IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **NO S 91 OF 2018**

BETWEEN: **COMPTROLLER-GENERAL OF CUSTOMS**

Appellant

DOMENIC ZAPPIA

Respondent

SUBMISSIONS OF THE APPELLANT IN REPLY

Filed on behalf of the Appellant by:

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PART I CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ARGUMENT

The issue

2. The respondent misstates the question raised by the appeal: cf RS [2]. The decision of the majority below — that the Tribunal erred in law because it determined the review adversely to the respondent "even though he was an employee and even though he had incomplete control over the goods" (FC [119]) — is not able to be confined by reference to the two passages quoted at RS [3]. The first passage (part only of FC [104]) is, in the majority's own words, "illustrative" of only one aspect of their Honours' reasoning. The second passage (part only of FC [116]) is again just one of "a number of matters" that were relied upon by the majority to support their conclusion that "s 35A(1) is not to be understood as directed to the kind of control exercised by an employee of a licensed warehouse, acting in that capacity": FC [116]; see also FC [105].

3. Similarly, the question identified by the respondent at RS [29] is not in fact "the central question of construction". The question on which the decision of the majority below turned, as FC [119] highlights, was simply whether an employee is capable of being "[a] person who has, or has been entrusted with, the possession, custody or control of dutiable goods which are subject to customs control". The appellant submits that the answer to that question is "yes".

The proper construction of s 35A

Parliamentary intention, consequences and the supposed "central construction issue"

4. The respondent approaches the construction of s 35A(1) from the starting point that the appellant's construction is "extreme": RS [20]. He then advances a remarkable argument, directed more to matters of policy than law, involving such assertions as that "[m]any laws exhibit a general policy intended to protect employees from personal liability" (RS [21]), that it would be "a significant policy stretch" to apply s 35A to employees (RS [24]), that "one could imagine the effects this might have on the licensed warehousing industry" because it "may become extremely difficult, if not impossible" to find employees (RS [25]), and that such a construction "would produce absurd results for commerce" (RS [39]). The appellant makes seven points in response.

5. *First*, even if the assertions just referred to could be made good (and there is no evidence to support them), they have little, if any, bearing on the legal question before the Court. The

settled purpose of s 35A(1) is to protect the revenue. It is no part of this Court's role to decide how that objective should be balanced against competing considerations. "[W]hen different views can be held about whether [a] consequence is anomalous on the one hand or acceptable or understandable on the other, the Court should be particularly careful that arguments based on anomaly or incongruity are not allowed to obscure the real intention, and choice, of the Parliament."[1]

6. *Second,* and in any event, the proper starting point is not a pre-conceived conclusion as to the policy merits or consequences of a particular construction but, rather, the words Parliament has used. When the respondent eventually reaches those words (at page 11 of his submissions), he proceeds as if s 35A(1) contains words that are not there. At various points, he treats s 35A(1) as if it provided that a person's possession or control must be "separate" from that of other persons (RS [44], [52]), or that it requires "personal custody" (RS [67]) or custody "in [a] personal capacity and separately from the company" (RS [72]), or that it requires a person to have "*complete* possession" or "*complete* control": RS [46], [50]. All of these words introduce qualifiers or concepts that are without foundation in the text. In those circumstances, there is considerable irony in the respondent's complaint that the appellant's submission that the general word "person" includes "employees" is to "read into [s 35A(1)] words that are simply not there": cf RS [27].

7. *Third,* the respondent's focus on the corporate veil and the separate legal entity doctrine is misplaced: RS [31]–[32]. Section 35A(1) is directed to "[a] person". That expression includes both natural persons (whether or not employees) and corporate persons.[2] There is no need to "pierce the veil" in order for s 35A(1) to apply to certain employees of a body corporate, for it applies to such persons directly provided they have the possession, custody or control of goods (whether or not their employer is a corporate entity).

8. *Fourth,* it is not to the point that an employer may, in some different contexts, be vicariously liable to third parties for the tortious acts of his or her employees committed in the course of employment: RS [21]. Section 35A(1) is not concerned with tortious liability, or even with fault. There is no basis to confine a provision directed to the protection of the revenue by reference to considerations directed to the allocation of tortious liability.

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1 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1998) 83 FCR 511 at 519 (Black CJ and Sundberg J), quoted with approval in *ConnectEast Management Ltd v Federal Commissioner of Taxation* (2009) 175 FCR 110 at [41] (Sundberg, Jessup and Middleton JJ). See also *ACQ Pty Ltd v Cook* (2008) 72 NSWLR 318 at [127] (Campbell JA, with whom Beazley and Giles JJA agreed).

2 *Acts Interpretation Act 1901* (Cth) s 2C(1).

9. *Fifth*, the respondent overstates the extent to which the law exhibits a "general policy" intended to protect employees from personal liability: RS [21], [24]. The only examples given — the *Employees Liability Act 1991* (NSW) and the *National Measurement Act 1960* (Cth) — are from very different contexts and are undercut by the concession that there are in fact "some contexts" where employees can be personally liable for their own actions within the course of their employer's business: RS [21]–[22]. In these circumstances, there is no sufficient basis in the "policy" of the law to depart from the ordinary meaning of the words used in s 35A.

10. *Sixth*, the appellant's construction of s 35A(1) does not have the "extreme" or "drastic" consequences suggested by the respondent: RS [20], [26]. The respondent's submission that, on that construction, a junior employee who wheels a trolley-load of cigarettes around the warehouse too fast is "at risk" (because the cigarettes can be described as "out of control") is absurd: cf RS [19]. Section 35A(1) requires dutiable goods to be kept "safely" in the sense that they must not be allowed to enter home consumption without the payment of duty. It is not concerned with safeguarding goods from damage while they are moved about a warehouse: FC [35], [69].

