

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CRI 2009-404-000365

IN THE MATTER OF an Appeal under the Summary Proceedings
 Act 1957

BETWEEN NEW ZEALAND CUSTOMS SERVICE
 Appellant

AND XINYU WANG
 Defendant

Hearing: 30 November 2009

Appearances: S N Haszard for Appellant
 C Robertson for Defendant

Judgment: 18 December 2009

JUDGMENT OF WHITE J

This judgment was delivered by Justice White on
18 December 2009 at 11.30 a.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

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[1] On 16 February 2009, the respondent, Mr Wang, arrived at Auckland International Airport on a flight from Shanghai, with US\$17,070 (NZ\$32,207) in his possession. In the Customs part of the passenger arrival card, completed by Mr Wang, he answered “No” to the question whether he was bringing into New Zealand more than NZ\$10,000.

[2] Mr Wang pleaded guilty in the Manukau District Court on 9 September 2009 to a charge of knowingly making a false declaration in breach of s 204(4)(a) of the Customs and Excise Act 1996 (“the Customs Act”) and was fined \$2,400 with court costs of \$130 and prosecuting solicitor’s fee of \$250.

[3] Mr Wang applied under s 236(2) of the Customs Act for the restoration of the currency which had been forfeited in full under s 225(1)(a)(iii) of the Customs Act. The District Court Judge ordered restoration of the sum of NZ\$10,000 so that the balance of NZ\$22,207 remained forfeited and condemned.

[4] The issues on this appeal by the New Zealand Customs Service (“Customs”) are:

- a) whether the District Court Judge erred in deciding that the Court had jurisdiction under s 236(2) of the Customs Act to order partial restoration of the currency; and
- b) whether, when making that decision, the District Court Judge erred in considering that the reference in s 225(1)(a) of the Act to “goods in respect of which an offence has been committed” relates only to the amount above the NZ\$10,000 limit for the purpose of the offence under s 204(4)(a) of the Act; and
- c) whether, if the District Court Judge was wrong, Mr Wang discharged the burden of producing sufficient counter-considerations to justify restoration of the currency.

The District Court decision

[5] The District Court Judge in his sentencing notes of 9 September 2009 said:

[24] The question of whether a forfeiture and condemnation should have been in respect of all the funds, or only in respect of that part of them which exceeded \$NZ10,000, is not something that I need to decide here and it is not really something which counsel for either side came prepared to argue, because what I put up to them was, I suspect, a novel point founded on acquaintanceship with legislation of a different sort. So I am certainly not being critical of counsel both of whom have been thoughtful and constructive in their approach.

[25] I think the concept of legitimacy runs in Mr Wang's favour in relation to the \$10,000. There is then another fascinating point, which is a point of statutory interpretation which I resolve in his favour, and that is whether the Court can make an order for restoration of some but not all goods forfeited and condemned. I hold that it can. So having regard to the circumstances before the Court and the statutory tests that I have mentioned, this seems to me to be a case where it is proper, in light of those tests, to order the restoration of \$NZ10,000. But the remainder of the cash forfeited and condemned remains forfeited and condemned.

[26] This has been an interesting matter. I have taken a couple of steps that, so far as I am aware, nobody else has taken before me. It is the sort of case where one says to counsel in the end, "well you've done your best, I've done my best". It would be very fascinating to see what an appellate Court would make of all this. Whether or not either side wants to take it there is a matter for them. But I am conscious of the fact that there is, in this area, probably a practical need – from the points of view of both the Customs Service and the Courts – for a judgment, at a higher level than this Court, dealing with this question of the divisibility of forfeited cash in particular (but possibly on occasions not all forfeited) and possibly, on some occasions, other goods as well, when issues of forfeiture and condemnation arise.

