EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT AUCKLAND

CIV-2017-004-002234
[2018] NZDC 14926

UNDER	The Land Transport Act 1998
IN THE MATTER OF	An appeal against a decision to refuse to exempt a vehicle from various vehicle standards.
BETWEEN	SHAUN IAN TIPPETT Appellant
AND	NEW ZEALAND TRANSPORT AGENCY Respondent

Hearing: 17 July 2018

Appearances: Appellant in Person
R Wilkin for the Respondent

Judgment: 14 August 2018

JUDGMENT OF JUDGE B A GIBSON

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[1] In June 2017 the appellant sought exemption from the respondent, pursuant to s 166 of the Land Transport Act 1998 ('the Act') from compliance with a number of rules relating to vehicle standards. The vehicle concerned is a 1997 Chrysler New Yorker imported into New Zealand from the United States. [Name deleted], a mechanical engineer employed by the respondent, deposed it was built as a non-homologated vehicle to export market specifications and to the Taiwan country code. Non-homologated means that the vehicle was not produced with the ability to be sold into any particular market requiring specific safety standards, as New Zealand does.

[2] The vehicle itself was imported into New Zealand in March 2003 by Kwang Ha New Zealand Limited. It was brought in as a temporary vehicle importation by an overseas visitor. Rule 6.1(h) of the Land Transport Rule: Vehicle Standards

Compliance 2002 (‘the Compliance Rules’) exempts the inspection and certification requirements for vehicles on entry for a vehicle that is registered for use on a road in a country other than New Zealand and that is not going to be in New Zealand for a continuous period of more than 18 months.

[3] Nevertheless the vehicle was not re-exported and remained in New Zealand. At one point a warrant of fitness, which expired on 28 February 2010, was issued for it. Another warrant of fitness was sought for it on 16 September 2009 but the vehicle failed its inspection and no further warrant of fitness inspection has been recorded by the respondent.

[4] Eventually the vehicle was purchased in September 2012 by the operator of the International Police Museum in Dannevirke. In April 2017 it was purchased by Mr Tippett. In June 2017 he was informed that he required an exemption from the compliance rules as there did not appear to be any Certificate of Standards compliance for the vehicle from the manufacturer. He deposed that he made enquiries throughout New Zealand and the United States and from the manufacturer in Canada, and was unable to obtain those documents. In June 2017 he sought the exemption which was declined by letter dated 8 August 2017. In September 2017 an appeal was brought to this Court.

Legal issues

[5] Section 166 of the Act sets out the power of the Land Transport Agency to grant an exemption and is in the following terms:

> (1) The Agency may, if the Agency considers it appropriate and upon such conditions as the Agency considers appropriate, exempt a person, vehicle, rail vehicle, or land transport related service from a specified requirement in a rule made under this Part.
>
> (2) Before granting an exemption under this section, the Agency must be satisfied in the circumstances of each case that the risk to safety will not be significantly increased by the granting of the exemption and that—
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> (a) the requirement has been substantially complied with and that further compliance is unnecessary; or

> (b) the action taken or provision made in respect of the matter to which the requirement relates is as effective or more effective than actual compliance with the requirement; or
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> (c) the prescribed requirements are clearly unreasonable or inappropriate in the particular case; or
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> (d) events have occurred that make the prescribed requirements unnecessary or inappropriate in the particular case.

[6] By virtue of s 106 of the Act there is a general right of appeal from the Agency's decision to the District Court. Section 111 provides that every appeal must be brought no later than 28 days after the date on which the appellant was notified of the decision appealed against, or within such further period that the District Court may allow. Section 111(2) allows the Court to hear all evidence tendered and representations made that the Court considers relevant to the appeal, whether or not that evidence would be otherwise admissible in that Court.

[7] Rule 18.19 of the District Courts Rules 2014, as with the previous rule 14.17 in the District Courts Rules 2009 provides that appeals are by way of re-hearing; see *Brown v New Zealand Transport Agency*[1] and *Yorke v New Zealand Transport Agency*[2].

