out essential checks. Persons engaging in commerce have legal responsibilities and ignore them at their peril.

[31.3] There is no evidence the breach was deliberate, but it was the result of negligence.

[31.4] The goods and the consequential costs are modest when compared with the seriousness of the issues.

[31.5] There has been no loss to anyone other than the appellant (aside from Customs' costs); however, that is only due to the intervention by Customs. Without Customs' detection, a consumer would have been adversely affected.

[31.6] In my view, granting relief would undermine the purpose or objective of the prohibition. It should primarily be a self-policing regime where importers take adequate care so that consumers are protected, as intended. Forfeiture is the primary mechanism to enforce compliance with the duties importers carry.

[31.7] There are no consequences for the appellant which I am aware of other than the forfeiture following from the prohibited importation.

[32] In my view, the forfeiture of this low value vehicle, including the consequential costs, is proportionate to the negligence of the appellant. Indeed, I would have little difficulty finding forfeiture without relief was justified if the vehicle had a much higher value.

[33] I have considered the appellant and its director's personal circumstances. However, it is their election to engage in commerce where consumers are at risk. The consequence of failing to comply with consumer protection legislation may well have harsh outcomes, and indeed result in business failure. In my view, the failure to carry out adequate checks after importing a large number of vehicles is concerning, and the forfeiture is necessary and appropriate. If the appellant is to continue to engage in its business, it is imperative that it takes such advice to ensure it is fully compliant.

Decision

[34] The Authority will dismiss the appeal, unless there are any further steps taken. If there is no further action, then the decision will become final 10 working days after the date of this decision.

Timetable

[35] If there are no steps taken and this decision becomes final, Customs may apply for costs for a further 15 working days, the appellant will have 10 working days to reply to any application for costs. If necessary, a telephone conference will be convened to discuss costs.

[36] Within 10 working days after this decision, the appellant may apply to:

[36.1] Provide further evidence and/or submissions.

[36.2] The application should include the evidence and submissions, and explain why it was not provided earlier.

[36.3] If the Authority considers the further material may potentially alter the outcome, it will provide Customs with an opportunity to reply, otherwise a final decision taking the new material into account will issue, confirming this decision.

Dated at Wellington 18 January 2019.

G D Pearson
Customs Appeal Authority