Chief Executive of the New Zealand Customs Service v Knowledge Cultures Ltd

High Court Hamilton CIV 2018-419-209, [2019] NZHC 1576
28 February; 8 July 2019
Hinton J

Customs and excise — Excise duty — Concession by counsel — Erroneous concession by counsel — Application to resile from concession — Remission of duty — "Destroyed, pillaged or lost" — Customs and Excise Act 1996, ss 73, 103(2), 103(3) and 113.

Excise duty is a domestic consumption tax on certain commodities manufactured in New Zealand, including wine. The Customs and Excise Act 1996 (the Act) required excise duty be levied, collected and paid on wine that is manufactured in a manufacturing area. The respondent, a wine-maker, discovered 2,500 bottles of wine were missing. The evidence of the directors of the respondent was that the wine was probably stolen by former employees of the respondent. The appellant imposed excise duty on the missing wine under the Act on the basis that duty was payable when the wine left the customs-controlled area. The respondent applied for remission of the duty under s 113. Remission was declined and the respondent appealed the decision to the Customs Appeal Authority (the Authority).

There was evidence before the Authority that would have enabled it to make a finding of fact that the wine existed and it was taken from the customs-controlled area. However, at the end of the hearing then-counsel for the present appellant, under pressure from the Authority, conceded that "the wine was probably miscounted, and therefore the wine did not exist". The appeal was allowed in the respondent's favour. The Authority also held (obiter) that s 103(2) of the Act potentially excluded remission of duties when goods (including stolen goods) are removed from a customs-controlled area without duty being paid.

The appellant appealed to the High Court, and contended it was not bound by the erroneous concession made before the Authority by its then-counsel. Both parties submitted the Authority erred in its interpretation of s 103(2) of the Act.

Held (allowing the appeal, but with costs to the respondent).

1 The Court may permit a party to resile from a concession where the interests of justice so require.

GFW Agri-Products Ltd v Gibson [1995] 2 ERNZ 323 (CA) followed.

Otter v Residual Health Management Unit (1999) 13 PRNZ 367 (CA) followed.

2 Matters which are relevant to whether the Court will permit a party to resile from a concession include whether the concession was inexplicable or irrational; the concession carried with it an acknowledgement that particular consequences would follow; the concession was unauthorised; the other party would have run its case differently if the concession had not been made; and new facts have come to light which may alter the nature of the case.

Walsh v Walsh (1984) 3 NZFLR 23 (CA) applied.

Otter v Residual Health Management Unit (1999) 13 PRNZ 367 (CA) followed.

Collier v Director of Proceedings of the Health and Disability Commissioner [2001] NZAR 91 (HC) followed.

Patcroft Properties Ltd v Ingram [2010] NZCA 275, [2010] 3 NZLR 681 followed.

3 The concession could be withdrawn in this case. It was almost imposed on counsel by the Authority, and the concession did not accord with the evidence and was patently perverse. Further, the concession was at the end of the case and did not impact upon the way the case was run.

4 The respondent was liable for excise duty in respect of the missing wine. Stolen goods, which may still be "available for consumption" are covered by the words "destroyed, pillaged or lost" in s 113 of the Act. The issue as to whether the appellant properly exercised the discretion not to remit the duty should accordingly be considered under s 113 of the Act.

5 The reference in s 103 of the Act to "released from liability" refers to the imposition of duty. The imposition of duty must be distinguished from obtaining payment of the liability (or remission of it). Remission of duty does not release a licensee from liability but renders the duty no longer due.

Cases referred to in judgment

Collier v Director of Proceedings of the Health and Disability Commissioner [2001] NZAR 91 (HC).

Commissioner of Inland Revenue v Wilson [2017] NZCA 100, (2017) NZTC 23-009.

GFW Agri-Products Ltd v Gibson [1995] 2 ERNZ 323 (CA).

Otter v Residual Health Management Unit (1999) 13 PRNZ 367 (CA).

Patcroft Properties Ltd v Ingram [2010] NZCA 275, [2010] 3 NZLR 681 (CA).

Walsh v Walsh (1984) 3 NZFLR 23 (CA).

Appeal

This was an appeal from a decision of the Customs Appeal Authority in relation to excise duty.

P Courtney for the appellant.

P Cornegé for the respondent.

HINTON J. [1] This appeal from a decision of the Customs Appeal Authority is about whether excise duty should be remitted on wine allegedly produced by the respondent.[1] Excise duty is a domestic consumption tax on certain commodities manufactured in New Zealand (as distinct from Customs duties on goods entering or leaving New Zealand).

[2] The relevant legislation is the Customs and Excise Act 1996 (the Act).

[3] The case raises essentially four questions of law:

(a) Whether the Authority erred in determining the appeal before it on the basis of a concession by counsel that the wine had not come into existence, and in finding that accordingly no liability for duty applied; rather than making findings of fact based on the evidence adduced and making its decision on a de nova basis, taking into account all the evidence. Alternatively, whether the concession can be withdrawn, in any event.

