IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B57/2013

BETWEEN:

ALAN CHARLES THIESS
Appellant

and

COLLECTOR OF CUSTOMS
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

C-AIR LOGISTICS SERVICES PTY LTD ACN 102 936 694
Third Respondent

GLOBAL LOGISTICS MANAGEMENT CORP PTY LTD (IN LIQUIDATION)
Fourth Respondent

MATTHEW JONES
Fifth Respondent (not a party to the appeal)

PAUL STEVENSON
Sixth Respondent

HIGH COURT OF AUSTRALIA
FILED
20 NOV 2013
THE REGISTRY BRISBANE

APPELLANT'S SUBMISSION

Part I: Certification that this submission is in a form suitable for publication on the internet

1. I certify that this submission is in a form suitable for publication on the internet.

Signed:

Part II: The issues presented by the Appeal

2. The appeal raises the issue of the proper construction of subsections 167(1) and 167(4) *Customs Act 1901*; in particular:

   (a) the meaning of the expression "the payment is made under protest in pursuance of this section" in subsection 167(4); and

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(b) whether the procedure mandated by subsection 167(1) must be invoked before subsection 167(4)becomes operative.

Part III: Certification that the Appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903*

3. The Appellant has considered whether notice should be given in compliance with section 78B of the *Judiciary Act 1903* and considers the giving of such notice to be unnecessary.

Signed:

Part IV: Citation of the report of the primary and intermediate court reasons for judgment

4. The were no reported reasons for judgment at first instance[1].

5. In the Court of Appeal: *Thiess v Collector of Customs & Ors* (2013) 272 FLR 451

Part V: The Facts

6. The facts relevant to this appeal are entirely uncontentious. None of the following matters is disputed.

7. The Appellant, who imported a yacht for his personal use, made a payment in respect of customs duty (including GST on the amount of the supposed customs duty) upon the importation of the yacht.

8. In truth, the Appellant had no statutory liability to pay such duty (or GST), having regard to the relevant tariff classification and the yacht's "gross construction ton" measurement.[2] Any liability which arose was a result of an entry made by the Third Defendant into the computer-based "COMPILE" system of self-assessment operated by the First Respondent. It is common ground that this entry was made in error.[3]

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[1] The primary Judge, Fryberg J., ordered pursuant to r 483 of the *Uniform Civil Procedure Rules 1999* (Qld) that certain questions be set down for hearing and determination by the Court of Appeal separately from and prior to the hearing and determination of all other questions and issues in the proceeding.

[2] [2013] QCA 54 at [8] and [19]

[3] [2013] QCA 54 at [19]

9. No "demand" for payment was ever made, orally or in writing, by any servant or agent of the First or Second Respondent. The only relevant "demand" occurred electronically, as a result of the erroneous entry made by the Third Defendant into the COMPILE system. Accordingly, the Appellant had no occasion to make the payment "under protest".

Part VI: Argument

The Legislation

10. Subsection 167(4) of the *Customs Act 1901* provides:

> (4) No action shall lie for the recovery of any sum paid to the Customs as the duty payable in respect of any goods, unless the payment is made under protest in pursuance of this section and the action is commenced within the following times:
>
> (a) in case the sum is paid as the duty payable under any Customs Tariff, within 6 months after the date of the payment; or
>
> (b) in case the sum is paid as the duty payable under a Customs Tariff or Customs Tariff alteration proposed in the Parliament, within 6 months after the Act, by which the Customs Tariff or Customs Tariff alteration proposed in the Parliament is made law, is assented to.

11. The expression "the payment is made under protest in pursuance of this section" cannot be construed otherwise than as a reference to subsection 167(1), which provides:

> (1) If any dispute arises as to the amount or rate of duty payable in respect of any goods, or as to the liability of any goods to duty, under any Customs Tariff, or under any Customs Tariff or Customs Tariff alteration proposed in the Parliament (not being duty imposed under the *Customs Tariff (Anti-Dumping) Act 1975*), the owner of the goods may pay under protest the sum demanded by the Collector as the duty payable in respect of the goods, and thereupon the sum so paid shall, as against the owner of the goods, be deemed to be the proper duty payable in respect of the goods, unless the contrary is determined in an action brought in pursuance of this section.