[27] I think there is a good deal to be said for a coherent approach in New Zealand across the jurisdictions of various Government departments who have statutory powers in that regard, remembering of course always that these processes of forfeiture and condemnation are among the oldest. They represent an approach to the enforcement of revenue statutes, and the prevention of illegal imports, which has been common to many jurisdictions long before Magna Carta was ever dreamed of. Those who tried to smuggle or juggle tended to lose everything they tried to get through the system dishonestly – and often enough they lost their heads as well.

The Customs and Excise Act 1986

[6] The relevant provisions under the Customs and Excise Act 1996 are ss 2(1), 39, 40, 204(4)(a), 225(1)(a)(iii), (3) and (4), 226(1), 231, 235 and 236.

[7] Section 2(1) of the Customs Act defines “goods” as meaning:

All kinds of moveable personal property, including animals.

[8] Section 204 provides:

(4) Every person commits an offence who –

(a) makes a false declaration under this Act, knowing it to be false:

...

(5) Every person who commits an offence against subs(4) is liable on conviction, -

(a) in the case of an individual, to imprisonment for a term not exceeding 6 months or to a fine not exceeding \$10,000; or

(b) in the case of a body corporate, to a fine not exceeding \$50,000; or

(c) in either case, to a fine of an amount not exceeding 3 times the value of the goods to which the offence relates.

[9] Section 225 provides:

Goods forfeited

(1) The following goods shall be forfeited to the Crown:

(a) Goods in respect of which an offence has been committed under –

...

(iii) Section 204 of this Act (which relates to offences in relation to declarations and documents):

[10] Section 231(1) provides:

Application for review of seizure

(1) Any person who has an interest in goods that have been seized under section 226 may, within the time specified in subsection (2), apply in writing to the Chief Executive for a review of the seizure.

[11] Section 235 provides:

Determinations where relief granted

- (1) If the Chief Executive decides, under section 233(1)(c), to grant relief, the Chief Executive may do so by making any of the following determinations:
 - (a) that the goods be given to the applicant or to another person who, but for the seizure, is entitled to their possession:
 - (b) that the goods be sold and that 1 or more of the following persons be paid the part or parts of the proceeds that the Chief Executive specifies:
 - (i) the applicant:
 - (ii) any other person who has an interest in the goods:
 - (iii) the Crown.
- (2) The Chief Executive may make a determination described in this section subject to any conditions that the Chief Executive thinks just.
- (3) Without limiting subsection (2), the Chief Executive may impose any of the following conditions:
 - (a) that there be paid to the Customs in respect of the seized goods a sum equal to the whole or any part of 1 or more of the following:
 - (i) any costs or expenses incurred by the Customs in transporting, storing, or disposing of the goods (including returning or giving the goods to any person), or any incidental costs or expenses relating to their detention:
 - (ii) any duty not already paid:
 - (iii) any duty already refunded:
 - (iv) the value of the detained goods, as determined by the Chief Executive:
 - (b) that the goods be modified, in a manner directed by the Chief Executive, so as to render them inoperable for unlawful purposes:
 - (c) that the costs or expenses incurred by the Customs in modifying the goods in accordance with a direction under paragraph (b) be paid to the Customs.
- (4) The Chief Executive must not make a determination described in this section if he or she is of the opinion that all or any of the goods

may be required to be produced in evidence in any criminal proceedings.

[12] Section 236 provides:

Condemnation of seized goods on conviction

- (1) Subject to subsection (2) of this section, where this Act provides that on the commission of any offence any goods are forfeited, the conviction of any person for that offence has effect as a condemnation, without suit or judgment, of any goods that have been seized in accordance with this Act and—
 - (a) In respect of which the offence was committed; or
 - (b) Which were forfeited under any of subsections (3), (4), or (5) of section 225 of this Act.
- (2) Where the Court imposes a sentence on any person on the conviction of that person for an offence to which subsection (1) of this section applies, the Court may, if it thinks fit, order the restoration of the goods forfeited to the person from whom the goods were seized and, where such an order is made, the conviction does not have effect as a condemnation of those goods.
- (3) In making an order pursuant to subsection (2) of this section the Court may impose such conditions as it thinks fit.
- (4) Subsection (2) of this section does not apply where the goods have, before the conviction, been sold, or restored to the person from whom they were seized, or otherwise disposed of by the Chief Executive under any other provision of this Act.

