New South Wales Supreme Court

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Comptroller-General of Customs v Stephen Edward Parker [2006] NSWSC 390 (8 May 2006)

Last Updated: 10 May 2006

NEW SOUTH WALES SUPREME COURT

CITATION: Comptroller-General of Customs v Stephen Edward Parker [2006] NSWSC 390

CURRENT JURISDICTION:

FILE NUMBER(S): 13933/92

HEARING DATE{S): 12 - 15, 18 - 21, 26 - 27 April 2005

DECISION DATE: 08/05/2006

PARTIES:
Comptroller-General of Customs - Plaintiff
Stephen Edward Parker - Defendant

JUDGMENT OF: Simpson J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
DJ Fagan SC with GM Elliott - Plaintiff
DR Stack - Defendant

SOLICITORS:
Australian Government Solicitor - Plaintiff
Yeldham & Associates - Defendant

CATCHWORDS:
Customs prosecution
offences against Customs Act 1901
thirteen offences of evasion of duty payable under the Act
offence of anauthorised movement of under bond goods
importation of goods

alcoholic liquor
warehousing of goods
deferral of duty otherwise payable
movement of goods "under bond"
"Continuing Permission" to move under bond goods
limitation defence
whether s249 creates a five year limitation on commencement of a prosecution under the Act
- whether prosecution was commenced within five years of the events on which it was founded
cause of action authorised by Part 20 r4(5) and r5A of Supreme Court Rules
whether inconsistent with s249 of Commonwealth Statute
leave granted to plead cause of action
doctrine of estoppel
whether by reason of acceptance of payment by plaintiff estopped from pursuing additional defalcations
no representation by officers of Customs
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significance of plaintiff's failure to give evidence
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significance of averment
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whether offence of unauthorised movement of goods committed by person who carries or directs movement, but does not physically move goods
offence established by proof that defendant caused an unauthorised movement
meaning of "evasion"

ACTS CITED:
Constitution of Australia s109
Corporations Act 2001 (Cth) s1316
Customs Act 1901 s7, s8(1), s33, s36, s39, s40AA, s68, s79(1), s82, s90(1), s92, s93, s234(1)(a), s245, s247, s248, s249, s255
Evidence Act 1995 (Cth)
Evidence Act 1995 (NSW) s20(2)
Judiciary Act 1903 s78B
Customs Tariff Act 1987 s21
Customs Tariff Act 1995

DECISION:
1. (i) that Stephen Edward Parker is convicted of the offence of moving or interfering, without authorisation of the Customs Act 1901, between 1 August 1987 and 31 May 1990, goods that were subject to the control of Customs
(ii) that Stephen Edward Parker is convicted of the offence that, between 1 August 1987 and 31 May 1990, he evaded duty of $1,447,061.70 payable on 43,054.5 litres of alcohol liquid (being Scotch whisky)
(iii) that Stephen Edward Parker is convicted of the offence that, between 13 November 1987 and 31 May 1990, he evaded duty of $90,457.95 payable on 2,691.4 litres of alcohol liquid (Scotch whisky)
(iv) that Stephen Edward Parker is convicted of the offence that, between 17 June 1988 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky)
(v) that Stephen Edward Parker is convicted of the offence that, between 27 June 1988 and 31 May 1990 he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky)
(vi) that Stephen Edward Parker is convicted of the offence that, between 27 June 1988 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky)
(vii) that Stephen Edward Parker is convicted of the offence that, between 28 July 1988 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky)

(viii) that Stephen Edward Parker is convicted of the offence that, between 31 July 1988 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky)
(ix) that Stephen Edward Parker is convicted of the offence that, between 19 September 1989 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky)
(x) that Stephen Edward Parker is convicted of the offence that, between 6 October 1989 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky)
(xi) that Stephen Edward Parker is convicted of the offence that, between 25 January 1990 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky)
(xii) that Stephen Edward Parker is convicted of the offence that, between 29 January 1990 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky)
(xiii) that Stephen Edward Parker is convicted of the offence that, between 30 January 1990 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky)
(xiv) that Stephen Edward Parker is convicted of the offence that, between 31 January 1990 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky)
2. I stand the matter over for further consideration as to the consequences of these orders.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

SIMPSON J

Monday 8 May 2006

13933/92 Comptroller-General of Customs v Stephen Edward Parker

JUDGMENT

1 **HER HONOUR**: By a statement of claim originally filed on 30 July 1992, the plaintiff, the Comptroller-General of Customs, sought orders, *inter alia*, that Stephen Edward Parker be convicted of three offences against s234(1)(a) of the *Customs Act 1901* ("the Act"). S234(1)(a) creates an offence of evading duty that is payable under the Act.

2 Since its original filing, the statement of claim has been through a number of incarnations. It has been amended four times. In its final form it is entitled "Re-amended Statement of Claim". This document was filed on 21 May 2003 pursuant to leave granted by Newman AJ on 16 May 2003. The Comptroller-General now seeks orders for the conviction of Mr Parker of 13 offences against s234(1)(a), and of one offence against s33(1). S33 creates an offence of (relevantly) moving goods that are subject to the control of Customs.

