

IN THE HIGH COURT OF AUSTRALIA

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**ORIGINAL**

DARCY

V.

LEVER BROS. PTY. LIMITED.

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**REASONS FOR JUDGMENT**

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**ORIGINAL**

*Judgment delivered at* Sydney

*on* Thursday - 25th September 1947.

DARCY v. LEVER BROS. PTY. LTD. AND ANOTHER

JUDGMENT

WILLIAMS J.

The plaintiff, who is the Collector of Customs for the State of New South Wales, is suing the defendants for breach of the conditions of three bonds executed by them in connection with the importation of ground nut kernels, which were imported <sup>from India</sup> by the Department of Import Procurement for the benefit of the defendant company. The goods arrived by three shipments in March April and October 1944, and a bond was executed in respect of each shipment.

Item No. 91 A of the Schedule of Import Duties to the Customs Tariff Act 1933-1939 provides, so far as material, that nuts for the manufacture of oils as prescribed by departmental by laws shall be free of import duty. The kernels were imported pursuant to by-law 1282, which provided that peanuts for use in the manufacture of oil under security might be admitted under this item on certain specified dates which included the dates of the three importations in question. The kernels were entered as goods for home consumption by the agent of the company who signed on its behalf certain certificates. The certificate on the first import entry was as follows:-

"we hereby certify that the above mentioned Groundnut Kernels have been imported solely for the expression of oil by Lever Brothers Pty. Ltd., Balmain, and further that the operation will be carried out in the presence of a Customs Officer".

The certificates on the second and third entries also contained these words and in addition the words:-

"and will not be otherwise used or disposed of without the consent of the Collector of Customs in writing".

The entries therefore contained an undertaking by the company that the kernels would be used solely for manufacture into oil, and that the operation would be carried out in the presence of a customs officer.

The bonds which are headed "Security to the Customs"

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provide that the subscribers are, pursuant to the Customs Act 1901-1936, bound to the Customs in certain stated sums (in each case exceeding £30,000) subject only to this condition, that where the goods specified hereunder entered at the port of Sydney on behalf of Lever Bros. Pty. Ltd. are entered for home consumption ..... 'under security' pursuant to any departmental by law or arrangement made with the Collector of Customs for the State of New South Wales and duty of customs ..... is payable ..... if the said Lever Bros. Pty. Ltd. shall either pay the said duty within seven days after demand made by the Collector in writing or (a) at all times keep use deal with and dispose of the goods solely for the purpose stated in the entry and in accordance with the said by law or arrangement and ..... (2) if every obligation provision and condition contained in or imposed by the said Act or any amendment thereof or any regulation thereunder or the relevant entry and applicable to the said goods is at all times duly observed performed and complied with to the satisfaction of the Collector of Customs for the State of New South Wales then this security shall be discharged.

The history of each shipment is the same. The goods arrived on the ship and were entered and passed for home consumption, the purchase money was paid to the Department of Import Procurement and the primage and special war duty to the Customs by the company and the bond was executed. The kernels were then carted by the company from the wharf to a store at Alexandria and stored there until they were required for manufacture into oil. The store was leased by the company after it had been inspected by customs officials and approved of as a fit place to store the kernels provided that the company placed certain locks and other safety appliances on the doors, which was done. The store was a substantial building with walls of brick, iron bars on the windows and a galvanised iron roof. The keys of the store were handed to the customs so that the company could only open the store in their presence. When the kernels were required for manufacture into oil the company communicated with the customs and an official was sent to unlock the store.

The kernels were then carted by the company to their Balmain factory and manufactured into oil, customs officials<sup>at the</sup> store and the factory<sup>(being present)</sup> during the whole of these operations. There is no suggestion that any of the kernels imported under the shipments in question were used otherwise than for the prescribed purpose except for 1632 bags. These bags were stolen by a thief who gained an entrance through the roof of the store about April 1945. The thief was subsequently arrested and convicted, and 101 of the 1632 bags were recovered by the police and returned to the company and manufactured into oil.

Sec 48 (1) of the Customs Act provides that whenever any Custom security is put in suit by the Collector the production thereof without further proof shall entitle the Collector to judgment for their stated liability (in this case over £30,000) against the persons appearing to have executed the same unless the defendants shall prove compliance with the conditions or that the security was not executed by them or release or satisfaction. But the plaintiff only claims judgment for the damage to the customs revenue suffered by the theft of the 1632 bags less the 101 bags subsequently recovered, that is to say, 1531 bags. He estimates this damage on the basis that the kernels in these bags could only have been imported into Australia for any use other than that prescribed by by law 1282 under item 78 of the Schedule of Import Duties which comprises edible nuts and includes in (E) kernels n.e.i. <sup>meaning</sup> (not elsewhere included). Mr. Wallace contended that the kernels that were lost were milling quality and therefore not within item 78 as they were not fit for eating. But peanuts are in the class of edible nuts even if some are not in fact fit for eating, and I think that the plaintiff is entitled to claim that the stolen kernels could only have been imported into Australia subject to the payment of customs duties under item 78 (E) apart from their importation under security for manufacture into oil. The damage claimed is calculated upon the basis of the duty which

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would have been payable under item 78 (E), i.e. at the rate of 6d per pound amounting to £7546-11- 5, less the amount <sup>£185-11-0</sup> already paid for primage and special war duty, that is to say, £7361 - 0- 5.

