HOUSE OF LORDS SESSION 2004–05
[2005] UKHL 34

on appeal from: [2003] EWCA Civ 896

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Greenalls Management Limited (Respondents)
v.
Her Majesty's Commissioners of Customs and Excise (Appellants)

ON
THURSDAY 12 MAY 2005

The Appellate Committee comprised:

Lord Nicholls of Birkenhead
Lord Steyn
Lord Hoffmann
Lord Hope of Craighead
Lord Walker of Gestingthorpe

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LORD NICHOLLS OF BIRKENHEAD

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons he gives, with which I agree, I would allow this appeal.

LORD STEYN

My Lords,

2. I have had the advantage of reading the opinion of my noble and learned friend Lord Hoffmann. I am in complete agreement with it. I would also make the order which he proposes.

LORD HOFFMANN

My Lords,

3. In 1998 Greenalls Management Ltd ("Greenalls") delivered approximately 250,000 bottles of Black Death vodka, manufactured in Warrington by an associated company, from their excise warehouse to carriers acting for a company allegedly engaged in exporting vodka to Belgium and Spain. No duty was paid on the basis that the goods were being moved from the warehouse for export. In fact the documentation supplied to Greenalls was fraudulent and the vodka never reached the

destinations specified. It was diverted for illicit disposal. The question in this appeal is whether Greenalls are liable for the duty.

4. The rules concerning excise duties in the Member States of the European Union have been partially harmonised by Council Directive (92/12/EEC) of 25 February 1992, "on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products" ("the directive"). The directive was adopted as part of the creation of a single market without fiscal frontiers. The main purpose of the directive was to have a single set of rules for determining the moment at which duty became payable, so as to avoid a situation in which duty could be levied on the same goods in different countries. Article 6.1 provides that excise duty shall become chargeable "at the time of release for consumption". The article then goes on to define what "release for consumption" means. It includes "any departure, including irregular departure, from a suspension arrangement."

5. A "suspension arrangement" is defined in article 4(c) as being a "tax arrangement applied to the production, processing, holding and movement of products, excise duty being suspended". It presupposes that duty has become chargeable. Liability to pay is then suspended. There are various types of suspense arrangements in UK law but for present purposes only two are relevant. First, there are holding suspense arrangements under regulation 8 of the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992 SI 1992/3135 ("the regulations"). These allow dutiable goods to be held in an excise warehouse without payment of duty. Secondly, there are movement suspense arrangements under regulation 9. These allow goods to be moved without payment of duty from a port to a warehouse or from a warehouse to a port or from a warehouse to a warehouse.

6. In the present case, the duty became chargeable when the vodka was made: see section 5 of the Alcoholic Liquor Duties Act 1979. Payment of the duty was suspended under regulation 9(2)(b), which provides that goods may be moved in duty suspension "from a tax warehouse…for export".

7. There is no dispute that there was an irregular departure from the suspension arrangement. Accordingly, there was a "release for consumption" within the meaning of article 6.1 of the directive. As a matter of European law, excise duty had to become chargeable at the

time of the irregular departure. On the other hand, the directive says nothing about who should be liable to pay the duty. This is a matter which is left to Member States to decide for themselves: see *van de Water v Staatssecretaris van Financiën Case C-325/99* [2001] ECR I-2729. To find out whether Greenalls became liable, it is therefore necessary to look at the United Kingdom legislation.

8. Section 93(2)(e) of the Customs and Excise Management Act 1979 ("CEMA") gives the commissioners power to make regulations enabling them to allow goods to be removed from warehouses without payment of duty "in such circumstances and subject to such conditions as they may determine". Section 1(1) of the Finance (No 2) Act 1992, which comes within a group of sections headed "abolition of fiscal frontiers etc", was clearly intended to enable the United Kingdom to give effect to the directive. It confers power on the commissioners to make regulations "for fixing the time when the requirement to pay any duty with which goods become chargeable is to take effect ('the excise duty point')." Subsection 1(4) adds that regulations which prescribe an excise duty point may also make provision?

> "specifying the person or persons on whom the liability to pay duty on the goods is to fall at the excise duty point (being the person or persons having the prescribed connection with the goods at that point or at such other time, falling no earlier than when the goods become chargeable with the duty, as may be prescribed."