12. Subsection (4) is capable of sensible operation only where the procedure mandated by subsection 167(1) of Act has been invoked. This requires that there be:

(a) a dispute as to either:

(i) the amount of duty payable in respect of the goods; or

(ii) the rate of duty payable in respect of the goods; or

(iii) the liability of the goods to duty; and

(b) a demand by the Collector for a particular sum as the duty payable in respect of the goods; and

(c) payment of that sum under protest.

13. In the present case, there is not, and never has been:

(a) any such dispute; or

(b) any relevant demand for payment by the First Respondent; or

(c) any payment made, or which might have been made, under protest.

The Authorities

14. That subsection (4) has no operation in such circumstances was recognised by the majority (Hill and Heerey JJ) in *Re Comptroller-General of Customs and Garrick William Hand v. Kawasaki Motors Pty Ltd*[4], saying:

> It follows that s.167 represents the only method whereby an action for recovery of overpaid customs duty can be brought **where there is a dispute between the owner and the Collector as to liability or matters affecting liability** and that it operates to exclude the availability of any alternative common law remedy ... .
>
> It was submitted by the respondent that the present was not a case which fell within s.167, that is to say that the present was a case where no protest was possible. **No doubt if this were the case, an action at common law might be taken to be outside the prohibition in sub-sec.(4).**
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> [emphasis added]

15. These observations were adopted by Sackville J in *SCI Operations Pty Ltd Limited and ACI Operations Pty Limited v. Commonwealth of Australia*, where His Honour added:[5]

> The history and operation of s.167 were considered at length in *Comptroller-General of Customs v. Kawasaki Motors Pty Ltd (No.2)* (1991) 32 FCR 243 (FCA/FC). In that case Hill and Heerey JJ. held that (at 263):
>
> > "s.167 represents the only method whereby an action for recovery of overpaid Customs duty can be brought where there is a dispute between the owner and the Collector as to liability or matters affecting liability and that it operates to exclude the availability of any alternative common law remedy."
>
> However, their Honours appeared to have accepted (at 264) that if no dispute had arisen as to the amount or rate of duty, or as to the liability of any goods to duty, the limitations imposed by s.167(4) did not apply. See also *Collector of Customs v. Gaylor*, at 655, per Handley JA.

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4 [1991] FCA 519; (1991) 32 FCR 219 at [29] and [30]

5 [1996] FCA 1739 at [61] to [64] – the other members of the Court did not directly address this point.

> In this case, there was no dispute as to the duty payable in respect of PET resin at the time of importation, in the sense that the appellants did not claim at the time that the duty was not payable. Moreover, the appellants have never asserted that duty was not payable at the time of importation; indeed they have been careful, no doubt mindful of s.167, to avoid such an assertion. Their claim is that the making of the CTCO in June 1994 conferred an entitlement to a refund of duty, although they rely on the retrospective effect of the CTCO.
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> **In my opinion, this is not a situation to which s.167(4) is directed. Section 167 is concerned to ensure that an importer who wishes to dispute liability to pay duty at the time of importation follows the stringent statutory procedure.** An importer who has applied or intends to apply for a CTCO is not entitled to dispute liability to duty at the time of importation (unless there is some independent ground for doing so). The importer's entitlement to a refund depends solely on subsequent events, which may not occur (if they occur at all) until well outside the six month period for instituting proceedings provided for in s.167(4)(a). **If s.167(4) applied to such a case, the importer would be required to commence proceedings before an essential element in the cause of action had occurred and before it was known whether it would occur. I do not think that this is the intention of the statutory scheme.**
>
> The present case is different from *Comptroller-General v. Kawasaki Motors*. There, the issue was the liability of an importer to pay duty in respect of goods imported after the date of a purported revocation of a CTCO. The contest related to the importer's liability to pay duty at the time of importation. The same was true in *A & G International Pty Ltd v. Collector of Customs*, S Ct Vic, Ormiston J., 22 December 1995, unreported. In the latter case, Ormiston J. made some observations about the interrelationship between s.167(1) and s.167(4) which may require some qualification to take account of a case such as the present.
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> [emphasis added]