(b) Whether the Authority, if wrongly relying on the concession, incorrectly found that the respondent was not liable for duty.

(c) Whether the Authority erred in finding (obiter) that s 103(2) of the Act potentially excludes remission of duties when goods (including stolen goods) are removed from a customs-controlled area (CCA) without duty being paid, rather than that the licensee of the CCA remained liable for unpaid duty under s 103(3).

(d) Whether the Authority erred in finding (again obiter) that for the purposes of s 113, the words "destroyed, pillaged, or lost" confines the operation of the section to circumstances where the goods have been destroyed, and are not available for consumption.

Background

[4] In summary, the respondent makes wine and stores its wine in a CCA licensed under the Act. In late 2016, the directors of the respondent discovered that 2,500 bottles of wine were missing from the CCA. The evidence of the directors was that the missing wine was probably stolen by former employees of the respondent.

[5] The appellant imposed excise duty on the missing wine under s 73 of the Act on the basis that duty was payable when the wine left the CCA, regardless of why it left. The respondent applied for remission of the duty under s 113. Remission was declined and the respondent appealed the decision to the Authority.

[6] There was evidence before the Authority that would have enabled it to make findings of fact that the wine did exist and was taken from the CCA:

(a) The respondent's directors gave evidence that they identified the wine was missing from their storage facility.

---

1 *Waipara River Estate Ltd v Chief Executive of New Zealand Customs Service* [2018] NZCAA 2.

(b) This evidence was not contradicted by the Chief Executive's witnesses. Two witnesses accepted that the wine was removed or missing from the CCA. Another noted in his evidence that "there may have been other things that could have happened to that wine rather than being stolen", referring to miscounting, but concluded that Dr Peters "was saying it was stolen, probably stolen" and did not contradict that evidence.

(c) The respondent's directors reported the missing wine to the Police, who recorded the matter as "Theft By Person In Special Relationship".

[7] In the hearing before the Authority, then counsel for the Chief Executive conceded, as recorded in the transcript, that "the wine was probably miscounted, and therefore the wine did not exist". The Authority concluded the hearing by noting:

> ... given the concession, it's inevitable that the appeal must be allowed in [the respondent's] favour because, given that concession, I've got to find that the wine didn't exist and there was no excise duty due in the first place, so that will be the decision.

[8] The Authority stated:[2] "... I indicated that [the concession] was not consistent with my evaluation of the evidence."

[9] The Authority also made statements as to the law noted at 3(b) and (c) above, which are obiter, given the basis of the decision, but which the Chief Executive seeks to correct as they involve important points of principle. These points are not disputed and I refer to them subsequently.

The concession

[10] Ms Courtney, for the Chief Executive, submits that the concession was as to an incorrect matter of law and therefore could not bind the Court.[3] I agree as to the proposition, but this was not a matter of law. It was a concession as to fact, which is binding.[4]

[11] However, the Court may permit a party to resile from a concession "where the interests of justice so require".[5] Where a party is permitted to resile from a concession, there may be costs consequences.

[12] Matters which are relevant to whether the Court will permit a party to resile from a concession include whether:

(a) the concession was inexplicable or irrational[6]

(b) the concession carried with it an acknowledgement that particular consequences would follow;[7]

(c) the concession was unauthorised;[8]

---

2 At [36].

3 *Commissioner of Inland Revenue v Wilson* [2017] NZCA 100, (2017) NZTC 23-009 at [40].

4 *Walsh v Walsh* (1984) 3 NZFLR 23 (CA) at 29.

5 *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323 (CA) at 327; and *Otter v Residual Health Management Unit* (1999) 13 PRNZ 367 (CA) at [8].

6 *Collier v Director of Proceedings of the Health and Disability Commissioner* [2001] NZAR 91 (HC) at [51].

7 *Walsh v Walsh* at 29.

8 *Collier v Director of Proceedings of the Health and Disability Commissioner* at [51] and

(d) the other party would have run its case differently if the concession had not been made;[9] and
(e) new facts have come to light which may alter the nature of the case.[10]

[13] As I made clear during the hearing, I am satisfied that, in this case, the concession can be withdrawn. There are three reasons in particular for that. First, although worded as a concession, it was almost imposed on counsel for the Chief Executive by the Authority who, judging by the transcript, became annoyed at the way counsel was arguing the case. Secondly, as the Authority expressly acknowledges, the concession did not accord with the evidence, which all pointed to the wine having existed, so the concession was patently perverse. Third, the concession made no difference to the way the case was run. Evidence had been called and cross-examined. The concession was at the end of the case.

Liability for duty

[14] The correct position in law therefore, having regard to the evidence adduced, is that the wine did exist, but it was removed from the CCA without duty being paid on it. The licensee of the CCA (the respondent) remained liable to pay the duty.