3 Each previous version of the statement of claim has named a number of other defendants besides Mr Parker but, by the time these proceedings came on for hearing, each of those matters had been brought to a conclusion. Mr Parker remains as the only defendant actually involved in the proceedings. He is alleged to have committed the offences on various dates between 1 August 1987 and 31 May 1990. All offences involve dealings with imported alcoholic spirits (Scotch whisky) which is controlled by the provisions of

the Act.

4 The facts alleged by the Comptroller are of considerable complexity and depend largely upon the analysis of a very large quantity of documents, many of which were seized in the execution, on 6 March 1990, of a warrant issued under s214(3) of the Act.

5 It is convenient, I think, to commence with an overview of the relevant provisions of the Act and regulations made thereunder as they apply to the circumstances of the present case. It will be appreciated, by having regard to the dates on which it is alleged the offences occurred, that an inordinately lengthy time has elapsed since the events under consideration, and there have been a number of changes in the Act during that time. References are to the provisions of the Act as they stood at the relevant time. For that reason I will refer to the provisions of the Act in the past tense. The following also incorporates, from the evidence, some matters of practice, the statutory foundation of which was not identified but which is uncontroversial.

6 By s7 of the Act, the Comptroller-General of Customs ("the Comptroller") had the general administration of the Act. The Act contained repeated references to "the Collector" or "a Collector". By s8(1) such a reference is to be construed as a reference to any principal officer of Customs (which expression was not otherwise defined) or any officer doing duty in the matter in relation to which the expression was used. A reference to the (or a) Collector of Customs for a State or Territory was to be construed as a reference to the principal officer of Customs for that State or Territory or for a part of that State or Territory.

7 By s68 imported goods were required to be entered (a) for home consumption, (b) for warehousing, or (c) for transhipment. On entry, the goods were given a lodgement number. Where goods were entered for home consumption, or for transhipment, duty became payable. That was not the case where goods were entered for warehousing. By s99(1)(a) and (b), goods that were originally entered for warehousing could, subsequently, be entered for home consumption or for export. When this occurred, duty became payable. Thus, one important effect of entering goods for warehousing was that it deferred the imposition of duty until, pursuant to s99(1)(a), the goods were subsequently entered for home consumption, or, pursuant to s99(1)(b), for transhipment (or export). (As I understand it, "entry for home consumption" merely meant that the goods were available to be used or marketed in Australia.) Entry for home consumption was achieved by completing a Form known as a "Nature 30". By s99(2), goods that had been entered for warehousing could not be delivered for home consumption unless they had been so entered, and appropriate authority (for which s39 made provision) had been given.

8 By s79(1) the Comptroller was empowered to grant to a person or partnership a licence ("a warehouse licence") to use a place described in the licence for warehousing goods. A licence was granted subject to a series of conditions that were set out in s82(1), subject to such other conditions as were prescribed for the protection of the revenue and for ensuring compliance with the Act (s82(2)), and subject to any additional conditions considered necessary or desirable by the Comptroller (s82(3)). Licensed warehouses were also known as Bond Stores. Goods warehoused in accordance with the warehousing provisions were said to be "under bond" or "underbond".

9 By s30(a)(i) all imported goods were subject to the control of Customs from the time of importation until they were dealt with "in accordance with an entry of the goods for home consumption" or otherwise in accordance with the Act, or until exportation, whichever first occurred (but subject to exceptions otherwise provided in the Act).

10 S33 prohibited the movement or alteration of, or interference with, goods subject to the control of Customs other than as authorised by the Act. By s36 the owner of imported goods was required to furnish to an appropriate Collector, in a manner prescribed by the regulations, particulars required by the regulations. An "owner" of goods was defined to include any person (other than an officer of Customs) being or holding himself out to be the owner, importer, exporter, consignee, agent, or person possessed of,

or beneficially interested in, or having any control of, or power of disposition over, imported goods. Where goods were entered for warehousing, the particulars required to be furnished were given on a Form B612, known as a "Nature 20", which was given a lodgement number.

11 By s40AA(2) a Collector was empowered to give permission in writing to a specified person to remove specified goods from one specified place to another specified place (for example, from one licensed warehouse to another). This was called a "Single Transaction Permission" (or "STP"). By s40AA(1) a Collector was empowered to give general permission in writing to a specified person to move goods of a specified kind from one specified place to another place specified in the general permission authority. This was called a "Continuing Permission" (or "CP"). When goods were moved in accordance with either of these authorities, the status of the goods as "under bond" goods was maintained, and duty did not become immediately payable. A warehouse licence holder acting on such authority was required to maintain a documentary record of the movement of the warehoused goods. Among other information required to be furnished was the identification of the goods moved, again by reference to the lodgement number allocated when the goods were initially imported.

12 By s92 a Collector was authorised to permit, in accordance with the regulations, the owner of warehoused goods to sort, bottle, pack or repack the goods. Any such repacking was to be recorded and the record was to include a note of the lodgement number allocated on the importation of the goods so as to identify, and permit tracing of, the goods after bottling or repacking. Each record of repacking was given a "repack number".