Customs and Excise Regulations 1996

[13] The relevant provisions of the Customs and Excise Regulations 1996 (“the Customs Regulations”) are reg 26 and Form 3. These regulations were enacted pursuant to s 40 of the Customs Act.

[14] Regulation 26 provides:

Certain goods deemed to be entered

- (1) The following goods or classes of goods shall be deemed to have been entered under section 39(1) of the Act:
 - (a) Goods that are temporarily imported into New Zealand under the authority of a Carnet de passages en douane for temporary admission issued pursuant to the Customs

Convention on the ATA carnet for temporary admission, on presentation of the carnet:

- (b) Goods being the personal baggage or household or other effects belonging to and accompanying passengers, or crew, in any craft, and not being motor vehicles or craft of any kind and not being dutiable goods imported for the purpose of sale, exchange, or as trade samples but including any such goods that are not required to be declared on any of forms 3, 3A, 4, 4A, 5, 5A, 6, or 7, when –
 - (i) A declaration in either form 3, 3A, 4, 4A, 5, 5A, 6, or 7, as appropriate, is presented to a Customs officer; or
 - (ii) The goods are lawfully removed from a Customs controlled area:
 - (c) Goods the total value of which is less than \$1,000 where those goods are the only goods imported by the importer in any one craft or, in the case of postal articles, in any one mail when application is made by the importer for their delivery.
- (2) Notwithstanding paragraph (c) of subclause (1) of this regulation, where the Chief Executive requires any document to be lodged with the Customs in respect of any goods referred to in that paragraph (c), the goods will not be deemed to be entered until the document has been lodged and accepted by the Chief Executive.

[15] Form 3 provides:

Please answer the other side first

3 Are you bringing into New Zealand: See the Customs Notes	yes	no
• goods that may be prohibited or restricted?	<input type="radio"/>	<input type="radio"/>
• goods over the personal concession for alcohol and tobacco products?	<input type="radio"/>	<input type="radio"/>
• goods over the NZ\$700 personal concession, or for business or commercial use, or carried on behalf of other persons?	<input type="radio"/>	<input type="radio"/>
• NZ\$10,000 or more, or the equivalent in foreign currency?	<input type="radio"/>	<input type="radio"/>

The Financial Transactions Reporting Act 1996

[16] The relevant provisions of the Financial Transactions Reporting Act 1996 (“the FTR Act”) are ss 37, 40 and 42.

[17] Section 37 provides:

Persons arriving in or leaving New Zealand must report cash

- (1) Every person who—
 - (a) Arrives in New Zealand from another country or is leaving New Zealand; and
 - (b) Has on his or her person, or in his or her accompanying baggage, or both, an amount of cash that, in total, exceeds the prescribed amount—shall make or cause to be made a report in accordance with this section.
- (2) Every report required by subsection (1) of this section—
 - (a) Shall be in writing in the prescribed form (if any); and
 - (b) Shall contain the following details in relation to the cash to which the report relates:
 - (i) The nature and amount of each type of cash:
 - (ii) The total amount of the cash; and
 - (c) Shall be signed by the person making the report or, as the case requires, on whose behalf the report is made; and
 - (d) Shall be given to a Customs officer before the cash leaves the control of the Customs.
- (3) Where any person to whom subsection (1) of this section applies is, by reason of age or disability, incapable of complying with the requirements of this section, it shall be the responsibility of the parent or guardian or other person for the time being having the care of that person to comply with those requirements on that person's behalf.

[18] Section 40 provides:

Offences

- (1) Every person commits an offence and is liable to a fine not exceeding \$2,000 who,—
 - (a) In contravention of section 37 of this Act, fails, without reasonable excuse, to make or cause to be made a cash report that satisfies the requirements of that section; or
 - (b) Without reasonable excuse, makes or causes to be made a cash report knowing that it is false or misleading in any material respect.