16. Likewise, in *Matchbox Toys Pty Ltd v. The Chief Executive of Customs*[6], Rolfe J (after citing the observations of Justices Hill and Heerey) remarked:

> In my opinion, it is inherent in what their Honours said that if it was possible to make a protest there was "any dispute" which had "arisen" and, accordingly, the owner must protect his rights by paying under protest. The same approach is manifest in *A & G International*. It would be too narrow an approach to s.167 to say that it only applied if the owner raised the matter of disputes with Customs at the time of making payment. It may be that at the time of making payment the owner does not consider that there is an obligation to do so but does not raise that with Customs. In those circumstances it could not be said, in my view, that some other remedy is available to the owner because the obligation remains upon the owner to protect his rights. In such circumstances I consider that the requirements of s.167 would have to be fulfilled. This approach overcomes a difficulty, which Ormiston J perceived in *A & G International*, viz the failure by the owner to raise a dispute of which he was aware.
>
> I also consider that on a proper construction of s.167 there is an obligation on the owner, at the time of paying duty, to satisfy himself that the duty demanded is payable. If this were not so then, arguably, the provisions of s.167 would be circumvented by an owner not

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6 [1997] NSWSC 494

bothering to consider or to consider properly whether such an obligation arose at the time of payment, but later concluding that the duty was not properly payable. Of course it may be that all the relevant facts and circumstances are not known to the owner and could not have been known even with the exercise of due diligence. In such circumstances it may be, depending on the facts, appropriate to say that "no protest was possible". But it is not possible to say that if the owner has simply failed to direct his mind to the issue properly. These views are, I believe, consistent with the evident intention of s.167, which deems the amount paid to be the proper duty, to ensure that if duty is paid without protest it cannot be recovered by recourse to an action in a court of competent jurisdiction. Thus there will be an element of certainty so far as the revenue authorities are concerned. The legislative intention to which I have referred is expressed in *Kawasaki* and *A & G International*.

A consideration of all that Hill and Heerey JJ said, and particularly the passage I have last quoted, indicates to me that they were concerned with a case where there was a dispute at the time when a protest could be made, viz at the time when the Customs duty was paid.

17. Again, in *Stretton v. Malika Holdings Pty Ltd*[7], the plurality remarked:

Further, sub-s.(1) of s.167 opens with a clause which stipulates the condition upon which the next clause depends; and all the succeeding provisions of the section are linked not only conceptually but by words which look either backwards or forwards ("thereupon ... so paid" and "action brought in pursuance of this section" in sub-s.(1); "within the times limited in this section" and "so paid" in sub-s.(2); "protest in pursuance of this section" in sub-s.(3); and at least "protest in pursuance of this section" in sub-s.(4)). Accordingly, if, as I consider occurred here, the opening condition is satisfied, the whole of the rest of the section is enlivened.

The view that sub-s.(1), and thus the whole linked section, is apt to embrace the dispute as to the three subject-matters that undoubtedly arose here is, I consider, confirmed by the heading to Div.4, "Disputes as to Duty", which is part of the Act (*Acts Interpretation Act 1901* (Cth.), s.13(1)). For one would expect to find all the provisions relating to disputes as to duty in that Division.