Vehicle standards rules

[8] New Zealand allows large scale importation of motor vehicles and no longer manufactures vehicles in significant numbers so as to allow the imposition of its own vehicle standards. The statutory and regulatory framework which has developed as a consequence of that is referred to in *Land Transport Safety Authority v Brian Casey*[3] where Randerson J at para [7], with reference to the various vehicle standards compliance rules then in force, said:

> [7] As the Judge explained, these regulations and rules set safety requirements and standards for systems and components of motor vehicles operating in New Zealand. Rather than operating its own standards regime, New Zealand requires importers of vehicles to demonstrate that their vehicles comply with one of four specified overseas regimes. Under those regimes (in a procedure known as the homologation process) standards are fixed after

[1] Dunedin District Court, 15 April 2011, CIV-2010-012-808, Kellar DCJ.
[2] Auckland District Court, 17 November 2011, CIV-2011-004-000580, Perkins DCJ at para [5].
[3] CA 144/1

> rigorous testing and procedures are specified to ensure compliance by manufacturers with the required standards. As a part of this process, certification bodies are appointed by the controlling jurisdictions to conduct audits of the manufacturers' production facilities.
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> [8] The system is described as being complex but cost effective. Compliance costs per the vehicle are low because of the large number of vehicles produced for each type approval issued.

[9] The Taiwanese market, for which the appellant's vehicle was marketed, is not one of the approved regimes and has a lower standard under its country code than the four specified regimes mentioned by Randerson J. Those regimes are Japan, the United States, Australia and Europe.

[10] Although at one point the vehicle was able to be issued with a warrant of fitness that does not, in itself, indicate compliance with the various vehicle standards rules applicable to this vehicle.

[11] As the vehicle is no longer exempt from the compliance rules, it having remained in New Zealand longer than a continuous period of more than 18 months from the date of its importation then, if it is to be driven in New Zealand, it now needs to comply with them.

[12] Clause 6.3 of the Compliance Rules provides for inspection and certification of vehicles imported from overseas with 6.3(3) providing that:

> The inspection and certification of a vehicle under section 6 must include:
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> (a) inspection of associated documents to determine whether or not the vehicle complied with applicable requirements when manufactured; and
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> (b) inspection of documents that verify the identity of the vehicle; and
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> (c) a determination as to whether the vehicle has a valid VIN assigned and affixed to it.

[13] Clause 6.4(1)(c) provides that a vehicle may only be certified if, amongst other things, it complies with applicable requirements. Mr Tippet, notwithstanding his efforts, was unable to obtain the necessary documents for inspection as would enable the certifier to establish whether or not the vehicle complied with applicable requirements when manufactured and accordingly the respondent determined that a

number of standards were not met by the vehicle. Mr Wilkin, in his submissions, said they were the following:

> Land Transport Rule: Door Retention Systems 2001;
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> Land Transport Rule: Interior Impact 2001;
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> Land Transport Rule: Light-Vehicle Brakes 2002;
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> Land Transport Rule: Seatbelts and Seatbelt Anchorages 2002;
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> Land Transport Rule: Steering Systems 2001;
>
> Land Transport Rule: Vehicle Standards Compliance 2002.

[14] Notwithstanding Mr Wilkin's submission, [the NZTA mechanical engineer], in his affidavit which was relied on by the Agency, said at para 41 that the Agency agreed with Mr Tippett that the Seats and Seat Anchorages Rule 2002 did not apply to the vehicle.

[15] However when the respondent wrote to the appellant, Mr Tippett, on 8 August 2007 declining his request for an exemption it referred not only to the rules set out in para [13] above, but also to an additional four rules, which the respondent now accepts are not applicable. The reason for declining the exemption in the Agency's letter to the appellant was:

> *As no evidence has been presented to demonstrate that the vehicle is compliant or substantially compliant with the required standards and as there do not appear to be any circumstances that would render the prescribed requirements unreasonable or inappropriate, the Agency cannot be satisfied that the requirements of s 166 of the Land Transport Act have been met. As such, an exemption cannot be issued in this case.*

[16] At issue is whether there would be a significant risk to safety, to be assessed on the civil standard, by concluding that evidence, other than the direct documentary evidence the Rules require, has been provided by the appellant so as to allow the

exemption sought. Baragwanath J in *Director of Land Transport v District Court at Auckland*[4] said the issue under s 166(2) of the Act was:

> … in the circumstances of the case that the risk to safety would not be significantly increased by the granting of the exemption. That must mean significantly increased beyond what would have been the risk had the rules been complied with.