- (2) Every person commits an offence and is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$1,000 who, otherwise than by force, wilfully obstructs any Customs officer in the exercise or performance of any power or duty conferred or imposed on that officer by this Part of this Act.
- (3) It is a defence to a charge under this section against a person in relation to a failure to make or cause to be made a cash report to a Customs officer before cash leaves the control of the Customs if the defendant proves—
 - (a) That the failure was due to some emergency or to any other circumstances outside the reasonable control of the defendant; and
 - (b) That the defendant made or caused to be made a cash report in respect of that cash as soon as practicable after the obligation to make the report arose.

[19] Section 42 provides:

Information to be forwarded to Commissioner

- (1) Where a cash report is made to a Customs officer, that officer shall, as soon as practicable, forward the report to the Commissioner.
- (2) Where, in the course of conducting a search pursuant to section 38 or section 39 of this Act, a Customs officer discovers any cash in respect of which a cash report is required to be made but has not been made, that officer shall, as soon as practicable, report the details of the search, and of the cash discovered, to the Commissioner.
- (3) Every report made pursuant to subsection (2) of this section shall be in such form as the Commissioner may from time to time determine after consultation with the Chief Executive of the New Zealand Customs Service.
- (4) The Chief Executive of the New Zealand Customs Service shall cause to be made and kept a record of each occasion on which a cash report is made to a Customs officer, together with details of the identity of the person making the report and the date on which the report is made, and shall ensure that such record is retained for a period of not less than 1 year after the date on which the cash report is made.

[20] The Commissioner referred to in this provision is the Commissioner of Police: s 42(1).

Submissions for Customs

[21] It was submitted for Customs that:

- a) The obligation to report the amount of cash above NZ\$9,999 being imported into New Zealand arises under s 37 of the FTR Act which requires the “total amount” of cash being imported to be reported. The offence is therefore the failure to report the total amount and consequently, in terms of s 225(1)(a)(iii) of the Customs Act, the “goods in respect of which an offence has been committed” is the total amount, i.e. US\$17,070.
- b) If partial restoration was to be permitted under s 236(2) of the Customs Act, then the legislature would have made that plain by including words such as “order the restoration of the goods, or part thereof ...” or words similar to those in s 235(1)(b). The power of the Court to impose conditions under s 236(3) does not provide justification for granting partial restoration.
- c) If the District Court Judge erred, then on the basis of the decisions in *New Zealand Customs Service v Brereton* HC NEL CRI 2006-442-000018 23 November 2007, *Leng v New Zealand Customs Service* HC AK A.4/03 4 March 2003 and *Comptroller of Customs v Olley* DC TAU CRI 2008-070-005841 20 November 2008, on the facts of this case, no restoration should have been ordered. The relevant facts include the number of false declarations made by Mr Wang, the level of his knowledge and the reason for his false declaration.

Submissions for Mr Wang

[22] Counsel for Mr Wang submitted that there was nothing in the Act which presented a bar to the partial restoration of condemned goods and the power for the sentencing Judge to impose conditions under s 236(3) was unfettered. The contrast in the wording between ss 235(3) and 236(3) was explicable when it was appreciated

that the former related to internal determinations by the Chief Executive whereas the latter related to a District Court Judge or higher authority.

[23] It was also submitted for Mr Wang that, if it was held that the District Court Judge had erred, then complete restoration should be ordered on the basis of *Brereton*. He argued that there were no “sinister aspects” in this case and it could be argued that Mr Wang’s father was out of pocket to the tune of US\$17,000 due to the stupidity of his son. While, as held in *Brereton* at [57](d), the issue of forfeiture and restoration should not be allowed to skew the sentencing exercise, complete restoration could be made and a punitive element still recognised with a fine of up to NZ\$10,000.