9. The regulations were made under various statutory powers, including CEMA and the 1992 Act. Regulation 4 determines the excise duty point and regulation 5 specifies the person liable to pay the duty.

10. Regulation 4(2) deals with the excise duty point when "any suspension arrangements apply to any excise goods". It lays down a chronological hierarchy. The excise duty point is to be the *earlier* of a list of events, of which the following are relevant:

> "(a) the time when the excise goods are delivered for home use from a tax warehouse or are otherwise made available for consumption, including consumption in a warehouse;

(b) the time when the excise goods are consumed;

(f) the time when the excise goods leave any tax warehouse unless—

(i) the goods are consigned to another tax warehouse in respect of which the authorised warehouse keeper has been approved in relation to the deposit and keeping of those goods, and the goods are moved in accordance with requirements prescribed in regulations 9 and 10 below;

(ii) the goods are delivered for export…"

11. In the circumstances of this case, paragraph (f) did not apply because the goods were delivered for export. But they were not lawfully exported. They were diverted for sale in the consumer market. The Commissioners say that in those circumstances the excise duty point was determined by paragraph (a). The goods were "made available for consumption". On the facts of this case, there can be no doubt that they were made available for consumption. The identity of the person who made them available is unknown. But the language does not require that they should have been made available by anyone in particular. It simply says that they must have been made available for consumption.

12. Such an interpretation is also necessary to enable the regulations to give effect to the directive. Article 6(1) of the directive was plainly intended to impose excise duty at the time when the goods were unlawfully diverted. The diversion was an "irregular departure" from a suspension arrangement and therefore a "release for consumption" which should have triggered a charge to duty. However, if paragraph (a) does not cover what happened, there is no other paragraph of regulation 4(2) which does. An interpretation of paragraph (a) which covers the facts of this case is therefore not only in accordance with the ordinary meaning of the language but required by the duty of a domestic court to interpret legislation, so far as possible, to comply with the terms of the directive.

13. The importance of identifying the precise paragraph in regulation 4(2) which determines the excise duty point arises out of the fact that regulation 5, which specifies the person liable to pay the duty, does so in some cases by reference to the paragraph under which the excise duty

point occurs. In particular, regulation 5(4) says that when the excise duty point specified in paragraph (a) of regulation 4(2) occurs, the person liable to pay the duty is the authorised warehouse keeper. It follows that if the correct interpretation of regulation 4(2) is that paragraph (a) determines the excise duty point in this case, that is an end of the matter. Greenalls are liable to pay the duty.

14. It is important to bear in mind that although regulation 5 is entirely domestic and is untouched by the duty to interpret legislation to give effect to European law, that is irrelevant in this case because there is no ambiguity or problem of any kind about the interpretation of regulation 5(4). Once one has interpreted paragraph (a) of regulation 4(2) and come to the conclusion that the facts of the present case fall within it, no interpretative bias is required to conclude that the person liable for duty is the warehouse keeper. With all respect to my noble and learned friend Lord Walker of Gestingthorpe, I do not see how any method of construction can make regulation 5(4) mean anything else. No doubt it is permissible, in the interpretation of regulation 4(2)(a), to bear in mind that a consequence of construing it to include certain facts will be that regulation 5(4) will make the ware house keeper liable. But one is still construing 4(2)(a), not 5(4), and the obligation to give effect to the directive applies with full force. Regulation 4(2)(a) cannot mean one thing for the purpose of giving effect to the directive and another thing for the purpose of applying regulation 5(4).

15. In any case, construing regulation 4(2)(a) to give effect to the directive requires no great intellectual effort. The construction I have suggested is, in my opinion, the ordinary meaning of the words. It is therefore necessary to examine why Jacob J and all three members of the Court of Appeal (for different reasons) came to the opposite conclusion.

16. Jacob J was persuaded that one ought to read into paragraph (a), after "made available for consumption", the words "from the warehouse". He therefore remitted the case to the tribunal to make findings as to whether the diversion occurred when the goods left the warehouse or at some later stage. Both sides appealed.