[17] Mr Tippett did provide the Agency with photographs of each of the door latches and catches, door hinges, and of doors both partly closed and fully closed to demonstrate substantial compliance with the Door Retention Rule so that the respondent could be satisfied there was no significant increase to safety if the exemption was granted. However the Agency's view, as recorded in [the NZTA mechanical engineer]'s affidavit, is that without a certificate of compliance for the vehicle there is no way to conclusively know what is fitted is compliant with approved safety standards. Further, as I have noted, [the NZTA mechanical engineer] accepted in his affidavit that the Land Transport Rule: Seats and Seat Anchorages 2002 Rules are not applicable to the vehicle. There are several standards as well as the general Vehicle Standards Compliance Rule 2002 for which compliance cannot be established. The vehicle specifically requires exemption from the door retention systems rules, the interior impact rules, the light-vehicle brakes and steering system rules.

[18] The Agency's view that without a certificate of compliance for the vehicle, there was no way to conclusively know what is fitted complies with approved safety standards ignores the right of proving compliance by, in effect, secondary evidence, such as the photographs in the case of the Door Retention Rule should they be sufficient. Whether they do prove compliance or substantial compliance to the point where safety is not compromised is not mentioned in [the NZTA mechanical engineer]'s affidavit as only the required certificates will do as far as the Agency is concerned. If that is the criteria then there is little point in having an exemption process as compliance, in the absence of the relevant certification, will never be able to be established. It also is at odds with the approach evidenced by *Director of Land Transport v District Court at Auckland* where Baragwanath J said, at paras [31] and [32]:

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[4] Auckland High Court, CIV-2005-404-3015

> [31] … Rule 6.3(4)(c) required production of a particular record and rule 6.3(4) required "other relevant documents" no doubt of a kind analogous with those required under subrules (a) or (c). Production of such records entitled an applicant to registration by what was described in argument as the front door: entry by right. The discretionary power of exemption under s 166 is provided by Parliament for cases where the evidence to establish a right to registration is unavailable. It was termed in argument the side door.
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> [32] It was common ground that the front door was unavailable in the present case because the necessary formal documentation was unavailable from either the manufacturer or the manufacturer's representative. It does not at all follow that the Judge erred logically in using the test of whether the vehicle *in fact* complied with AVR 69/00 and EC 96/79. The touchstone whether the risk to safety would not be significantly increased by the granting of the exemption and that the specified requirements of the rule have been substantially complied with and that further compliance was unnecessary. Proof of compliance for those standards *by the documents stipulated in rule 6.3(4) permits registration as a right under rule 6.3(4)*, that is by the front door. But if, despite the absence of a ticket of entry via the front door the Judge was satisfied by other evidence that the conditions of s 166(2) were satisfied, the first condition would be satisfied and it would be open to the Court to move to the next question of exercise of discretion under s 166(1). …

[19] In his email of 19 February 2018 to the appellant , [the NZTA mechanical engineer] stated, without any detail or analysis of what the photographs showed or failed to show in terms of the relevant rule, that it was not possible to demonstrate compliance by means of the photographs.

[20] Judge Kiernan, the Judge at first instance in the *Department of Land Transport v District Court at Auckland* case, was able to find substantial compliance with the particular rule at issue, the New Zealand Frontal Impact Rule 2001, as there was no difference between the model of Ferrari for which a waiver was sought and other models accepted as complying with the Frontal Impact rule. She also found that vehicle safety was not in question and there was nothing to substantiate any concern that if the vehicle was granted an exemption commercial importers would be able to import non-complying vehicles. The Agency does not allege the Frontal Impact Rule 2001 is one not met by the vehicle. However the point that substantial compliance could be shown by comparison with other models of the same vehicle known to comply with acceptable standards does not assist the appellant as there are no vehicles built for the Taiwan market which comply with appropriate vehicle standards for New Zealand. The Ferrari was manufactured at one plant at Maranello, Italy, and was intended for sale and use in Europe. As Baragwanath J noted, at paragraph [38] of the

decision, it was inconceivable that it would not meet whatever were the European standards of the time and it was inconceivable that it would be built to a lower standard than would meet the various standards of what he described as the "New Zealand smorgasborg".

[21] Consequently, notwithstanding the absence of a detailed critique, it is difficult to see how the respondent could have come to any other view than to consider that the photographs provided did not establish that the door retention systems rule had been substantially complied with.

[22] The Interior Impact Rule 2001, is a rule which covers the design, construction and maintenance of interior fittings in motor vehicles is one which is closely linked to the Frontal Impact Rule. In Brookers Law of Transportation Vol 2 at 8-1301 the author notes:

> The rule's aim is to minimise injury to motor vehicle occupants who might come into contact with such fittings in a crash.