Discussion

[24] The first issue is whether under s 225(1)(a)(iii) of the Customs Act the “goods in respect of which an offence has been committed” were the US\$17,070 (NZ\$32,207) or just the amount over the figure of NZ\$9,999 referred to in Form 3 of the Customs Regulations.

[25] In my view, the answer to this issue depends on the precise nature of the “offence” which has been committed. Here the “offence” under s 204(4)(a) is making a false declaration under the Customs Act, knowing it to be false. The false declaration arises because of the breach of Reg 26 of the Customs Regulations by answering the question in Form 3 incorrectly. The question in Form 3 is:

Are you bringing into New Zealand:

....

- NZ\$10,000, or the equivalent in foreign currency?

A person with NZ\$10,000 or more or the equivalent in foreign currency in their possession on arrival who answers the question “no” will have made a false declaration. The “goods” the subject of the false declaration will be the money or the cash, i.e. the NZ\$10,000 or more. On its face the false declaration will relate to the full amount of the money involved and not simply to that amount which is over

the limit of NZ\$9,999. In this case the “goods” in respect of which the offence of making a false declaration has been committed will therefore be the full amount of the money involved.

[26] Even if this interpretation were considered “far reaching”, which I do not consider it is, a perhaps far reaching approach to the interpretation of the Customs Act and Regulations is consistent with the policy behind the legislation which reflects the long-established aim of deterring potential offenders. Without strong provisions supporting their administration, the Customs laws are notoriously difficult to enforce: *Williams v Attorney-General* [1990] 1 NZLR 646 (CA) at 677-678 and *Brereton* at [48]. The existence of provisions in the Customs Act permitting applications for review of seizure (s 231(1)) and restoration of goods (ss 235 and 236) also supports this interpretation.

[27] This interpretation is based on the relevant provisions of the Customs Act and Regulations and not on the provisions of the FTR Act. In my view caution is required in placing too much reliance on the latter legislation in this context for two reasons. First, s 204(4)(a) of the Customs Act refers to making a false declaration under “this Act”, i.e. the Customs Act, and not under the FTR Act. Secondly, the FTR Act has its own separate “cash report” regime in Part 5, which applies when a person arrives in New Zealand with over NZ\$9,999, and its own separate offence provision in s 40.

[28] At the same time, however, the fact that this interpretation of the relevant provisions of the Customs Act and Regulations is consistent with the reference to the “total amount” in s 37(2)(b)(ii) of the FTR Act is not irrelevant. Consistency of approach between two statutes dealing with similar subject matter is appropriate: J F Burrows, *Statute Law in New Zealand*, (4th ed Lexis Nexis, Wellington, 2009) at 247-249. And here the two statutes are complementary because:

- a) several of the provisions in Part 5 of the FTR Act were amended by s 289(1) of the Customs Act;

- b) the separate “cash report” regime follows when a person arrives in New Zealand with over NZ\$9,999; and
- c) s 42 of the FTR Act requires the Chief Executive of Customs to forward the “cash report” to the Commissioner of Police as the first step in enforcing the anti-money laundering provisions of the FTR Act.

[29] My answer to the first issue, therefore, is that the District Court Judge may have erred in implying at [25] of his decision that the reference in s 225(1)(a) of the Customs Act to “goods in respect of which an offence has been committed” may relate only to the amount above the NZ\$9,999 limit for the purpose of the offence under s 204(4)(a) of the Customs Act.

[30] The second issue is whether the power of the Court under s 236(2) of the Customs Act to “order the restoration of the goods” permits the Court to make an order in respect of part of the goods.

[31] In my view the answer to this issue is that as a matter of common sense Parliament in enacting the provision would have intended the Court to have power not only to order the restoration of the whole of the goods, but also such lesser part of the goods as the Court in the proper exercise of its discretion considered appropriate. It would be strange if the discretionary power of the Court (“may, if it thinks fit”) was restricted to an all or nothing approach.

