

HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, GAGELER AND KEANE JJ

ALAN CHARLES THIESS

APPELLANT

AND

COLLECTOR OF CUSTOMS & ORS

RESPONDENTS

Thiess v Collector of Customs
[2014] HCA 12
2 April 2014
B57/2013

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Queensland

Representation

A J H Morris QC with P L Somers for the appellant (instructed by Walsh Halligan Douglas Lawyers)

J T Gleeson SC, Solicitor-General of the Commonwealth with G J D del Villar and J K Edwards for the first and second respondents (instructed by Australian Government Solicitor)

No appearance for the third to sixth respondents

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Thiess v Collector of Customs

Customs and excise – Recovery of sum paid to Customs as duty payable – Where appellant's customs agent transmitted incorrect information in computer import entry for imported yacht – Where customs duty overpaid due to mistaken belief as to weight of yacht – Where appellant discovered mistake outside statutorily prescribed period for recovery and sought to recover monies paid – Whether s 167(4) of *Customs Act* 1901 (Cth) operates as a bar to recovery of customs duty paid where no dispute under s 167(1).

Statutes – Interpretation – Whether action available for recovery of customs duty paid outside prescribed statutory circumstances.

Words and phrases – "customs duty", "demand", "dispute", "no action shall lie for the recovery of any sum", "payment under protest".

Customs Act 1901 (Cth), ss 163, 167.

1 FRENCH CJ, HAYNE, KIEFEL, GAGELER AND KEANE JJ. This appeal concerns the construction of s 167(4) of the *Customs Act* 1901 (Cth) ("the Act"), the opening words of which provide that "[n]o action shall lie for the recovery of any sum paid to the Customs as the duty payable in respect of any goods".

2 Section 167(4) operates to bar all actions for the recovery of sums paid to the Customs as duty payable in respect of goods, irrespective of whether a dispute as to the amount or rate of duty payable in respect of the goods had arisen at the time of payment, subject only to two exceptions. The exceptions are actions under s 167(2), commenced within times specified in s 167(4), and actions to enforce rights or to compel exercise of powers under s 163.

The Act

3 Goods imported into Australia become subject to the control of the "Customs" – at times relevant to this appeal, the Australian Customs Service – at the time of their importation¹. The owner must enter the goods for home consumption or for warehousing². Goods to be entered for home consumption remain subject to the control of Customs until delivered into home consumption in accordance with an authority given by Customs to take them into home consumption³.

4 The process of entering goods for home consumption begins with a communication of information to Customs, which at times relevant to this appeal took the form of an "import entry"⁴. An import entry could be either a documentary import entry⁵ or a computer import entry⁶. A documentary import entry would be given by the owner in an approved form⁷. It was to include "such

1 Section 30.

2 Section 68.

3 Sections 30, 68 and 71C. At relevant times ss 30, 68 and 71B.

4 Section 71A(1).

5 Section 71A(1)(c).

6 Section 71A(1)(d).

7 Section 71A(2) and s 71K.

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information as the approved form requires"⁸. A computer import entry was transmitted by means of computer facilities known as the "COMPILE computer system" by a registered COMPILE user, who could be the owner or a person acting on the owner's behalf⁹. It was to contain "such information as is set out in an approved statement relating to that communication"¹⁰.

5 Where an import entry had been given or transmitted to Customs, Customs was to give or transmit an "import entry advice"¹¹. If the owner gave a documentary import entry, the import entry advice was to be given to the owner in documentary form¹². If a registered COMPILE user transmitted a computer import entry, the import entry advice was to be transmitted to that user by means of the COMPILE computer system¹³. The import entry advice could, in either case, include a statement to the effect that the goods were cleared for home consumption¹⁴.

