CUSTOMS

Revenue and Customs Commissioners v Berriman; R (on the applications of Revenue and Customs Commissioners) v Teeside Crown Court [2007] EWHC 1183 (Admin), [2007] All ER (D) 267 (May)

This case was worthy of note on a number of fronts. It involved, unusually, an application for Judicial Review by Customs, an examination of the legislation relating to Customs' powers to seize goods and a very novel business idea that was the root cause of the litigation!

Background

In the summer of 2004 Mr Philip Berriman, along with his business partner Trevor Lyons, purchased £64,000 worth of cigarettes and alcohol. Mr Berriman stored these goods on board his rather large boat, aptly named the Rich Harvest, which he then sailed to the North Sea off Hartlepool and conveniently anchored just outside UK territorial waters.

Mr Berriman and Mr Lyons arranged for the distribution of leaflets to the good people of Hartlepool, advertising cut price cigarettes and alcohol which could be bought out at sea, effectively forming Hartlepool's very own off-shore off-licence. The goods were stated to have been purchased duty-paid in a German supermarket, but they were actually purchased in Heligoland, a tiny island off the coast of Germany, and as such were classed as "Third Country" (non-European Community) goods.

When Customs learned of Mr Berriman's and Mr Lyons' business venture they were concerned that there was the potential for goods to be imported into the UK without the corresponding payment of VAT and duty. HMRC warned Mr Berriman, by letter, that should he ever bring his boat to port, he would need to make arrangements for the handling of the goods in accordance with the Customs Controls on Importation of Goods Regulations 1991. As fate would have it, stormy seas forced the boat into port on the 9 July 2004 and the goods were detained by Customs. However, on condition of re-export, they were returned and were placed on board a different boat, the Cornish Maiden, which again sailed outside UK waters. Soon after, the stormy summer seas hit again, forcing the boat into port for repairs.

Just prior to this, HMRC had written to Mr Berriman informing him that the goods must be placed in a warehouse within 24 hours of the boat's arrival. They were even considerate enough to e-mail Mr Berriman the prices of removing the goods to the nearest warehouse, at around £300. Mr Berriman preferred not to have the expenditure, and presumably the inconvenience of losing custody of the goods, and requested that he have HMRC's approval to store them securely on the boat or even in a container on the dock. Unfortunately HMRC were not convinced that this was secure enough, due to the high risk of theft, and his proposals were rejected outright. Worried the goods would disappear, HMRC got in there first and formally seized them.

Mr Berriman complained on two grounds; first that the seizure of the goods had been illegal, and secondly about the manner in which the goods were handled. The goods were offered to Mr Berriman for restoration of £250 plus the cost of transportation and storage which had been incurred. This was not taken up. As Mr Berriman had challenged the seizure Customs initiated condemnation proceedings in the Hartlepool Magistrates' Court as required by the Customs and Excise Management Act 1979. On the 24 January 2005 Mr Berriman's goods were condemned to forfeiture, which formally placed them in the hands of the Crown to dispose of as it saw fit.

The Crown Court proceedings

Mr Berriman appealed against condemnation of the goods by the Magistrates Court, and thus the case was heard by Teeside Crown Court. On review of the facts of the case the Crown Court found that the offer for sale of goods outside the territorial waters was not unlawful. However, the

Crown Court also found that there was a realistic prospect of revenue being lost when the goods were brought ashore. The court therefore considered the issue of the requirement by HMRC that Mr Berriman place the goods into approved temporary storage.

The court looked at art 51(1) of the Community Customs Code, Council Regulations (EEC) 2913/92. This article requires that goods in temporary storage are to be stored in places pre-approved by HMRC. The Crown Court concluded that “approval” required a reasonable opportunity for any sensible proposal by Mr Berriman for storage to be considered before it was rejected. They found that HMRC gave no consideration to the proposals of storage on the boat or in the container and went so far as saying that they had had a "unilateral closed mind", because they did not even entertain the idea of storage at the dock. Presumably they liked Mr Berriman's open-minded approach to the whole matter.

The Judicial Review proceedings

HMRC took the view that the Crown Court had got their decision completely wrong, and they promptly appealed to the High Court. Interestingly it appears that although the right of appeal would ordinarily have been by way of case stated to the Divisional Court, the application for Judicial Review was made to give either side a further right of appeal to the Court of Appeal if necessary. HMRC submitted that the Crown Court had no jurisdiction to review or reverse the storage approval decision made by HMRC, and that it was solely in the VAT & Duties Tribunal's domain, and that they should have dealt with the case.

The High Court summarised the combined European and domestic legislation as requiring the following:

(1) Goods that enter the UK from outside the customs territory of the European Community must be stored in a place approved by customs authorities.

(2) A failure to store goods in a place approved by the Commissioners renders those goods liable to forfeiture or seizure by the Commissioners.

(3) Where the owner of goods that have been seized contests their liability to forfeiture the Commissioners must take civil condemnation proceedings against that person or entity in the Magistrate's Court or the High Court.

(4) Decisions by the Commissioners not to approve a place for storage of goods are susceptible to an appeal to the VAT & Duties Tribunal.

It is clear from the Crown Court judgment that the word “approved” was construed as requiring a reasonable opportunity to be given for consideration by the Commissioners of any sensible proposal for storage put forward. The judgment states that "this was relevant to the proportionality of the Commissioners decision to seize the goods". In the view of the High Court, the Crown Court failed to consider the decision from the point of view of the Commissioner's officer at the time when he made it. The background to the officer's decision was, as stated above, that Mr Berriman had previously been warned by letter that if he brought the boat into port he must comply with HMRC’s control. The Commissioners had little knowledge of Mr Berriman other than that his business was some form of off-shore off-licence which rendered it practically impossible for the Commissioners to collect duty from those landing goods purchased from the boat. The Commissioners unsurprisingly wanted to nip this business in the bud.

The High Court concluded that the test applied by the Crown Court was a merits-based decision, and not, at that, a really fair review of the Commissioners’ decision. A reasonableness test was read into article 51(1) of the Community Customs Code by the Crown Court that simply was not present. The Code, by its design, enables decisions to be made by Customs authorities quickly and efficiently, and such “reasonable considerations” and counter proposals do not fall in line with this code. The High Court held that HMRC officers just do not have the time to give consideration to suggestions as to storage made by individuals and businesses and whether they are reasonable or not.

The High Court concluded therefore that once HMRC had designated an approved place for the goods to be stored and Mr Berriman had refused to permit the goods to be moved there, they became liable to forfeiture. Thereafter the goods were properly seized. The High Court also found that the offer of restoration had been properly made and the application by HMRC was allowed.

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