11. *Seventh*, the respondent's example (RS [40]) of a warehouse licensee that has a single shareholder, single director and single employee highlights that, on the respondent's construction, s 35A(1) will be entirely ineffective to protect the revenue whenever a warehouse licence is held by a corporation that is structured in such a way that it has few assets (irrespective of the assets of the natural person behind it). The example demonstrates why a purposive interpretation favours the appellant's construction.

Textual analysis

12. The reasons why the appellant's construction of s 35A(1) should be preferred are set out at AS [37]–[55]. To the limited extent the respondent engages with those arguments, none of the submissions he makes should be accepted.

13. *First*, as noted at [6] above, the respondent seeks to insert the word "complete" into the text of s 35A(1), such that the section requires that a person have "*complete* possession" or "*complete* control": RS [46], [50]. That is sought to be justified by reference to the use of the definite article before the words "possession, custody or control", but that provides no support for the submission, particularly where: (a) the section applies to "a" person; (b) the respondent does not dispute that more than one person may have possession, custody or control of dutiable goods at the same time (RS [46], [50]); and (c) the respondent accepts that one person may have possession while another person may be entrusted with

possession: RS [51]. In these circumstances, a super-added requirement that a person must have "complete" possession or "complete" control is contrary to the text of the section as a whole, and also likely to render the provision unworkable in practice.

14. *Second*, and in any event, the relevant expression is "the possession, custody or control" of dutiable goods. As written, the definite article qualifies the entire expression, the meaning of which is to be construed as a whole. As the decisions of this Court show, there is no reason why a group of words joined by the disjunctive "or", rather than the conjunctive "and", cannot constitute a composite expression: cf RS [54].[3]

15. The significance of the words "the possession, custody or control" being read as a compound expression is to recognise three key matters: first, that each part of the expression throws light on the meaning of the rest;[4] second, that it was intended by Parliament to employ the words collectively in their widest sense;[5] and third, that the meaning of the compound may, as a result, be more than simply the sum of its parts.[6] Each of those matters points against the approach of the majority below.

Alleged inconsistencies in the appellant's approach

16. The respondent's reliance on the "Statement of facts and reasons" attached to the original decision under s 35A(1) is difficult to understand, given that the original decision was followed by *de novo* review in the Tribunal: cf RS [69]–[72]. It is the findings of fact by the Tribunal that are now relevant, and the Tribunal found that Zaps had, and had been entrusted with, the possession, custody and control of the Stolen Goods (AAT [16]–[19]) and that John and Domenic each had control of the goods: AAT [30]–[31]. Further, while the respondent asserts that the application of s 35A to him turned "entirely on his being an employee of Zaps" (RS [70]), the Tribunal in fact found that "Domenic did not simply report to John in the course of a master-servant relationship", and that, given the family business context, it was "a much richer, more textured relationship": AAT [23]. The submissions at RS [71]–[72] involve an impermissible attempt to challenge those findings.

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3 See, eg, *Federal Commissioner of Taxation v ANZ Banking Group Ltd* (1979) 143 CLR 499 at 533-534 (Mason J), referred to at FC [33], [80], which concerned the expression "in his custody or possession". See also *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151 at [136] (Basten JA), concerning the expression "quashed or called into question".

4 *XYZ v Commonwealth* (2006) 227 CLR 532 at [102] (Kirby J).

5 *Federal Commissioner of Taxation v ANZ Banking Group Ltd* (1979) 143 CLR 499 at 533 (Mason J).

6 See, eg, *Crisp & Gunn Co-operative Ltd v Hobart Corporation* (1963) 110 CLR 538 at 543, applied in *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

The respondent's proposed notice of contention

17. It appears the respondent proposes to apply for leave to file a notice of contention out of time, although the appellant has been served with different (unfiled) versions of that document. The appellant does not object to the filing of a notice limited to giving effect to the argument at RS [73]–[80]. However, that argument should be rejected.[7]

18. The respondent asserts on two occasions that his *evidence* to the Tribunal was "that he always ran all decisions by his father, and followed his father's directions": RS [15], [77]. He neglects to mention that the Tribunal's *finding* is not in those terms. To the contrary, the Tribunal found that the respondent: was employed by Zaps "to oversee operations at the warehouse"; "made the operational decisions at the warehouse", although he delegated some matters to staff; "oversaw what happened to the goods and … was responsible for what happened", albeit that he was subject to the direction of John and referred anything "big" to him for resolution; and alone represented Zaps at a meeting with the ATO to discuss the break-ins at the warehouse: AAT [24]–[26]. On that basis, the Tribunal found that the respondent "was the one who directed what was to happen to the goods on a day-to-day basis", had "authority [to] accept and release the goods" and "[i]f he gave orders with respect to the goods, the employees followed them": AAT [31].

19. Those findings sufficiently demonstrate that the respondent was a person who had, or was entrusted with, the possession, custody or control of the Stolen Goods. On that basis, the Court could allow the Tribunal's decision to stand: AS [64]. But even if the Court is not minded to take that course, given the above findings there is no basis upon which this Court could affirmatively conclude that the respondent did *not* have the requisite control. Accordingly, the proposed notice of contention must be dismissed.

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[7] See also RS [68], which questions whether Zaps itself had possession, custody or control (that being an argument rejected by the Tribunal and the Federal Court: AAT [16]-[19]; FC [95]). As the AAT noted, the assertion that Zaps did not have possession, custody or control is hard to square with the fact that it was asserting a possessory lien over the goods: AAT [18].