[32] If a principle is required for this common sense answer, then reference may be made to F Bennion, *Bennion on Statutory Interpretation* (5th ed, Lexis Nexis, London 2008) at 555:

Greater includes less The requirement that common sense shall be used in interpretation brings in such obvious principles as that the greater includes the less: *omne majus continet in se minus*. This is a principle the law recognises in many contexts.
(citations omitted)

[33] The view that the Court's power to order restoration of part of the goods appears to have been accepted by Customs in *Brereton* where Wild J recorded at [40] that Customs had submitted that:

Against that background, the s 236(2) discretion should only be exercised where there are compelling reasons justifying the restoration of the goods notwithstanding conviction. Compelling reasons might include a situation in which the person being sentenced established (if necessary by calling evidence) that it had a legitimate purpose for a portion of the goods, or that some or all of the goods belonged to an innocent third party.

And Wild J appears to have accepted this submission when he concluded at [57](c) that among the factors supporting restoration was that the offender had a legitimate purpose for part of the goods.

[34] It does not seem to have been submitted for Customs in *Brereton* that the District Court Judge's order restoring one-half of the tobacco leaf to the Breretons was invalid on that ground. While it may not be practicable to order partial restoration of some goods (e.g. the sapphire and diamond cluster ring involved in *Leng*), other goods such as the tobacco leaf in *Brereton* and the cash here are capable of partial restoration.

[35] A similar practical approach was adopted in *Solicitor-General of New Zealand v Spijkerbosch* HC ROT CIV 2007-463-000999 10 July 2009 where Heath J held at [21] that in the context of the Proceeds of Crimes Act 1991 the discretionary nature of the power to make a forfeiture order provided jurisdiction to make an order for partial forfeiture where appropriate.

[36] The submission for Customs that the express conferment on the Chief Executive of Customs (and the Minister before him under the predecessor provision) of a power to order partial restoration in s 235(3) meant that Parliament did not intend to confer a similar power on the Court under s 236(2) is not persuasive in this case. The old rules of statutory interpretation on which such arguments were based are no longer viewed as determinative: Burrows, *Statute Law in New Zealand*, at 213-214. And arguments by way of contrast, which may appear initially attractive, need to be viewed with a degree of scepticism: cf. *Goodman Fielder Ltd v Commerce Commission* [1987] 1 NZLR 10 (CA) at 18. Parliament may well have

considered that it was appropriate to spell out the powers of the Chief Executive expressly in s 235 while leaving the powers of the Court in s 236 at large.

[37] Counsel for Customs did not suggest that acceptance of a power to order partial restoration would be contrary to the purpose of the provisions of the Customs Act relating to the return of forfeited goods. Indeed a power to order partial restoration may be seen as consistent with viewing these provisions as involving “merciful consideration” or “an act of clemency” on the part of the Chief Executive or the Court: cf. *Williams v Attorney-General* (CA) at 678 and *Brereton* at [48].

[38] The view which I have reached on the first issue also tends to support the conclusion on the second issue in that the strictness of the application of the forfeiture and seizure provisions may be ameliorated in an appropriate case by the power of the Court to order partial restoration in respect of the permitted amount of NZ\$9,999.

[39] The fact that the Court has power to order restoration under s 236(3) “on such conditions” as it thinks fit does not in my view assist one way or the other on this issue.

[40] I therefore agree with the decision of the District Court Judge, albeit for somewhat different reasons. I uphold his decision and dismiss the appeal on this issue.

[41] The conclusions which I have reached on the two issues of statutory interpretation mean that it is not necessary for me to consider the third issue raised by Customs on the appeal because counsel for Customs made it clear that Customs only required that issue to be considered if the District Court Judge had erred on the second statutory interpretation issue. Counsel for Customs did not suggest that, if I decided to uphold the decision of the District Court Judge on the issue of the power to order partial restoration, the order for restoration of the sum of NZ\$10,000 should be reviewed.

Result

[42] The appeal is dismissed.

D J White J