18. Yet again, in *Parks Holdings Pty Ltd v. Chief Executive Officer of Customs*[8], the plurality remarked:

Section 167 seems clearly enough to be drafted on the assumption that for a dispute to have arisen as to the amount of duty payable or the liability of goods to duty, the Collector must have demanded that the owner pay a sum 'as the duty payable in respect of the goods'. It is difficult to envisage how a dispute between the Collector and an owner could arise without the Collector demanding from the owner payment of the duty said to be payable in respect of the goods. As *Malika* confirms, the administration of the *Customs Act* depends on the honesty and diligence of owners in describing imported goods accurately so that they may be properly assessed for duty. If Customs disagrees with the description of goods entered by the owner, or claims that goods not entered for home consumption or otherwise are liable to duty, at some point the Collector will have to do something that can be characterised as making a demand for the duty payable in respect of the goods. There may be a factual question in any given case as to whether in fact a demand has been made and therefore a dispute of the kind envisaged by s 167 has arisen: cf *Re OES Holdings Pty*

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7 [1998] VSCA 127 at [27] and [28]

8 [2004] FCAFC 317

> *Ltd and Collector of Customs* (1982) 5 ALD 58, at 65 (AAT). But in the ordinary case there will be little room for doubt that the Collector has in fact demanded the sum said to be due.
>
> This construction of s 167 is consistent with the principal object of the section. Where a dispute arises between Customs and the owner of imported goods, triggered by Customs in fact demanding the duty said to be payable in respect of the goods, the owner may take advantage of the procedure in s 167. In particular, the owner, upon payment of the duty demanded, can secure a judicial determination of the dispute and can obtain release of the goods pending that determination.

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The "floodgates" argument

19. On the hearing of the special leave application in this matter, learned senior counsel for the First and Second Respondents advanced (in effect) a "floodgates" argument: that "no one has any incentive to protest including people who are doing their job properly"[9]. The suggestion seems to be that someone may knowingly enter goods incorrectly so as to attract higher customs duty – or perhaps discover their error shortly after the erroneous entry was made – but then make a conscious decision to refrain from protesting, thereby to enlarge the period in which action may be brought to

20 recover the amount of the overpayment.

20. This, with respect, is nonsense. Importers who are (or become) aware that they have paid too much by way of customs duty can generally be expected to be actuated by self-interest, in moving promptly to recover the amount of the over-payment, regardless of the application of s.167(4). It is bizarre to suggest there is any tangible risk that importers will either deliberately enter goods incorrectly, or consciously refrain from protesting when an error has been discovered, simply to delay for as long as possible the prospect of recovering the amount of the overpayment.

The "unfairness" argument

30 21. Likewise, at the special leave hearing, senior counsel for the Respondents contended that "on the construction [for which the Appellant contends], you would penalise the people who are diligent and thorough and make a protest

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[9] transcript, 11 October 2013, [2013] HCATrans 239

under section 167(4) [sic.] and people who take no care about putting in their information for their duty, for their customs entry, those people are put in an advantageous position over those people who protest"[10].

22. Once again, even to imagine circumstances where this may produce an outcome which unfairly benefits the careless and the dilatory over the astute and the diligent, it must be assumed that importers who have overpaid customs duty have a desire to postpone, for as long as possible, the prospect of recovering the overpayment. Again, this is a nonsense.

23. But, if the result in a particular case is unfair, that is because the common law – which operates where the statutory regime does not apply – allows recovery to those who make payments under genuine mistakes, without regard to the degree of blame attaching to the mistake, but (generally speaking) denies relief to those who deliberately overpay. In no sense is this a consequence of the construction of subsection 167(4) for which the Appellant contends, beyond the fact that such a construction clears the way for an importer who has overpaid by mistake to seek recovery at common law.

The operation of s.167(4) in the context of a self-assessment regime

24. Senior counsel for the Respondents, again at the special leave hearing, submitted that "... if one construes section 167(4) as allowing someone who makes a mistake of their own volition in a self-assessment scheme not to make a protest and then to have a restitutionary claim, it drives a truck through section 167(4). There is no point in having it."[11]

25. One may quibble whether a "mistake" made by an importer "of their own volition" could be called a "mistake" at all; or whether it would support any form of restitutionary claim. In any event, the hypothetical case of a person making "a mistake of their own volition in a self-assessment scheme", and

[10] transcript, 11 October 2013, [2013] HCATrans 239
[11] transcript, 11 October 2013, [2013] HCATrans 239

then deciding "not to make a protest" so as to enliven a restitutionary claim, is so unlikely as not to warrant consideration.