13 By s90(1) the holder of a warehouse licence was required to facilitate inspection by Customs officers of the warehouse and its contents; by s91 a Collector was empowered, at any time, to gain access to and enter, if necessary by force, any warehouse and examine any goods therein.

14 At the relevant times duty was imposed upon goods by s21 of the *Customs Tariff Act 1987* and the Schedules thereto (now replaced by the *Customs Tariff Act 1995*).

15 A warehouse licence holder was required to maintain a Bond Register. This recorded the date of importation, the name of the owner of the goods, the type of goods, the lodgement number, any repack number, and other information. The system was so designed as to enable the tracing of any particular importation of goods. Only alcoholic goods are the subject of the present prosecution and provisions relating to other goods may be disregarded for this purpose. So also may be goods initially entered either for home consumption or for transhipment. These proceedings are concerned only with goods (alcoholic liquor) entered initially for warehousing, although generally these would, at some later time, have been entered for home consumption. It is the processes concerning the payment of duty on goods initially warehoused, and subsequently released onto the domestic market, that are here in issue.

16 An elaborate and complex documentary path was designed. Its principal objective was to ensure that the appropriate duty was paid, at the appropriate time, on every drop of alcohol that found its way onto the domestic market or was, after importation, exported.

17 When alcohol was imported in bulk, and rebottled in a warehouse, it could be traced through the recording system. S93 appears to have recognised the possibility of the loss of some under bond goods, such as, in the case of alcohol imported in bulk and then bottled, spillages and breakages. Each document recording any dealing with the alcohol included a reference to the lodgement number which was a reference to the alcohol imported in bulk before rebottling. The lodgement number identified the source of the goods to be bottled (or repacked). It was the foundational record to which all subsequent records related.

18 In short, any owner (in the extended definition of the word) of imported alcohol was required to account for every drop. Alcohol imported for warehousing could be accounted for in any of four (and no more) ways: by its remaining in the licensed warehouse under bond, in which case duty was not then

payable; by being entered for home consumption and made available on the domestic market, in which case duty became payable at the time of entry for home consumption; by being entered for transhipment (that is, for export), presumably after bottling, packing, or other refinement of the imported quantity, in which case duty became payable when the alcohol was entered for transhipment; or by being the subject of spillage or other loss in the warehouse, in which case, unless the Collector formed the view that the loss was excessive, duty was not payable on the quantity lost (s93).

19 In summary, the process, so far as the evidence discloses, appears to have been this:

(i) on importation goods were entered either for warehousing, for home consumption, or for export. Goods were entered for warehousing by the lodgement with Customs of a prescribed form known as a "Warehousing Entry", also referred to as a "Nature 20". Once entered for warehousing, the goods were given a lodgement number. With this was recorded, *inter alia*, the name of the owner of the goods, a description of the goods, the quantity involved, and the location of the warehouses at which they were to be stored;

(ii) when the goods were "repacked" (usually meaning, in the case of alcohol having been imported in bulk, bottled), the repack record identified (by reference to the lodgement number) the importation(s) from which the repacked goods were taken as well as the manner of repacking;

(iii) when the goods were moved (either in bulk or after repacking) to another licensed warehouse, either under a Continuing Permission or a Single Transaction Permission, a numbered record (called a Continuing Permission or a Single Transaction Permission docket or document) was made, again specifying the lodgement number and thus identifying the importation(s), the source of the repacked goods, as well as any repack number;

(iv) when goods which had been warehoused were to be released onto the domestic market they were entered for home consumption. This involved completion of another prescribed Form, known as a "Nature 30" form. This document also identified the lodgement number as well as containing other information. At this point that duty became payable.

20 This system was designed to ensure that it was possible to trace, through the records, the whole of every importation, and to trace back to their source any repacked goods.

21 It was recognised that, in dealing with alcohol, some losses, by spillage or otherwise, were likely, and these were required to be quantified. If spillages or breakages were not satisfactorily accounted for, duty remained payable.

22 The Bond Register maintained by a warehouse operator appears to have been something of a master document, bringing together records of all dealings with the goods.

23 The system was such that all documents should have correlated to one another. If the recording system was working properly, and the goods were dealt with in accordance with the Act, there should have been equality between the quantity of goods imported on the one hand, against, on the other hand, the quantity represented by combined losses, goods entered for home consumption, any goods exported, and any goods remaining in the warehouse. In theory, the documentary path was such as to enable the tracking of the whole content of any particular importation, until its entry for home consumption (and indeed, there was a computer programme (TRACE – Total Retrieval and Analysis of Customs Entries) designed to do precisely that), and consequently, to ensure that duty was, at the appropriate time, paid. At least two circumstances diminished what would otherwise have been the efficacy of this system. There was, it seems, no limit on the time during which goods could be warehoused, and quarantined from the imposition of duty. There was thus no point at which it could be seen that duty that was payable had not been paid. Customs officers were empowered to and did conduct random audits of warehouses, and these, again at least in theory, should have shown up any anomalies. The other circumstance, at the relevant time, was that

the recording system in warehouses was largely a manual one, dependent upon the accuracy of the individual recorder, and subject to human error.