The defendants have pleaded that they have complied with the conditions of the bonds. They have also pleaded that it was a term of the bonds that the same should bind the defendants and should operate and apply only with respect to such of the kernels as should from time to time cease to be subject to the control of the customs within the meaning of the Customs Act and the regulations and by laws made thereunder, and should be delivered to the defendants for home consumption, and that the kernels to which the plaintiff's claim relates remained under the control of the customs and had not been delivered to the defendants for home consumption. The defendants have also pleaded that the bonds were subject to a condition that if the goods therein specified or any of them should at any time be destroyed lost or stolen otherwise than by the neglect or default of the defendants, then the bonds should be void so far as they related to such goods, and that the goods to which the plaintiff's claim relates were destroyed lost or stolen otherwise than by the neglect or default of the defendants.

It is only necessary to consider the suggested implied condition in relation to goods stolen otherwise than by the neglect or default of the defendant, and I am quite unable to read any such implication into the bonds or the certificates in the entries which are incorporated in the bonds. In the first place the provisions of the bonds simply repeat the provisions of regulation 41 (1) of the Customs Regulations so that, if such a condition should be implied in the bonds, it should also be implied in the regulation, and I would not be justified in reading into the regulation words which are not there. In the second place it is only legitimate to imply a term in an agreement where it is necessary to give the transaction that business efficacy which both parties must have intended it to / have.

have. Here the whole purpose of the certificates in the entries and of the bonds was to protect the revenue of the customs so that the kernels would only be imported free of duty provided they were in fact used for the prescribed purpose and for no other purpose. If the kernels were stolen, they could be applied for some other purpose, and the sole condition on which they were allowed into Australia free of duty would be defeated.

It is more difficult to decide the date upon which the responsibility of the company to keep use deal with and dispose of the kernels solely for the purpose stated in the entries first commenced. The defendants contend that the kernels whilst in the store at Alexandria were still subject to the control of the customs, and had not been delivered to the company for home consumption. This contention rests on the fact that the customs held the keys of the store. There are several cases in which it has been held that the effect of one person handing the keys of a building or part of a building which contains goods to another person, especially where the goods are bulky and difficult to move, is to place the second person in full control and therefore in possession of the goods. Halsbury 2nd Ed. Vol. 25 pp 213-214. But the effect to be given to the handing over of the keys in any particular case must be determined in the light of all the circumstances of that case. Ancona v Rogers L.R. 1 ex.div. 285 at p 290. Wrightson v. McArthur 1921 2 K.B. 807 at pp 816-817.

Part III of the Customs Act contains several sections in which the goods are defined as being subject to the control of the Customs. Sec. 30 (a) provides that goods shall be subject to the control of the Customs where imported from the time of importation until delivery for home consumption. Sec. 32 provides that the control of the Customs especially includes the right of the Customs to examine all goods subject to such control. Sec. 33 provides that no goods subject to the control of the Customs shall be moved altered or interfered with except by authority and in accordance with this Act. Sec. 34 provides that the Customs shall not be liable for any loss or damage occasioned

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to any goods subject to the control of the Customs except by the neglect or wilful act of some officer. Sec. 36 provides that entries may be made and passed for all goods subject to the control of the Customs. Sec. 40 provides that all goods in respect of which any entry has been made or passed shall forthwith be dealt with in accordance with the entry. Sec. 42 provides that, where security is required, pending the giving of the security, the Customs may, in relation to any goods subject to the control of the Customs, refuse to deliver the goods or pass any entry relating thereto.

I think that the expression "subject to the control of the Customs" in all these sections refers to the period prior to the delivery of the kernels to the carters of the company to be carried to the store at Alexandria. But Mr. Wallace relies upon reg. 41 (2) which provides that goods entered for home consumption under security pursuant to a departmental by law made under any item of the Customs Tariff shall continue to be subject to the control of the Customs until every obligation provision and condition contained in or imposed by the Act, the regulations, the by law, the entry and the security and applicable to the goods have been observed, performed and complied with to the satisfaction of the Collector. Sec 42 of the Customs Act plainly contemplates that all goods in respect of which entries have been made and passed and the required security given, shall be delivered to the importer, and pass out of the control of the Customs. Faint suggestions were made during the addresses that reg. 41 (2) might be inconsistent with sec. 42 and therefore invalid. It is the duty of the court to place a meaning on reg. 41 (2), if possible, which will give it validity, and I think that the form of control of the Customs intended by reg. 41 (2) is such control after the goods have been delivered for home consumption as is reasonably necessary to enable the Customs to see that goods entered for home consumption 'under security' are in fact kept and used only for the purpose stated in the entry and in accordance with the by law.