17. It is not easy to understand why the judge decided to add these words. He did not accept the argument of Mr Venables QC that a restriction in the scope of the paragraph was needed because otherwise the regulation, read with 5(4), would be unreasonable and unfair,

imposing upon the warehouse keeper a liability which "he had done nothing to deserve". Counsel had submitted that for this reason one should imply a requirement that the goods had been made available for consumption "by the warehouse keeper". But the judge rejected this submission. He said that there was nothing unreasonable about making the warehouse keeper liable for the duty even though he did not himself intend to depart from the suspense arrangements. It is practical because the commissioners do not have to investigate the extent, if any, to which the warehouse keeper was to blame in parting with the goods. If someone else was responsible, the warehouse keeper is not without remedy. By virtue of the joint and several liability created by regulations 5(5) and (6), he has a right of recourse against those primarily responsible for the diversion. Of course he may in practice find it difficult to pursue them. But the commissioners are in the same position. The warehouse keeper can reduce the commercial risk by requiring a bond or guarantee. Whether he does so or is content to run the risk of having to pay the duty without effective recourse is a matter for him. No one is obliged to run an excise warehouse. It is a privilege which carries obligations.

18. Despite these arguments, which I find entirely convincing, the judge was willing to imply that the goods must have been made available for consumption "from the warehouse." He said that paragraph (a) was "essentially" about goods leaving the warehouse. But in my opinion one cannot proceed by constructing a theory about the essence of a statutory provision and then change the language to make it fit the theory. One must read what the statute actually says. Paragraph (a) is not primarily about goods leaving a warehouse. It is paragraph (f) which deals with goods leaving a warehouse. Even in paragraph (a), when the draftsman wants to refer to movement from a warehouse, or things happening in a warehouse, he does so. There is a reference in paragraph (a) to goods being delivered *from a tax warehouse* and to consumption *in a warehouse*. But the words "otherwise made available for consumption" are limited only by the requirement that this must happen while "any duty suspension arrangements" apply.

19. If the words had been concerned only to sweep up other ways in which the goods might have been available for consumption from the warehouse, paragraph (a) would have said "are delivered for home use or otherwise made available for consumption from or in a tax warehouse". Furthermore, paragraph (a), like the rest of regulation 4(2), applies to "any" suspension arrangements. It applies not only to holding goods in a warehouse under regulation 8 but also to moving them from a warehouse under regulation 9. But the effect of the judge's construction

is altogether to remove movement suspension arrangements from the scope of paragraph (a). Once the goods have left the warehouse, the paragraph ceases to apply.

20. As for the obligation to interpret the regulations in accordance with European law, Jacob J said that the gap in regulation 4(2) could be filled by reference to sections 94 and 95 of CEMA. Section 94(1) applies when goods which have been warehoused are "found to be missing or deficient". Subsection (3) provides that unless it can be shown to the satisfaction of the commissioners that the absence or deficiency is accounted for by some "legitimate cause", the commissioners may assess the excise duty upon the occupier of the warehouse or the proprietor of the goods. Section 95 says that when goods have been lawfully permitted to be moved from a warehouse to another warehouse or some other place, section 94 shall apply to the transit as if the goods were still in the warehouse, but only so as to impose liability upon the proprietor of the goods.

21. It is of course true that compliance with a European directive does not have to take the form of a self-contained code. It can be spread over more than one legislative instrument. But, as the Court of Justice said in the *van de Water* case, article 6 of the directive requires Member States to harmonise the *time* at which excise duty becomes chargeable. Sections 94 and 95 are not obvious candidates for giving effect to that article because they are not primarily concerned with the time at which liability attaches. Instead, they specify the circumstances in which liability will arise and the persons who will be liable. Only indirectly will they determine the time of liability.

22. So much was recognised by section 94(6), which was inserted by the Finance (No 2) Act 1992, the same Act which gave the commissioners the powers under which they made the regulations to give effect to the directive. Subsection (6) says that the preceding provisions of section 94—

> "so far as they have effect for…fixing the excise duty point…or…determining the person on whom any liability to pay any such duty is to fall, shall have effect subject to the provisions of any regulations under section 1"

23. "So far as they have effect for" is not language which suggests that sections 94 and 95 were intended to be relied upon to give effect to the directive. On the contrary, it says that so far as they may incidentally have the effect of determining such matters, they are to be ignored and the regulations are to be applied instead. When one comes to the regulations, it seems to me clear that regulation 4(2) was intended to provide a complete code for determining the excise duty point for goods subject to suspension arrangements. The opening words establish a hierarchy: it is to be the *earlier* of the events mentioned in paragraphs (a) to (f). How are sections 94 to 95 to be incorporated into this hierarchy? The notion of a chronological hierarchy only makes sense if paragraph 4(2) contains a complete list of the events which have to be ranked in time.