24 By s214(1), a Collector who had been given information in writing on oath that imported goods had been illegally dealt with, was empowered to require the owner of the goods immediately to produce and hand over all books and documents relating to those goods (and of all other goods imported or exported by him, her, or it at any time within the preceding five years). In practice this was done by the issue of a Notice in writing.

25 By s214(2) the Comptroller or a Collector was empowered also to issue to any officer of Customs or officer of police a Customs Warrant, in the form prescribed by Schedule V (a "Schedule V warrant"). A Schedule V warrant authorised the holder to enter and search any premises in which any books or documents relating to the goods were supposed to be, to search any person, and any "chests, trunks or packages therein", and to take possession of any such books or documents.

26 By s214(3) in the event of default, by an owner, in compliance with a requirement given under s214(1), a Customs officer or police officer in possession of a Schedule V warrant could, at any time of the day or night, break into and enter any premises in which any books or documents relating to the goods were, or were supposed to be, and search therein and take possession of such books and documents which were found.

27 It is unnecessary to say any more about s214. It has been the subject of consideration by me in reasons given in conjunction with this judgment for a decision with respect to the admission of evidence obtained in pursuance of the execution of a Schedule V warrant: **Comptroller-General of Customs v Stephen Edward Parker** [2006] NSWSC 387.

background

28 Mr Parker was a director and shareholder of a company called Breven Pty Ltd ("Breven") and another called Lawpark Pty Ltd ("Lawpark"). Lawpark carried on business as an importer and distributor of alcoholic spirits for human consumption. One of Lawpark's customers was Australian Liquor Marketers Pty Ltd ("ALM"), which carried on business as a wine and spirit distributor. Breven held a warehouse licence, entitling it, subject to conditions, to store, under bond, "alcoholic beverages and associated materials". The conditions required, *inter alia*, that Breven retain records and make them available for inspection on demand by Customs officers. The premises in which the goods were stored were known as "the Breven Bond". Breven conducted a business of bottling and storing scotch whisky for a number of importers. Its customers included Lawpark, as well as other liquor distributors, such as Penney's Pty Ltd, which traded under the name of "Liquorland", and Castlemaine Perkins Pty Ltd ("Castlemaine"), formerly known as "Bond Liquor Marketing". Liquorland operated as a liquor retailer. Between 1986 and 1990 Castlemaine itself operated a Customs licensed bonded warehouse in Coorparoo, Queensland. Mr Parker was intimately involved in the operation and management of the Breven Bond. It was he who physically maintained the majority of the records.

29 Over the years Breven was issued with a number of Continuing Permissions, authorising it to move spirits, under bond, to other licensed warehouses specified in the Continuing Permission document. From time to time new premises were added to the list of specified bond houses or warehouses. Bond Liquor Marketing, Castlemaine, and ALM were among the warehouses the subject of Continuing Permissions granted to Breven. At other times Single Transaction Permissions were issued authorising a single movement.

30 From time to time, between 1986 and 1981, under the authority of ss90 and 91 of the Act, the Breven Bond was inspected. This was ordinarily, if not always, undertaken by Mr Rodney Hedrick, who then had the classification of Control Officer. Mr Hedrick found that Breven's records frequently proved to be inadequate and incomplete. Inspections took place, at least, in or about November and December 1987 and

in January, February and March 1988.

31 At a time not disclosed by the evidence, but prior to March 1990, what appears to have been an extensive and comprehensive operation was under way in Customs. It was given the code name "Operation Ludwig". The investigation represented by Operation Ludwig was not confined to the establishments or individuals involved in the present proceedings.

32 As a result of the information obtained during the course of Operation Ludwig, a Notice under s214(1) was issued requiring Lawpark to produce and hand over documents to Mr James Mutton, an officer of Customs. At the same time, against the possibility of non-compliance with the Notice, a Schedule V warrant was issued. During the morning of 6 March 1990 Mr Mutton led a team of Customs officers to the Breven Bond. There he served Mr Parker with the s214 Notice. He followed this by executing the Schedule V warrant. As a consequence of the execution of the warrant voluminous documentary material was seized from the Breven Bond. It is that material, and expert analysis of it, that is the primary source of, and provides the foundation for, the present prosecution. Resolution of the issues in the prosecution has involved tracking through many of these documents.

33 Later that day Mr Mutton and other Customs officers attended Mr Parker's home at Bangor. Mr Parker was present. One Customs officer, Mr Graeme Green, had a conversation with Mr Parker. Mr Green asked if Mr Parker kept any documents at home, to which he replied:

"No. I keep them at the office".

A subsequent search of the home yielded a number of documentary records in an attaché case.

34 On 18 April Mr Mutton and other officers visited the Breven Bond. During the course of that day the Scotch whisky that remained was seized, and removed on a number of semi-trailers.