[23] Mr Tippett, an experienced police officer trained in crash investigation and road policing, advanced a number of arguments, in his affidavit, in support of an exemption from rules, in particular that the vehicle had been driven in New Zealand for a number of years without any problem attached to safety and that, having attended a number of accidents in his occupational capacity, he "... *would much prefer to have been in my Chrysler motor vehicle than many of the others involved in collisions"*. He supplied photographs of the brake pedal and steering wheel and other photographs of the internal parts of the vehicle in an attempt to prove substantial compliance with the Interior Impact Rule, as he had for the Door Retention Rule.

[24] For some rules, such as the Glazing Windscreen Wipe and Wash and Mirrors 1999 Rule, photographs were accepted by the respondent as being sufficient to indicate substantial compliance. Mr Tippett's difficulty, as with the Door Retention Rule is that in the absence of a full mechanical report following inspection of the vehicle and referenced to the relevant rules, or alternatively, evidence of other vehicles of the same range and model manufactured under the same conditions and known to be compliant with the relevant rules or with manufacturing safety standards acceptable in New

Zealand, photographs are not sufficient to demonstrate compliance for a rule as significant as the Interior Impact Rule which, as the evidence adduced by the respondent shows, is critical for road safety generally. Public interest and public safety are critical matters.

[25] In *Director of Land Transport Safety Authority v District Court at Te Kuiti*[5], the significance of the Frontal Impact Standard Rule was illustrated by reference to evidence of a 17- 25% increase in safety due to frontal impact protection standards. On appeal, it was found by Randerson J that the risk to safety would be significantly increased by the granting of the exemption from the Frontal Impact Rule. The rule, as with the other rules, applies to the vehicle, not the owner, and so notwithstanding Mr Tippett's undoubted exemplary record as a driver and his concern for his family, expressed in his affidavit as supporting his view that the vehicle was safe otherwise he would not have purchased it, I am satisfied the respondent, with the information it was provided, was not in a position to provide an exemption from the rules for which there was insufficient evidence of substantial compliance, without significantly increasing the risk to safety.

[26] The vehicle also required exemptions from the Light-vehicle Brakes 2002 as well as the Steering Systems 2001 Rule. With respect to the brakes the respondent's submission was that the appellant had an inherent difficulty in showing any type of substantial compliance "*merely from something akin to a warrant of fitness test*" because of the inspection, which passed the vehicle, did not indicate whether the components were in a condition substantially similar to the relevant rule. The Steering Systems Rule covers the design, construction and maintenance of the steering system and is, as noted in the commentary to the rule in Brookers Law of Transportation Volume 2 8-1401 is designed to ensure that steering systems provide safe and sensitive control of a motor vehicle and to minimise injury to the driver who might come into contact with steering systems or components in a crash. [The NZTA mechanical engineer]'s objection, on behalf of the respondent, was that the standards covered all aspects of the two systems, not just brake pedal and friction materials in relation to the brake rule, and the steering wheel, which were the subject of photographs supplied by

[5] High Court, Hamilton, CIV-2003-419-165, 30 April 2004

Mr Tippett to the respondent. I accept that, in the absence of a detailed inspection, photographs of two of the components of the respective systems were not sufficient for the respondent to be satisfied that an exemption ought to be granted on the basis that there had been substantial compliance and the exemption would not cause any significant increase to safety.

[27] In its submissions the respondent raised the floodgate argument, namely if the exemption were granted it would undermine the rationale for vehicle standards which are, primarily, safety issues and that it would be exploited by commercial importers. These were not grounds given to the appellant in the refusal of the exemption but nevertheless they are, I accept, legitimate grounds for the Agency, in appropriate cases, to consider. In *Casey* at para [34] the Court of Appeal specifically held that the Director was entitled to consider the risk of exploitation of the exemption process by commercial importers and the impacts the Director considered could follow, as well as potential impacts on the integrity of the Vehicle Safety Standards regime, and ultimately on the safety of vehicles imported into the country. In that case the vehicle had been imported from South Africa, another country outside the four specified overseas regimes whose standards are fixed after rigorous testing and procedures. However, not only did the Agency not rely on that ground in refusing the exemption, but there was no significant development of the point in [the NZTA mechanical engineer]'s affidavit and further evidence would be necessary if the matter were to be determined on that basis.

[28] However, it is clear the appellant was unable to demonstrate that the Agency's approach in refusing to grant an exemption for the vehicle was wrong, and so it was not unreasonable for it not to be satisfied that the risk to safety would not be significantly increased by the granting of the exemption. Accordingly the appeal is dismissed.

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B A Gibson DCJ