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The kernels were the property of and in the possession of the company. It was for the company to determine from time to time when and in what quantities they would be carted from the store to the factory and manufactured into oil, and the Customs only held the keys by arrangement and as incidental to its right to be present during the operation.

For these reasons I am of opinion that the undertaking that the company would at all times keep and use the kernels solely for the purpose stated in the entry and the by law commenced when it took delivery of the kernels at the wharf, and that the loss of the kernels in the 1531 bags was a breach of this undertaking. Therefore the defence that the defendants complied with the conditions of the bonds fails.

By one cross action the defendants allege that the goods in question, while still subject to the control of the Customs and before the same had been delivered to the defendant for home consumption, were lost or stolen by the neglect of the officers of the Customs in the exercise of such control. This cross action can be disposed of by saying that there is not a scintilla of evidence that the theft of the 1632 bags was caused, or contributed to by any neglect of any officer of the Customs.

By the other cross action the defendants claim to set off a similar sum by way of damages to that claimed in the action for an alleged breach by the plaintiff of his statutory obligation under sec. 163 of the Customs Act to remit the duty under item 78 (E) on the 1531 bags. The defendants are faced by several difficulties in this cross action of which I need only mention two, both of which are, I think, fatal to its success. In the first place the plaintiff is not suing to recover duty on the 1531 bags under item 78 (E). He is suing to recover damages for breach of the condition of the bonds. In the second place the defendant must prove that the 1632 bags were pillaged whilst under Customs control. But the goods were only under Customs control to the extent that the Customs held the keys, and there is not a scintilla of evidence that the pillaging of the goods was due to any lack of care in the custody of the keys. This cross

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action also fails.

The plaintiff is therefore entitled to judgment and the remaining question is for what amount. The Customs (Import Licensing) Regulations 1939 provide that the importation of goods shall be prohibited unless, (a) a licence to import the goods is in force and the terms and conditions (if any) to which the licence is subject are complied with; or (b) the goods are excepted from the application of these regulations. Reg. 15 (1) provides that the Minister may except from their application any goods or any classes of goods. (2) ..... the exception..... may be limited to (a) goods produced in any particular country specified by the Minister; (b) any goods imported in a manner, or at or within a time, specified by the Minister; or (c) any goods to be used for a particular purpose specified by the Minister. At one period goods produced in India were excepted from the application of these regulations. But by a notice of variation of a previous ministerial determination relating to the exception of certain goods from the application of these regulations published in the Commonwealth Gazette on 6th December 1941, it was provided that the exceptions were varied by excluding from the operation thereof inter alia goods classifiable under item 78 (E) of the schedule to the customs tariff other than goods the produce of certain countries which did not include India.

The defendants contended that the kernels could not have been lawfully imported if they were goods classifiable under item 78 (E) so that no duty could lawfully have been imposed under that item, and the loss of revenue to the Customs from the theft must be nominal.

As I said during the hearing, the question of the validity of these regulations is the subject of a reserved judgment of the Full Court. I need not however delay the delivery of this judgment because I can assume in favour of the defendants that the regulations are valid, and the kernels could only have been lawfully imported as goods classifiable under item 78 (E) by licence.

But customs by law 1282 was made by the Minister of State for Trade and Customs, that is by the Minister authorised by reg. 15 to exempt goods from the application of the Import Licencing Regulations. This by law provided that the kernels might be admitted for use in the manufacture of oil under item 91 (A) under security on certain specified dates. They were goods imported at a particular time and for a particular purpose specified by the Minister, and therefore specifically excepted by the Minister from the application of these regulations.

The meaning of 'under security' is defined by reg. 41. The conditions to be inserted in the security are stated in reg. 41 (1). Reg. 41 (4) then provides that the Collector may release the goods from the obligations imposed by this regulation, the by law, the entry, and the security upon receipt of the full amount of the duty which would have been payable upon the importation of the goods if the goods had not been entered in accordance with the tariff item pursuant to which the by law was made. The bonds therefore comply with reg. 41 when they provide that the company shall either pay the duty within seven days after demand made by the Collector of Customs in writing or comply with the conditions of the security. The company did not comply with the conditions of the bonds. Accordingly the plaintiff is entitled to claim as damages a sum equal to the duty which would have been payable on the importation of the stolen kernels if they had not been entered in accordance with the tariff item pursuant to which the by law was made, *that is to say equal to the duty under item 78(E).*

For these reasons I give judgment for the plaintiff for £7361- 0- 5 with costs.