35 Between 6 March and 31 May Mr Hedrick carried out a physical stocktake of the spirits then contained in the warehouse. He ascertained that by 30 May none remained. Since all the documentation of the warehouse had been removed, he advised Mr Parker to institute a temporary recording system. On or about 30 May Mr Hedrick undertook an attempted reconciliation of the temporary records. He had a conversation with Mr Parker, and told him that he had "found a few shortages". (On the evidence this must have been a reference to "shortages" that had occurred since 6 March.) He deposed to the following conversation with Mr Parker:

"Mr Parker: What's going to happen about them?

Mr Hedrick: We'll send you a bill for them.

Mr Parker: I'd rather pay it and not be billed for it.

Mr Hedrick: What, make a voluntary payment?

Mr Parker: Yes, but I'll have to work it out and check with you."

36 The following day, 31 May, Mr Parker paid to Mr Hedrick the sum of $84,226.54, the sum that had been calculated by Mr Hedrick as the total of the "shortages" to which he had referred.

the pleadings

37 The case pleaded on behalf of the Comptroller is that, during the relevant period (between 1 August 1987 and 31 May 1990), the Breven Bond received substantial quantities of Scotch whisky, and that Mr Parker dealt with it in such a way as to evade the payment of duty, giving rise to 13 offences of evasion

against s234(1)(a) and one offence of unauthorised movement of under bond goods against s33(1). In order to prove this, the Comptroller relies upon inferences he asserts may and should be drawn from the documents seized on his behalf on 6 March 1990. The Comptroller alleges the following. (I will adopt the terminology used by Customs officers. For Customs purposes alcohol is measured in "litres of alcohol liquid", abbreviated to "LAL's".)

38 On 1 August 1997 there was present in the Breven Bond not less than 30,850 LALs. During the relevant period 938,002.5 LALs of imported Scotch whisky were moved into the warehouse. Of this, 383,294.6 LALs were imported by Lawpark, which, by reason of the extended definition (if not otherwise) was an "owner" of that liquor. By reason of the extended definition, Breven was also an owner of the whole of the liquor contained in the warehouse, as was Mr Parker.

39 Certain of the records maintained by Breven contained inaccurate entries. For example, the records showed that during the relevant period 894,498 LALs were removed from the warehouse. They also showed (wrongly) that 44,178 LALs were bottled (and the bottling recorded on four repack dockets). The records showed (wrongly) that 49,571.8 LALs were removed from the warehouse pursuant to 12 Continuing Permissions. It was the Comptroller's case that 92,632.3 LALs were removed without authorisation and delivered, unlawfully, for home consumption; that this was Scotch whisky that had been imported by Lawpark; that this was done by or at the behest of Mr Parker; and that, in doing or causing that to be done, Mr Parker evaded duty amounting to $3,113,371.60; that this was achieved in 13 separate transactions, constituting 13 separate offences of evasion against s234(1)(a), and one offence of unlawful movement of goods subject to the control of Customs, contrary to s33(1).

40 The facts alleged on behalf of the Comptroller are set out in detail in the Re-amended Statement of Claim. There are, I think, two key paragraphs. In paragraph 32, the Comptroller pleads that, on twelve occasions, quantities of Scotch whisky (totalling 49,577.8 LALs) were removed from the Breven Bond, purportedly under the authorisation of Continuing Permissions, to various licensed premises to which the Continuing Permissions applied, but that, in fact, these movements were not so authorised. (That is what is pleaded: as I understand it the evidence points to a conclusion that while there were in existence genuine grants of Continuing Permissions which would have authorised the movements purportedly recorded, the movements as recorded (to a licensed warehouse) did not take place, and the liquor was released onto the domestic market.)

41 In paragraph 34 the Comptroller alleged that another 43,054.5 LALs were removed from the Breven Bond without authorisation and were delivered for home consumption (again without the necessary authorisation under s99(1)).

42 The Re-amended Statement of Claim also contains the following pleading:

"AND THE PLAINTIFF pursuant to and to the extent provided by s255 of the *Customs Act* avers that all matters and facts specified herein are true and correct."

43 S255 was in the following terms:

"**255 Averment of prosecutor sufficient**

(1) In any Customs prosecution the averment of the prosecutor or plaintiff contained in the information, complaint, declaration or claim shall be *prima facie* evidence of the matter or matters averred.

(2) This section shall apply to any matters so averred although:

(a) evidence in support or rebuttal of the matter averred or of any other matter is given by witnesses; or
(b) the matter averred is a mixed question of law and fact, but in that case the averment shall be *prima facie* evidence of the fact only.

(3) Any evidence given by witnesses in support or rebuttal of a matter so averred shall be considered on its merits and the credibility and probative value of such evidence shall be neither increased nor diminished by reason of this section.

(4) The foregoing provisions of this section shall not apply to:

(a) an averment of the intent of the defendant; or
(b) proceedings for an indictable offence or an offence directly punishable by imprisonment.

(5) This section shall not lessen or affect any onus of proof otherwise falling on the defendant."