[15] Duty is imposed by the Act and, in making an assessment when no entry has been made, the Chief Executive is required to establish that liability for duty applies and to quantify the amount payable.

[16] Section 73(1) requires excise duty to be levied, collected and paid on wine that is manufactured in a manufacturing area, and domestically-manufactured wine is specified to be subject to duty under Part A of the Excise and Excise-equivalent Duties Table.[11] Given the evidence adduced, the Authority should have found that the wine existed, that the wine had been removed from the CCA, and that the duty due on the wine had not been received by the Crown.

[17] Accordingly, the Chief Executive correctly quantified the liability for duty and gave the required notice of the assessment, as entry had not been made when the wine was removed from the CCA. The licensee of the CCA (the respondent) was liable for the duty under s 103(3).

Errors in interpretation of ss 103 and 133 of the Act

[18] As noted, although the Authority (wrongly) found that the wine never existed (and therefore that there was no liability for duty), the Authority went on to discuss remission of duty.

[19] In this regard, both the respondent and the appellant contend that the Authority erred in holding (obiter) that s 103(2) of the Act potentially excluded remission of duties when goods (including stolen

---

[52].
9 *Patcroft Properties Ltd v Ingram* [2010] NZCA 275, [2010] 3 NZLR 681 (CA) at [14].
10 *Otter v Residual Health Management Unit* (1999) 13 PRNZ 367 (CA) at [7] and [8].
11 Section 73(1).

goods) are removed from a CCA without duty being paid. The Authority stated:[12]

> On its face, [s 103(2)] excludes the application of s 113 in the present case. At the very least, it demonstrates that it would be an exceptional exercise of the discretion to allow remission.

[20] Section 113 deals with the remission of duty and provides that, subject to prescribed exceptions, restrictions or conditions, the Chief Executive may refund or remit duty where satisfied that goods have been "damaged, destroyed, pillaged, or lost," or have diminished in value or deteriorated in condition, prior to their release from the control of Customs; or are of faulty manufacture; or have been abandoned to the Crown for disposal prior to release from control of Customs.

[21] Section 103(2) of the Act provides:

> The licensee shall not be released from liability under this section by virtue of any other provision of this Act or any other Act.

[22] Both counsel say that the Authority's finding at [31], which I have set out above, is incorrect. That is clearly so. The phrase "released from liability", which is used in s 103(2), refers to the imposition of duty under s 103(1). The imposition of duty must be distinguished from obtaining payment of the liability, for example through collection, enforcement or settlement. Remission relates to this second stage. It does not release the licensee from liability, but renders the duty no longer due.

[23] Both parties also contend, and I agree, that the Authority incorrectly found that, for the purposes of s 113, the words "destroyed, pillaged, or lost" confines the operation of that section to circumstances where the goods have been destroyed and are not available for consumption.[13] On the face of the section that is incorrect. Plainly "pillaged" and "lost" mean something different to "destroyed". The ordinary meaning of "lost" is missing or unable to be found. One meaning of "pillaged", as the Authority said itself, is to rob indiscriminately or to take property by force.[14] It follows therefore that stolen goods, which may still be "available for consumption", are covered by the words "destroyed, pillaged or lost", and therefore come within the operation of s 113.

Discretion to remit

[24] The respondent is liable for the duty, but the question remains as to whether in the circumstances of this case the Chief Executive properly exercised their discretion not to remit.

[25] Both parties initially asked that, ifl reach this point, I make that decision rather than refer the matter back to the Authority.

[26] However, I pointed out that I have little, if anything, in the way of submissions or relevant precedent or guidelines as to how that review is to be conducted. Counsel then agreed that I should refer that point back.

---

12 At [31].
13 At [29].
14 At [28].

[27] I note for the record that while the Chief Executive considers that there was negligence on the part of the respondent in the "loss" of the wine, they accept the Authority's finding that the respondent was not negligent.[15] The Chief Executive's position seems to be that, unless the "loss" of the goods was in some way Customs' responsibility, there should be no remission of liability. The respondent says on the other hand that, where the loss was not due to its negligence, remission should follow.

Conclusion

[28] The appeal is allowed, and an order is made quashing the Authority's decision.

[29] The issue as to whether the Chief Executive properly exercised his discretion to refuse to remit the duty is referred back to the Authority.

[30] Leave is reserved in case there is some point I have overlooked.

Costs

[31] The appellant has been successful and would normally be entitled to costs. However, there is the question of the concession. Where a Court allows a concession to be withdrawn, there are usually costs consequences. However, the "concession" here was most unusual for the reasons I have noted. The position is further complicated because, even had the concession not been made, this matter would have had to go on appeal because of the errors in interpretation on the part of the Authority. Those errors were however not in dispute. Weighing up these matters, I have decided to award costs in favour of the respondent in the sum of $2,000.

Reported by: Zannah Johnston, *Barrister and Solicitor*

---

15 As an aside, I note that this finding is wholly inconsistent with the finding the wine never existed.