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

APPELLANT'S ANNOTATED REPLY

Part I: Certification that the reply 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: A concise reply to the argument of the respondent

Section B: Whether Customs made a relevant "demand"

2. The First and Second Respondents contend that "a sum shown on the COMPILE system as customs duty payable for importation of goods was clearly a 'demand' within s.167(1)."[1]

3. It may be accepted that, in every case:

   (a) the importer is required to give the Collector of Customs an "import entry advice" relating to the goods in the import entry[2], which is transmitted by the importer to the Collector of Customs via COMPILE; and

1 First and Second Respondents' submissions paragraph 24.

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(b) the Collector of Customs has powers over imported goods – in particular, the power to retain, move and sell goods – if the amount shown in the COMPILE system as duty payable is not paid.

4. It does not follow that an import entry record made ***by the importer*** in COMPILE, as required by the *Customs Act*, is a "demand". Otherwise, the First and Second Respondents would have to bear the legal consequences – both beneficial and adverse – of a "demand" which they are taken to have made, despite the absence of any conscious involvement by any servant or agent authorised to make such a demand.

5. The legislature saw fit to require that there be a "demand", as a step separate and distinct from the "import entry advice" which the importer is required to lodge, and in addition to providing powers to the Collector of Customs over imported goods. There is no warrant for reading down the requirement for a "demand", by attributing the legal consequences of a "demand" to other steps, being steps for which the legislature made specific provision by explicitly attaching certain legal consequences which are quite different from those attaching to a "demand".

Section D: the double operation of s.167

6. Again, it may be accepted that s.167(4) – whenever it applies – has a "double operation": both specifying the time limit for the bringing of the statutory action, and precluding common law actions where the statutory action is available. But this is of no assistance in determining whether s.167(4) applies in a particular case, with either or both of these consequences.

7. To posit alternate drafting which the legislature might have deployed to preserve common law actions[3] is to reverse settled principles of statutory construction. The question is ***never*** whether the legislature has, with sufficient clarity, manifested an intention to preserve common law causes of action; the question is ***always*** whether the legislature has, with sufficient clarity, manifested an intention to abrogate common law causes of action. And the positing of alternate drafting proposals merely demonstrates that, in the present context, the answer to the second (correct) question must be in the negative.

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2 *Customs Act 1901* s.71A and 71B.

3 see paragraph 39 of the First and Second Respondents' submissions

8. In any event, it is perfectly apparent[4] that s.167, in its present form, was never designed to operate in the context of a self-assessment regime, where there is no demand, no dispute, and no opportunity for payment under protest. That, in itself, is a complete answer to the alternate drafting posited by the First and Second Respondents. Where, as here, there is no demand, no dispute, and no payment under protest (nor any opportunity to make one), the section simply has no application.

9. *Malika Holdings Pty Ltd v. Stretton*[5] does not support the First and Second Respondents. *Malika Holdings* concerned an action by the Collector of Customs rather than one brought by the importer, so questions of the operation of s.167(4) did not directly arise. To the extent it is relevant at all, the extract from the reasons of Gummow and Callinan JJ at paragraph 92[6] affirms that, adopting the First and Second Respondents' emphasis:

> What is presently of importance is that the common law rights referred to above are replaced by a statutory action against the Collector conferred upon owners of goods by s.167 <u>if the conditions spelled out in the section are satisfied</u>.

10. *A & G International v. Collector of Customs*[7] is the only authority which provides any semblance of support to the First and Second Respondents. But the passages relied upon from Ormiston J's reasons are merely *obiter dicta*, and in any case should not be followed. In substance, his Honour decided that s.167(4) applies even where a protest would have been impossible. That view must be taken to have been overruled in *Comptroller-General of Customs v. Kawasaki Motors Pty Ltd [No 2]*[8], per Hill and Heerey JJ at 264.

Section E: the statutory purpose

11. It is suggested that the statutory purpose is served by the construction for which the First and Second Respondents contend, striking an appropriate balance between the interests of the importer and those of the revenue.

12. Let this be made clear: neither the Commonwealth, nor any of its agencies, has any legitimate "interest" in being permitted to take unconscionable advantage of

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4 see paragraph 26 of the Appellants' submissions
5 (2001) 204 CLR 290 at 319 [92], 306 [53] and 306 [53].
6 reproduced at paragraph 42 of the First and Second Respondents' submissions
7 (1995) 129 FLR 23.
8 (1991) 32 FCR 243.

importers' mistakes, by retaining money which was never lawfully exigible as customs duty, without the importer having any form of recourse whatsoever. Yet this is the ***only*** "interest" served by the construction for which the First and Second Respondents contend.

13. On the Appellant's construction, s.167 ***does*** serve a legitimate purposes. It applies where an appropriately authorised agent of the Commonwealth, having turned his or her mind to the issues, considers that a particular sum is exigible by way of customs duty, and therefore makes the appropriate demand. If, in such circumstances, the importer wishes to contest the decision of the Commonwealth's agent, a procedure is laid out for doing so: but the *quid pro quo* is that the importer must comply strictly with that procedure, including the lime-limits imposed.

14. It is said that permitting "a plaintiff to bring common law actions to recover customs duty years after the payments were made, and to bring such actions without any formal protest having been made at the time of payment, would totally undermine certainty for the revenue." Yet in all other contexts – absent express provisions to the contrary – a plaintiff who has made a mistaken payment is entitled to recover it by proceedings commenced within the ordinary statutory limitation period; and this is so, whether or not the defendant represents "the revenue". There can be no sensible suggestion that "certainty for the revenue" has been (or is at risk of being) "undermined" by the availability of such a remedy, in those rare cases where a payment is genuinely mistaken, rather than (for example) being the result of a genuine disagreement with revenue authorities.

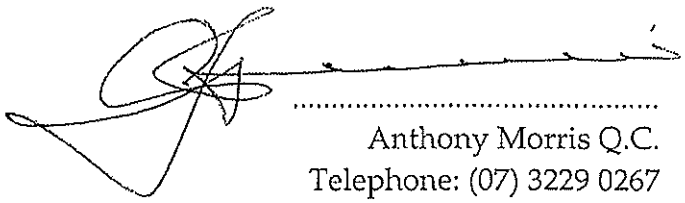
15. The supposed concern is, in any event, more apparent than real. In the rare cases of genuine mistake, importers will act promptly, in their self-interest, to correct them.

16. Moreover, the supposed concern – on the rare occasions when it may arise – supplies no reason why, in practical terms, the mistaken payer should be deprived of any remedy at all. On the construction advanced by the First and Second Respondents, a mistake which resulted in the making of a payment will always be irremediable, since a person making a mistaken payment is not going to do so under protest.

17. However, if the concern has any substance, is something which Parliament might have addressed, and may still address, by an appropriate provision. That Parliament

has not (yet) done so is manifest from the terms of s.167, applying only where there is a dispute, a relevant demand, and payment under protest.

Dated: 20 February 2014



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