44 The orders claimed by the Comptroller in the Re-amended Statement of Claim are:

A. the conviction of Mr Parker for a single offence against s33(1) of the Act (constituted by the removal of the Scotch whisky without authorisation);
B. the conviction of Mr Parker of 13 offences of evasion contrary to s234(1)(a) of the Act (which offences were particularised);
C. an order for the recovery of penalties pursuant to the Act against Mr Parker;
D. an order that the unpaid duty be paid by Mr Parker;
E. costs.

45 Mr Parker has filed a defence to the Re-amended Statement of Claim. He has raised two defences of substance, and otherwise argues that the Comptroller has failed to prove certain essential elements of the offences. The two defences of substance are:

(i) that, by reason of a limitation period imposed by s249 of the Act, the prosecution is statute barred; and
(ii) that, by reason of his payment of the sum of $84,226.54 on 31 May 1990, and the acceptance of that amount on behalf of the Comptroller, the Comptroller is estopped from further pursuing the claim.

46 Since, if either of the substantive defences is successful, it will be unnecessary to determine the merits, it is appropriate and convenient to deal with those issues first.

(i) the limitation defence

47 S249 of the Act was in the following terms:

"**Commencement of prosecutions**

249 Customs prosecutions may be instituted at any time within 5 years after the cause thereof."

48 It is the defence case that this section ought to be construed as imposing a limitation period of five years from the date of the events in question for the institution of any prosecution under the Act. There are a number of strands to this defence. A number of questions arise. They are:

(i) what is the proper construction of s249? Does the section, in fact, create a five year limitation on the commencement of a prosecution under the Act?;

(ii) was the prosecution in any event commenced within five years of the date of the events on which it was founded?

(iii) if s249 has the effect contended for on behalf of Mr Parker, what (if any) was the effect of SCR Pt 20 r4?;

49 In order to explain the way in which the defence was put, it is necessary to refer to some further historical facts, and some additional statutory provisions.

50 As is apparent from what I have written above, the offences are alleged to have been committed between 1 August 1987 and 31 May 1990. If s249 has the effect for which Mr Parker contends then, in respect of the various offences alleged, the time for instituting the prosecution expired between 31 July 1992 and 30 May 1995. It is, however, by no means common ground (or clear) that s249 does have that effect. It will be necessary to return to this. It is also convenient here to mention that although the argument proceeded on the basis that the proceedings are a single prosecution, for the purpose of this argument, they ought to be seen as 14 separate prosecutions. If a limitation period applies, it is not necessarily the case that it has the same impact in respect of each offence alleged.

51 As I have also earlier mentioned, the first statement of claim bearing the number that identifies the present proceeding was filed on 30 July 1992. That can be taken to be the date on which the proceedings so constituted were commenced. In that statement of claim Mr Parker was named as the third of four defendants. The others were, in order, Lawpark, Breven, and Garry Thomas Lawler (also a director of and shareholder in Lawpark and Breven). Against Mr Parker the Comptroller then alleged three offences against s234(1)(a). Earlier, on 21 January 1992, the Comptroller had filed another statement of claim, naming Breven and Mr Parker as defendants. In this statement of claim, against Mr Parker the Comptroller alleged four offences against s234(1)(a). I can not discern, from these pleadings, whether the four offences alleged in the first statement of claim were entirely separate and distinct from the nine alleged in the second statement of claim, or whether there was some overlap.

52 By leave granted by the Prothonotary on 26 Ocotober 1992, on 1 September 1993 the Comptroller filed an amended statement of claim. The same four defendants (Lawpark, Breven and Messrs Parker and Lawler) continued to be named as defendants. Against Mr Parker the Comptroller now pleaded two offences against s234(1)(a).

53 A further amended statement of claim was filed on 9 February 2000, continuing to name the same four defendants. Only one offence against Mr Parker was pleaded.

54 For reasons which are not apparent, and no longer relevant, on 10 June 1994 Sully J ordered that, pending further order of the court, the proceedings be stayed.

55 On 16 May 2003, on the application of the Comptroller, Newman AJ dissolved the stay ordered by Sully J and vacated certain orders made by his Honour. He granted the Comptroller leave to discontinue the proceedings numbered 10519 of 1992. Most relevantly for present purposes, he granted leave further to amend the statement of claim in the present proceedings, in the form of a draft statement of claim that had been placed before him. That draft statement of claim became the Re-amended Statement of Claim, filed on 21 May 2003. The offences alleged in proceedings numbered 10519 of 1992 were incorporated into the Re-amended Statement of Claim.

56 In this version of the statement of claim, for the first time, Mr Parker is charged with the single offence against s33, as well as the 13 offences against s234(1)(a). It was also in this version of the pleading that paragraph 32, making a specific allegation that in twelve instances Breven documentation purportedly (and falsely) recorded movement of liquor pursuant to Continuing Permissions, appeared.

57 Put simply, as I understand it, Mr Parker's argument is that the current version of the pleading constitutes a departure from the original and earlier pleading so significant as to amount to the commencement of a new and different proceeding, and that, by reason of s249, the Comptroller is out of time to commence that proceeding.