26. The real point exposed by this submission is that s.167, in its present form, was never designed to operate in the context of a self-assessment regime. As subsection 167(1) makes clear, the Parliament had in contemplation a situation where officers of the Customs inspect goods (or the paperwork relating to goods); make a decision regarding whether duty is exigible, and, if so, the applicable rate and amount payable; demand payment of that sum; and are met with a contrary contention by the importer. If the issue cannot be resolved on the spot, the importer is allowed to pay under protest, retain the goods, and commence proceedings within 6 months.

27. None of this is readily transposed to a self-assessment regime, where there is no demand, no dispute, and no opportunity for payment under protest. If Parliament is of the view that a 6-month limitation period remains apposite in the context of a self-assessment regime, then the appropriate course is to legislate for it; not to contort the language of a provision which was plainly never intended to apply in such circumstances.

28. Until such legislation is enacted, the clear duty of the courts is not to paper over the cracks in the legislative framework by introducing specious concepts involving a duty of care and diligence on the part of the importer, and denying relief to those who could have made a protest but failed to do so through their own lassitude. Rather, it is to uphold the rights and remedies available to the subject at common law, unless those rights and remedies have been clearly and unambiguously excluded or modified by statute.

Part VII: Applicable statutes as they existed at the relevant time

29. The text of the applicable statutory provisions as they existed at the relevant time are:

Subsection 167(4) of the *Customs Act 1901*:

(4) No action shall lie for the recovery of any sum paid to the Customs as the duty payable in respect of any goods, unless the payment is made under protest in pursuance of this section and the action is commenced within the following times:

(a) in case the sum is paid as the duty payable under any Customs Tariff, within 6 months after the date of the payment; or

(b) in case the sum is paid as the duty payable under a Customs Tariff or Customs Tariff alteration proposed in the Parliament, within 6 months after the Act, by which the Customs Tariff or Customs Tariff alteration proposed in the Parliament is made law, is assented to.

Subsection 167(1) of the *Customs Act 1901*:

(1) If any dispute arises as to the amount or rate of duty payable in respect of any goods, or as to the liability of any goods to duty, under any Customs Tariff, or under any Customs Tariff or Customs Tariff alteration proposed in the Parliament (not being duty imposed under the *Customs Tariff (Anti-Dumping) Act 1975*), the owner of the goods may pay under protest the sum demanded by the Collector as the duty payable in respect of the goods, and thereupon the sum so paid shall, as against the owner of the goods, be deemed to be the proper duty payable in respect of the goods, unless the contrary is determined in an action brought in pursuance of this section.

30. These provisions of the *Customs Act 1901* remain in force, in this form as at the date of these submissions.

Part VIII: Orders sought

31. The Appellant seeks the following orders:

(a) That the appeal be allowed;

(b) That the decision and orders of the Court of Appeal be set aside;

(c) That the Appellant recover from the First and Second Respondents:

(i) the sum of $548,918.93; and

(ii) interest thereon, pursuant to the *Supreme Court Act 1995* (Qld), from 9 November 2006.

(d) That the First and Second Respondents pay the Appellant's costs of and incidental to:

(i) the proceedings at first instance before the Supreme Court of Queensland;

(ii) the proceedings in the Court of Appeal;

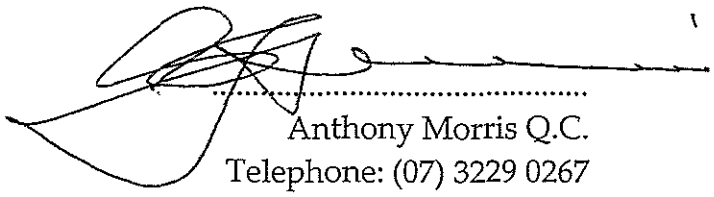
(iii) the application for special leave; and

(iv) the appeal to this Court.

Part IX: Estimate of the number of hours required for the presentation of the appellant's oral argument

32. The Appellant estimates that 2 hours will be required for the presentation of the Appellant's oral argument.

Dated 20 November 2013



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