6 An authority to take the goods into home consumption was then given by Customs where an import entry advice had been given or transmitted and where "a payment is made of any duty, GST ... or other charge or fee payable at the time of entry of, or in respect of, the goods covered by the import entry advice"¹⁵. If the import entry advice was given to the owner in documentary form, the authority was to be given to the owner in writing¹⁶. If the import entry advice was transmitted to a registered COMPILE user by means of the COMPILE

8 Section 71K(b).

9 Section 71A(3) and s 71L.

10 Section 71L(1)(c).

11 Section 71B(1).

12 Section 71B(2).

13 Section 71B(3).

14 Section 71B(2)(b)(i) and (3)(c)(i).

15 Section 71B(4)(a) and (b).

16 Section 71B(4)(c).

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computer system, the authority was to be given in a message transmitted to that user by the same means¹⁷.

7 Customs duty, imposed under a Customs Tariff (relevantly the *Customs Tariff Act* 1995 (Cth)) on goods imported into Australia, is payable at the time of entry of the goods for home consumption¹⁸. GST, where also imposed, is payable on the amount of that duty¹⁹.

8 Customs duty constitutes a debt to the Commonwealth charged on the goods, payable by the owner, and recoverable at any time in any court of competent jurisdiction by proceedings in the name of "the Collector"²⁰. Functions of the Collector are exercised by the Chief Executive Officer and other designated officers of Customs²¹.

9 Section 167 of the Act, to which it will be necessary to return, provides in part:

"(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.

17 Section 71B(4)(d).

18 Section 132AA(1).

19 Sections 13-5 and 13-20(2)(c) of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth).

20 Section 165. At relevant times s 153.

21 Section 8.

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- (2) The owner may, within the times limited in this section, bring an action against the Collector, in any Commonwealth or State Court of competent jurisdiction, for the recovery of the whole or any part of the sum so paid.

...

- (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.

- (5) Nothing in this section shall affect any rights or powers under section 163."

Sub-sections (3) and (3A) of s 167, which need not be reproduced, set out exhaustively when a payment is taken to be made under protest.

10 Section 163 of the Act – to which s 167(5) refers – provides, amongst other things, that refunds, rebates and remissions of duty may be made in such circumstances, and subject to such conditions and restrictions, as are prescribed²². Where prescribed circumstances exist and prescribed conditions and restrictions are met, s 163 creates rights to payment enforceable by actions in

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debt against the Commonwealth²³, as well as enlivening powers to make payment which can be subject to administrative review²⁴.

- 11 The circumstances prescribed for the purposes of s 163 include where "duty has been paid through manifest error of fact or patent misconception of the law"²⁵. The conditions and restrictions prescribed for a refund in those circumstances include that an application is made for the refund within a prescribed period²⁶.

Facts

- 12 Mr Thiess owned a yacht which he imported into Australia in 2004 and which he intended to enter for home consumption. His customs agent, a registered COMPILE user, transmitted a computer import entry on his behalf.

- 13 The customs agent mistakenly believed that the gross weight of the yacht was 108 tonnes. In fact, the gross weight was 160 tonnes. Acting on that mistaken belief, the customs agent ascribed to the yacht the wrong tariff classification. The COMPILE computer system automatically used the classification ascribed by the agent to calculate that the customs duty payable on the entry of the yacht would be in an amount of \$494,472 and that an additional amount of \$49,447 would be payable as GST and to display those amounts to the customs agent. The amounts so calculated and displayed, totalling \$543,919, were in consequence of that automatic calculation included within the "Total Amount Payable" shown in the computer import entry which the agent then transmitted. The true position was that no customs duty was payable, and consequently that no additional GST was payable. Yachts not exceeding 150 tonnes attracted duty; yachts exceeding 150 tonnes were duty free²⁷.

23 *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 305 [40], 313 [65]; [1998] HCA 20.