58 For a number of independent reasons that argument must be rejected.

question (i): the true construction of s249

59 The starting point is the determination of the effect of s249. It is by no means clear that s249 was intended to create a five-year limitation period. Senior counsel who appeared for the Comptroller challenged the construction proposed on behalf of Mr Parker. He referred to the decision of the High Court in **The Attorney-General of the Commonwealth & Anor v Oates** [1999] HCA 35; 198 CLR 162. That case concerned s1316 of the Corporations Law which provided:

"Despite anything in any other law, proceedings for an offence against this Law may be instituted within the period of 5 years after the act or omission alleged to constitute the offence or, with the Minister's consent, at any later time."

60 That section differs (relevantly, in substance) from s249 only in its opening words. (It also differs in providing for prosecution outside the time specified with the consent of the Minister, but that is not material to the present argument.) The difference that is material, however, is a difference of considerable significance. The issue which arose in **Oates** in the High Court was whether, proceedings having been instituted outside the period of five years after the acts or omissions alleged to constitute the offence charged, the Minister's consent was necessary, and, if so, whether the Minister was required to accord procedural fairness to the proposed defendant by providing him with an opportunity to be heard in relation to whether the Minister ought to give his consent to the otherwise out of time prosecution. (The Minister had in fact given his consent but had provided the defendant with no opportunity to be heard on whether he should do so.) At first instance the Federal Court held that it was not necessary for the Minister to accord procedural fairness to the proposed defendant. The Court therefore did not consider whether, on the true construction of the section, consent was required.

61 On appeal, the Full Court disagreed and declared that the consent that had in fact been given was void, since it had not been given after the respondent had been given an opportunity to be heard, and he had, accordingly, been denied procedural fairness. In coming to that conclusion, the Full Court expressly held that s1316 meant that (absent the Minister's consent) proceeding for a relevant offence may only be instituted within a five year period of the events giving rise to the prosecution.

62 The High Court took a different approach. The Court examined the complex interplay of State and Federal statutory provisions of which s1316 was a part. It concluded that s1316 was a "facultative" provision and did not create a statutory limitation. As I read the judgment, of some significance in the Court's reaching this conclusion were the opening words of the section:

"Despite anything in any other law ..."

That was because, by other statutory provisions, time limits of less than five years were imposed in respect of the bringing, in certain courts, of some summary prosecutions under the same law. S1316 therefore had the effect of extending the time for prosecution, summarily, of those offences, that otherwise would have been statute barred by reason of provisions applicable to particular courts. It did not speak to, and was not directed to, offences prosecuted on indictment, as was there the case.

63 Those opening words do not appear in s249. That is not necessarily fatal to the Comptroller's submission, but it certainly is a matter which requires consideration. It means that the path which led the High Court to its conclusion does not so readily lead to the same conclusion with respect to s249.

64 Somewhat hesitantly, I have come to the conclusion that, although the parallels are not precise, the reasoning in **Oates** leads me to a similar result. S249 appeared in Part XIV of the Act, entitled "Customs Prosecutions". S245(1) listed the courts in which Customs prosecutions may be instituted. These included, relevantly for NSW, the Supreme Court, the District Court and a court of summary jurisdiction. Ss247 and 248 made applicable to Customs prosecutions the procedural rules of the court (and state or territory) in which the prosecution was brought.

65 This would suggest to me that the purport of s249 was to exclude and extend any limitation period of less than five years imposed by general provisions applicable to the court in which the prosecution was instituted. The section was not framed in the language of mandate in which one would expect a section imposing a statutory bar would be framed. Such a section would be framed in terms such as:

"Customs prosecutions *shall* be instituted ..."

66 Following the reasoning in **Oates**, I conclude that the purpose of s249 was to exclude any lesser statutory time limits applicable by reason of provisions relevant to the court in which the prosecution is brought.

67 Accordingly, I am not satisfied that s249 has the effect for which counsel for Mr Parker contends. This is the first and principal reason why the limitation defence must fail.

question (ii): was the prosecution commenced within five years?

(For the purpose only of this and the next argument, I will assume, contrary to the view I have just expressed, that s249 does impose a statutory limitation period.)

68 In this respect is apposite to repeat that the Re-amended Statement of Claim should not, for the purpose of this argument, be viewed as containing a single cause of action. Each offence alleged ought to be seen as an individual, and separate, cause of action. If a limitation period did apply, it would have to be considered in relation to the date on which each individual offence is alleged to have been committed.

69 I have above given some detail of the progression of the claims made in the various versions of the statement of claim. What is plain is that, in every version from the first, the Comptroller alleged that unauthorised movement of alcohol from the warehouse had occurred; that this was done by or at the instigation of Mr Parker; and that, as a consequence, duty that was payable was not paid.

