IN THE SUPREME COURT OF NEW ZEALAND

SC 88/2017
[2017] NZSC 156

BETWEEN	DB BREWERIES LIMITED Applicant
AND	CHIEF EXECUTIVE OF THE NEW ZEALAND CUSTOMS SERVICE Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: A M Callinan and N M Blomfield for Applicant
P H Courtney for Respondent

Judgment: 11 October 2017

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay costs of $2,500 to the respondent.

REASONS

Introduction

[1] The applicant, DB Breweries Limited (DB), applies for leave to appeal against the decision of the Court of Appeal.[1] The Court of Appeal set aside a decision of the High Court[2] and, consequently, of the Customs Appeal Authority (the Authority).[3] The High Court and the Authority had upheld a claim by DB that the respondent, the Chief Executive of the New Zealand Customs Service (the

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1 *Chief Executive of the New Zealand Customs Service v DB Breweries Ltd* [2017] NZCA 307 (Harrison, Cooper and Winkelmann JJ) [*DB* (CA)].

2 *Chief Executive of the New Zealand Customs Service v DB Breweries Ltd* [2016] NZHC 2181 (Faire J) [*DB* (HC)].

3 *XXXXX v Chief Executive of the New Zealand Customs Service* [2016] NZCAA 02.

Chief Executive), refund duty paid by DB on goods which deteriorated whilst DB stored them in a Customs controlled area.

[2] DB's claim for a refund of the duty it had paid was based on the goods deteriorating whilst "subject to the control of the Customs" as that term is defined in s 20(1) of the Customs and Excise Act 1996 (the Act). Section 20(1)(a) relevantly provides that goods are subject to the control of the Customs:

> (a) where the goods have been imported, from the time of importation until the time the goods are lawfully removed for home consumption or exportation from a Customs controlled area; …

[3] Section 20(2) provides that for the purposes of s 20(1):

> (2) … goods that are removed from a Customs controlled area to another Customs controlled area are not removed for home consumption.

[4] On the proposed appeal, the applicant wishes to argue the Court of Appeal was wrong to conclude that the goods in this case were no longer "subject to the control of the Customs".

Background

[5] The proposed appeal arises in this way:

(a) DB imported cider and alcoholic ginger beer into New Zealand by sea. Prior to entry of the goods DB's agent submitted the requisite electronic import entry clearances and paid the excise-equivalent duty due. Customs cleared the goods before they landed in New Zealand at the Ports of Auckland Customs controlled area.

(b) After the goods came into New Zealand, DB uplifted the goods and transferred them initially to a contracted storage facility (the first Customs controlled area). From the first Customs controlled area DB took the goods to Customs controlled areas located within its own manufacturing facilities.

(c) While being stored in the facilities the goods passed their best-before date. DB was not able to sell the goods.

(d) DB claimed a refund of excise duty on the deteriorated goods under s 113 of the Act. The Chief Executive declined to pay a refund. DB successfully appealed to the Authority and that decision was upheld by the High Court. The Chief Executive's appeal to the Court of Appeal was successful.

The proposed appeal

[6] DB says the proposed appeal will involve the interpretation of s 20(1) and (2) and which of the parties' interpretations accords with New Zealand's obligations under the General Agreement on Tariffs and Trade (GATT). Accordingly, it is submitted the proposed appeal raises questions of general or public importance and of general commercial significance.[4]

[7] In allowing the appeal, the Court of Appeal said that the phrase "subject to the control of the Customs" "connotes some form of regulatory control under the Act".[5] However, the Court said that was not the case here and "no legislative purpose would be served if a refund were available" in the present circumstances.[6] Further, the Court did not consider s 20(2) applied because its import was to ensure "movement between" Customs controlled areas "does not of itself constitute removal for home consumption, provided the goods remain subject to the control of Customs".[7]

[8] The approach to be adopted to the interpretation of the phrase "subject to the control of the Customs" may be a question of general or public importance and of general commercial significance.[8] However, we do not consider any question of general or public importance or general commercial significance arises in the present

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4 Senior Courts Act 2016, s 74; and Supreme Court Act 2003, s 13.
5 *DB* (CA), above n 1, at [48].
6 At [43].
7 At [50].
8 The phrase "subject to the control of the Customs" is used in a number of provisions in the Customs and Excise Act 1996, for example, ss 47 and 48 which deal with the removal of goods from Customs controlled areas.

case where, as the Court of Appeal described, "the importer has simply chosen to leave the goods in a Customs controlled area".[9] Nothing is raised by the applicant to support the contention it is arguable that, on these facts, the goods remained subject to the control of the Customs. Nor does anything raised by the applicant support the submission that s 20(2) was directed to the movement of the goods in this case.[10] Even if there were a point of public or general importance or general commercial significance, it would not have sufficient prospects of success to justify the grant of leave. In these circumstances, we see no appearance of a miscarriage of justice.

[9] The application for leave to appeal is accordingly declined.

[10] We award costs of $2,500 to the respondent.

Solicitors:
Simpson Grierson, Auckland for Applicant
Crown Law Office, Wellington for Respondent

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9 At [43].

10 For completeness, we note the Customs and Excise Bill 2016 (209-2) (awaiting its second reading) would not maintain s 20(2). The explanatory note to the Bill records that removal of this section is to avoid the outcome in the High Court decision in this case: at 2–3.