24 Section 273GA(1)(haaa).

25 Regulation 126(1)(e) of the Customs Regulations 1926 (Cth).

26 Regulations 127(1) and 128A(4). At relevant times regs 127(1) and 128A(5).

27 Item 8903.92 of Sched 3 to the *Customs Tariff Act* 1995 (Cth).

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14 Customs transmitted an import entry advice to the agent. The import entry advice included a statement to the effect that the yacht was cleared for home consumption subject only to quarantine clearance. The customs agent, as agent for Mr Thiess, then paid to Customs by electronic transfer a total amount which included the mistakenly calculated amount of \$543,919. Customs then transmitted a message to the agent giving authority to take the yacht into home consumption. The yacht was delivered into home consumption in accordance with that authority.

Proceedings

15 Mr Thiess discovered the mistake only after the expiration of the prescribed period for making an application for a refund under s 163 of the Act. He brought proceedings in the Supreme Court of Queensland against parties which included the Collector and the Commonwealth. No relevant distinction having been drawn between the Collector and the Commonwealth, it is convenient to refer to those parties together as "the Commonwealth".

16 Mr Thiess' claim against the Commonwealth in the proceedings was to recover the amount of \$543,919. He framed that claim principally as one for money had and received, relying on the money having been paid under a mistake of fact, and in the alternative as one for restitution in equity or for equitable compensation. Questions of law were reserved on the pleadings for the consideration of the Court of Appeal.

17 The Court of Appeal determined in the course of answering those questions that the Commonwealth had lawful defences to Mr Thiess' claim: s 167(4) of the Act provided a defence in so far as the claim was to recover the amount of \$494,472 paid as customs duty; s 36 of the *Taxation Administration Act* 1953 (Cth) provided a defence in so far as the claim was to recover the additional amount of \$49,447 paid as GST²⁸.

18 An argument put on behalf of Mr Thiess before the Court of Appeal was that s 167(4) of the Act had no application to his claim to recover the amount paid as customs duty, for the reason that no "demand" had been made and hence no "dispute" had arisen within the meaning of s 167(1) at the time of payment²⁹. Fraser JA, with whom de Jersey CJ and Muir JA agreed, rejected that argument

28 *Thiess v Collector of Customs* [2014] 1 Qd R 81.

29 *Thiess v Collector of Customs* [2014] 1 Qd R 81 at 89 [24].

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on its minor premise. His Honour characterised the automatic calculation of the amount payable as customs duty by the COMPILE computer system as a demand by Customs for payment of that amount³⁰. His Honour emphasised that Mr Thiess could have paid that amount under protest had he been alert to his own interests³¹.

Appeal

19 In this appeal by special leave from the decision of the Court of Appeal, counsel for Mr Thiess embraced an argument that the opening words of s 167(4) of the Act speak only to the statutory cause of action created by s 167(2). He again argued that s 167(4) can have no application absent a dispute within the meaning of s 167(1). He again argued that no dispute had arisen.

20 We reject the argument on its major premise. We therefore reach the same result as the Court of Appeal, without having occasion to address whether it can properly be concluded that a dispute within the meaning of s 167(1) had crystallised at the time of payment³².

21 Mr Thiess, through his counsel, conceded that he cannot recover the amount paid as GST if he is prevented by s 167(4) from recovering the amount paid as customs duty. That concession makes it unnecessary for the purpose of determining the appeal to give separate consideration to recovery of the amount paid as GST.

Construction of s 167(4)

22 Statutory construction involves attribution of meaning to statutory text. As recently reiterated³³:

30 *Thiess v Collector of Customs* [2014] 1 Qd R 81 at 90-91 [28].

31 *Thiess v Collector of Customs* [2014] 1 Qd R 81 at 92 [31].

32 Cf *Parks Holdings Pty Ltd v Chief Executive Officer of Customs* (2004) 141 FCR 165 at 179 [54], 180 [58].

33 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 87 ALJR 98 at 107 [39]; 293 ALR 257 at 268-269; [2012] HCA 55 (footnote omitted).

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"This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text."