24. The members of the Court of Appeal dismissed the commissioners' appeal and allowed Greenalls' appeal for reasons which differed from those of Jacob J and each other. To Schiemann LJ it appeared obvious that "regulation 5(4) was not intended to impose liability on a warehouse keeper in circumstances where he is utterly blameless and no longer has any connection with the goods." That, really, was that. In other words, he accepted the broad equitable argument of Mr Venables that Jacob J had (in my opinion rightly) rejected.

25. Schiemann LJ went on to say that "problems of this kind" were intended to be dealt with by the provision of a bond. Under regulation 10(1)(a) and (4), the commissioners may require the provision of security for the duty as a condition of allowing goods to be moved under suspension. The warehouse keeper could have been required to provide such a bond. But that seems to me an argument for the warehouse keeper being liable rather than the contrary. A bond is security for a liability. The fact that someone can be required to give a bond is not inconsistent with his being personally liable. Usually it is his own liability which the bond is intended to secure.

26. Schiemann LJ disposed of the European obligation to interpret the regulations in accordance with the directive by saying that although the directive required that an excise duty point should arise when there was departure from a suspension arrangement, it did not say that the warehouse keeper had to be liable. That is true. But Schiemann LJ did not explain how, in a case of diversion in transit, the excise duty point could arise on a departure from the suspension arrangement otherwise than under paragraph (a). He made no use of sections 94 and 95 of

CEMA, with which Jacob J had filled the gap. Nor did he explain how, if the excise duty point did arise under (a), the warehouse keeper could avoid being liable under regulation 5(4).

27. Carnwath LJ took a different line. He accepted that the only way in which regulation 4(2) could be read as giving effect to the directive was by treating paragraph (a) as applying to any goods made available for consumption, whether "regularly or irregularly". But he said it was surprising that, if this had been the intention, there was not some specific reference to "irregular departure". It might, he said, be necessary to treat such words as implied.

28. I must confess to being puzzled by the suggestion that words would need to be implied. As I have said, there can be no doubt that the goods in this case were made available for consumption. The only way to prevent paragraph (a) from applying is to imply some restrictive words, such as "lawfully", or "by the warehouse keeper". But the language as it stands is perfectly clear.

29. Carnwath LJ then raised an entirely new point, namely, whether regulation 5(4), interpreted in accordance with its apparent meaning, was intra vires the powers conferred by the 1992 Act. As I have said, the Act gave the commissioners power to make regulations which impose liability upon persons having a "prescribed connection" with the goods. Carnwath LJ said that once the goods had left the warehouse, there would be no "direct connection" between them and the warehouse keeper. So there was no connection which the commissioners could prescribe to make the warehouse keeper liable.

30. I do not understand this objection. The 1992 Act does not limit the commissioners to prescribing a *contemporaneous* connection with the goods. On the contrary, the statute says expressly that the connection may be at "such other time…as may be prescribed". The only limit is that it must not be earlier than when the goods became chargeable to duty. In this case, the goods became *chargeable* to duty when they were made. Thereafter, the liability to pay was suspended. In my opinion a warehouse keeper has a connection with goods which leave his warehouse under movement suspension arrangements. The fact that this connection lies in the past when the goods are diverted does not mean that it cannot be prescribed as a ground for liability.

31. Mr Venables said that if liability arose from having been a warehouse keeper in the past, it would be far too wide. It meant, he said, that once one had been a warehouse keeper, one could be liable for duty on any irregular departure from suspension arrangements thereafter. It would apply to goods which had passed through several warehouses or which had been exported and then reimported or smuggled back.

32. I do not agree. Paragraph (a) creates an excise duty point in respect of goods subject to any suspension arrangements. The warehouse keeper in regulation 5(4) is obviously the warehouse keeper in respect of the relevant suspension arrangements. If the goods are moved in suspension from his warehouse under regulation 9, he is the warehouse keeper. When they reach another authorised warehouse, the movement suspension arrangements come to an end. A new holding suspension arrangement under regulation 8 applies. If they are moved again, it will be subject to a new movement suspension arrangement. So there cannot be liability unlimited in time. It exists only while the relevant suspension arrangements continue.

33. Having decided that regulation 5(4) would be ultra vires if it applied to goods after they had left the warehouse, Carnwath LJ said that there was an "apparently irreconcilable conflict" between the requirements of the directive and the limited powers conferred by the 1992 Act. He resolved the conflict in favour of Greenalls by applying the principle that taxes should be imposed by clear words and relying on sections 94 and 95 of CEMA to comply with the directive.

34. In my opinion, however, the words are clear enough. Once one rids oneself of a priori assumptions about what they should mean and illusory questions of vires, there is no problem about allowing them to mean exactly what they say.

35. Finally, Sir Christopher Staughton said that the whole of paragraph (a) was concerned with the "intent of the warehouse keeper" in delivering the goods from or in the warehouse. But that is not what it says.

36. I would therefore allow the appeal and determine the issue in favour of the commissioners.

LORD HOPE OF CRAIGHEAD

My Lords,

37. I have had the advantage of reading in draft the speech of my noble friend Lord Hoffmann. For the reasons which he gives, with which I agree, I too would allow the appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

38. I have found the disposal of this appeal more difficult than some of your Lordships. I have no difficulty with the general proposition that large-scale evasion of excise duty on spirits is a very serious problem which may call for draconian procedures and remedies. The opening paragraphs of the judgment of Lawrence Collins J in *Re Anglo-German Breweries* (29 November 2002) indicate the scale of the problem. The respondent Greenalls Management Limited is an authorised warehousekeeper, a status which carries heavy responsibilities and, no doubt, commensurate financial advantages. It does business on a large scale and has access to expert advice as to its potential liabilities, and the extent to which they could be covered by insurance, secured guarantees, or similar arrangements. There is no unfairness or injustice in the notion that it may become liable for large sums of excise duty in circumstances where it is not at fault.

39. Nevertheless, it is still a principle of British law that if taxes and duties are to be imposed, they should be imposed by clear words. That does not require a return to literal interpretation: see the observations of Lord Wilberforce in *W T Ramsay Limited v Inland Revenue Commissioners* [1982] AC 300, 323, and those of Lord Steyn in *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991, 999-1000. But if Parliament is to impose fiscal liabilities which might be regarded as draconian it should do so in terms which, fairly construed, are reasonably clear.

40. The language of regulations 4 and 5 of the 1992 Regulations (the Excise Goods (Holding, Movement, Warehousing and REDS)

Regulations 1992, SI 1992/3135) is remarkably obscure. All too often judges feel constrained to describe taxing provisions as obscure, using more or less measured language to do so, and there is some danger of a sort of linguistic inflation setting in. Nevertheless, I regard these two regulations as exceptionally obscure. Regulation 4 (whose function is to fix the excise duty point at a particular point of time) is intended to implement Article 6 (1) of the Directive (Council Directive 92/12/EEC), although few readers, seeing the two texts side by side, would guess that that is so. For the purposes of fixing the excise duty point, therefore, regulation 4 gets the benefit of the principle of sympathetic interpretation which has recently been reaffirmed by the Grand Chamber in joined cases C-397/01 to C-403/01 *Pfeiffer v Deutsches Rotes Kreuz*, 5 October 2004. The Crown relies strongly on that principle in this appeal.

41. But regulation 5 (on which the Crown must rely to bring home to the respondent liability for duty at the excise duty point) is not implementing the Directive. It is (under Article 6 (2)) a matter for legislative choice of the Member States themselves, subject only to the requirement of non-discrimination. The principle of sympathetic interpretation has little if any part to play in construing Regulation 5. On this point I am inclined to agree with the observations of Rix LJ in *Customs & Excise Commissioners v First Choice Holidays Plc* [2004] STC 1407, 1422, para 46.

42. On the basis that your Lordships are not required to apply the principle of sympathetic interpretation to Regulation 5, I see much force in the reasoning of Carnwath LJ in the Court of Appeal, [2003] 1 WLR 2609, 2619-2621, paras 44-53. But in a matter which has already been overtaken by amending legislation, I do not think I should carry my doubts to the point of active dissent. I would therefore, with some hesitation, allow this appeal and make the order which Lord Hoffmann proposes.