23 Objective discernment of statutory purpose is integral to contextual construction. The requirement of s 15AA of the *Acts Interpretation Act* 1901 (Cth) that "the interpretation that would best achieve the purpose or object of [an] Act (whether or not that purpose or object is expressly stated ...) is to be preferred to each other interpretation" is in that respect a particular statutory reflection of a general systemic principle. For³⁴:

"it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

24 The relevant text of s 167(4) of the Act is emphatic: "[n]o action shall lie for the recovery of any sum paid to the Customs as the duty payable in respect of any goods". Two qualifications are apparent.

25 First, s 167(2) permits the bringing, within the times limited by s 167(4), of a statutory action for the recovery of the whole or any part of a sum paid under protest pursuant to s 167(1). It is that statutory action to which s 167(4) goes on to refer when it adds the express qualification "unless the payment is made under protest in pursuance of this section and the action is commenced within the following times".

26 Second, s 167(5) adds the express qualification that nothing in s 167 affects any rights or powers under s 163. Section 167(4) therefore says nothing to affect any action to enforce any right to a refund, rebate or remission of duty which arises under s 163. In particular, s 167(4) does not bar an action in debt to enforce the right which arises under s 163 to recover a sum paid through manifest error of fact or patent misconception of law, where application is made within the

34 *Cabell v Markham* 148 F 2d 737 at 739 (1945), quoted in *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [27]; [2000] HCA 33.

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prescribed period for a refund of that sum, and where other prescribed conditions of, and restrictions on, the making of that refund are met.

27 The scheme of the Act is inconsistent with the implication of any further qualification. The scheme, as already explained: gives to Customs control over goods imported into Australia; requires goods intended to be entered for home consumption to be the subject of a documentary import entry or a computer import entry followed by an import entry advice; and makes payment of duty a condition of Customs relinquishing control by giving an authority to take the goods into home consumption.

28 The function of s 167 within that scheme is to provide, by s 167(1), a mechanism for payment under protest, so as to allow goods to be entered for home consumption in circumstances where the owner and Customs are in dispute as to the amount of duty payable in respect of those goods. The comprehensive nature of that mechanism is demonstrated by the exhaustive operation of s 167(3) and (3A) to explain when, if at all, a payment is to be taken to have been made under protest. The correct amount of duty payable is then able to be determined after entry, in a statutory action under s 167(2).

29 By barring any other recovery action, s 167(4) enhances the operation of that scheme. It creates an incentive for the owner to be vigilant in the process of entering goods for home consumption to identify what the owner considers to be the duty payable. It creates an incentive for the owner then to abide by the statutory mechanism of payment under protest and subsequent statutory action in the event of a difference emerging in that process between what the owner considers to be the correct duty payable and what Customs considers to be the duty payable.

30 Legislative history confirms that legislative design. Section 167, including s 167(4), is substantially in the form in which it was substituted by an amendment to the Act in December 1910³⁵. Section 167 in its original form had provided, in the event of a dispute as to the amount or rate of duty, for the owner to be entitled to take delivery of the goods after depositing the amount demanded by the Collector. The amount deposited was then deemed to be the proper duty unless the contrary was determined in an action commenced by the owner against the Collector within a specified time. The amount deposited appears in practice

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to have been held in a trust fund and not to have been treated as revenue pending the commencement and determination of that action³⁶.

31 Whether an action was available at common law for the recovery of an amount paid as customs duty outside the operation of s 167 as originally enacted was in 1904 seen as an open question by the original Comptroller-General of Customs³⁷. In September 1910, individual members of the High Court gave different answers in *Sargood Bros v The Commonwealth*³⁸. Griffith CJ refrained from determining whether the remedy given by the section was exclusive³⁹. O'Connor J⁴⁰ and Higgins J⁴¹ held that a common law action was available. Isaacs J in dissent held that a common law action was not available⁴². Recovery in an action at common law by an owner who could have raised a dispute, Isaacs J went on to say, "would throw the finances of the country into utter confusion"⁴³:

"After several years questions might be raised which, on some suddenly discovered interpretation of a taxing Act, whether internal revenue or Customs, would unexpectedly require the return of enormous sums of money, and quite disorganize the public treasury."

His Honour continued:

"Indeed, it reduces sec 167 to a dead letter, depriving it of all efficacy whatsoever. No merchant, so long as such a position prevails, would be

36 *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) at 280, Opinion No 233.

37 Wollaston, *Customs Law and Regulations*, (1904) at 104.

38 (1910) 11 CLR 258; [1910] HCA 45.

39 (1910) 11 CLR 258 at 266.

40 (1910) 11 CLR 258 at 276-277.

41 (1910) 11 CLR 258 at 308-309.

42 (1910) 11 CLR 258 at 301-303.

43 (1910) 11 CLR 258 at 303.

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foolish enough to raise a dispute and act under a section which requires him to sue within six months, when by deliberately preserving silence he can sue within at least six years."

Those remarks of Isaacs J are to be understood against the background that customs duty accounted at that time for more than half of all Commonwealth revenue⁴⁴.

32 The opening words of s 167(4), in the form in which s 167 was substituted less than three months later, can be seen to have been an immediate prophylactic statutory response to the spectre of widespread fiscal confusion raised by Isaacs J. Those words as then enacted operated in combination with s 167(5) to ensure that, apart from the statutory action for recovery newly created by s 167(2), no action was to lie for the recovery of any sum paid to Customs as the duty payable in respect of any goods other than an action to enforce a right or to compel the exercise of a power under s 163.

33 The preservation by s 167(5) of an action to enforce a right or to compel the exercise of a power under s 163 operated immediately to ameliorate the potentially harsh operation of s 167(4) and continues to do so. Significantly, at the time of the substitution of s 167 in 1910, s 163(2) provided that "[w]henever duty has been paid through manifest error of fact or patent misconception of the law ... a refund rebate or remission of the duty as the case may require shall be made in manner prescribed". It is not irrelevant to the facts in the present case to observe that one illustration of duty having been "paid through manifest error of fact", which had been published as early as 1904, was of goods having been entered at a weight which was subsequently found to have been incorrect⁴⁵. After 1910, s 163 continued itself to provide for payment of a refund in those circumstances until repealed and re-enacted in 1971, with effect from 1974, to provide, as it does now, for refunds to occur only in prescribed circumstances⁴⁶. The same circumstances of duty having been paid through manifest error of fact

44 Commonwealth Bureau of Census and Statistics, *Official Year Book of the Commonwealth of Australia*, No 4 (1911) at 804.

45 Wollaston, *Customs Law and Regulations*, (1904) at 103.

46 *Customs Act* 1971 (Cth).

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or patent misconception of the law were prescribed in 1974⁴⁷ and have continuously been prescribed since then.

34 Counsel for Mr Thiess sought to gain support for the proposition that s 167(4) can have no application absent a dispute within the meaning of s 167(1) from the decisions in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 2)*⁴⁸ and in *Malika Holdings Pty Ltd v Stretton*⁴⁹. *Kawasaki Motors* decided that s 167(4) operates at least to bar an action outside s 167(2) where there is a dispute within the meaning of s 167(1); whether s 167(4) has a broader operation was specifically left open⁵⁰. *Malika Holdings* decided only that s 167 has no application to an action by the Collector to recover unpaid duty. To the extent reasons for judgment in *Malika Holdings* touch on the construction of s 167(4), they are consistent with the construction explained in these reasons for judgment⁵¹. Finally, we note that the construction of s 167(4) explained in these reasons for judgment is consistent with that implicitly adopted in the reasoning of at least a majority in *The Commonwealth v SCI Operations Pty Ltd*⁵².

Orders

35 The appeal is dismissed with costs.

47 Customs Regulations Amendment 1974 (Cth) (SR No 112 of 1974).

48 (1991) 32 FCR 243.

49 (2001) 204 CLR 290; [2001] HCA 14.

50 (1991) 32 FCR 243 at 264.

51 (2001) 204 CLR 290 at 306 [53], 319 [92], 319-320 [95].

52 (1998) 192 CLR 285 at 304 [37], 310-311 [60].