70 Fundamental to the limitation defence was the proposition that the Re-amended Statement of Claim incorporates causes of action not previously pleaded. Counsel went to some trouble, by tracing through the successive statements of claim, to show what he contended to be the shifting ground on which the Comptroller based his case, and to establish that the case as now pleaded is a new one, and different from that pleaded prior to 1992 and 1995, that is, within the period contemplated by s249. The variations generally related to the quantities of alcohol on which it was alleged that duty had not been paid. I do not regard such amendment as amendment of such substance as to plead a new cause of action. It is no more than the particularisation of the claim originally made. Counsel also set some store upon the introduction of paragraph 32 into the Re-amended Statement of Claim, in which, for the first time, express reference was made to the movement of alcohol purportedly, but not in reality, pursuant to and on the of Continuing Permissions. I also do not regard this as a matter of substance. It is a pleading of one of the facts by which the Comptroller proposed to prove the case against Mr Parker.

71 The question that has given me most cause for thought, and which was not in fact raised by counsel for Mr Parker, is whether the introduction, outside what is said to be the limitation period, of an alleged offence against s33 ought to be regarded as the introduction of a new cause of action otherwise statute barred. Two answers present themselves. The first is that this was incorporated in the decision of Newman AJ. This is not the occasion to challenge that decision. The second answer is that the allegation is not based on any new or additional facts: it is an allegation that, on the facts already pleaded, an offence against another section is established. I have therefore concluded that the pleadings which post-date the five-year period from the date of the offence giving rise to the alleged offences do not amount to the pleading of an otherwise statute barred cause of action. They are merely variations in the particularisation, either of what was alleged to have been done, or the legal consequences of what was alleged to have been done, or the pleading of an additional factual foundation for the offences said to have been committed. This

is the second reason to reject the limitation defence.

question (iii): the effect of SCR Pt 20 r4

72 By ss 247 and 248 of the Act the rules of practice and procedure of a state court are made to apply to Customs prosecutions in those courts.

73 SCR Part 20 (which applied at the time these proceedings were instituted and heard) was concerned with amendment. R4 relevantly provided:

"**Statutes of limitation**

4 (1) Where any relevant period of limitation expires after the date of filing of a statement of claim and after that expiry an application is made under rule 1 [which permitted the Court to order or grant leave to amend any document in the proceedings] for leave to amend the statement of claim by making the amendment mentioned in any of sub-rules (3), (4) and (5), the Court may in the circumstances mentioned in that sub-rule make an order giving leave accordingly, *notwithstanding that that period has expired*.

(2) ...

(3) ...

(4) ...

(5) where a plaintiff, in his statement of claim, makes a claim for relief on a cause of action arising out of any facts, the Court may order that he have leave to make an amendment having the effect of adding or substituting a new cause of action arising out of the same or substantially the same facts and a claim for relief on that new cause of action.

(5A) an amendment made pursuant to an order made under this rule shall, unless the Court otherwise orders, relate back to the date of filing of the statement of claim.

(6) ...

(7) this rule does not limit the powers of the Court under rule 1." (italics added)

74 The effect of the rule is that leave may be granted to amend a statement of claim even where the amendment raises a cause of action which would otherwise have been statute barred: see, for example, **McGee v Yeomans** [1977] 1 NSWLR 273; **Air Link Pty Ltd v Paterson (No 2)** [2003] NSWCA 251; 58 NSWLR 388.

75 Counsel for Mr Parker, however, argued that, where the effect of the rule is to defeat, or permit the defeat of, a limitation period imposed by a Commonwealth statute, then, to the extent that the rule overrides the effect of that statutory provision (of which, it was inherent in the argument, s249 is an example), then the rule is inconsistent with that statutory provision, and, by s109 of the *Constitution of Australia*, is invalid. (So far as I am aware, no notices under s78B of the *Judiciary Act 1903* have been given. It is not entirely clear that such notices were required. Since it will not be possible to finalise this matter in this judgment, I will limit myself to expressing a tentative view and leave open the s109 question, in case either party wishes to pursue it, in which case I will hear argument on whether s78B notices are necessary.)

76 The short answer to the argument, as I perceive it, is, as counsel for Mr Parker himself acknowledged, to be found in the decision of the Court of Appeal in **Air Link**. There a similar argument was (by majority)

rejected. I propose to follow that decision.

77 Thus, the third reason for rejecting the limitation defence will be that the amendment, even if it does, as is fundamental to Mr Parker's argument, raise a new cause of action, based upon facts that are outside the five year period specified by s249, is authorised by Part 20 r4(5) and r5A and leave to do precisely that was granted by Newman AJ.

78 Senior counsel who appeared for the Comptroller did not accept that any conflict between the two provisions (that is, *SCR* Pt 20 r4, and s249) has been shown to exist. The basis upon which it was suggested that no such conflict exists was that *SCR* Pt 20 r4 is merely procedural and does not contain any substantive law. That may well be so. (It may well be that the rules of court are not intended to enact substantive law, and, by their very nature, merely regulate the procedure by which the Court administers substantive law provisions.) But if the effect of those procedural rules is to override a substantive law provision, then, in my opinion, a conflict has been shown to exist. In my opinion, if the construction of s249 proposed on behalf of Mr Parker were correct, then the conflict identified on his behalf has also been shown to exist.

79 Counsel for Mr Parker also queried whether, in fact, the leave granted by Newman AJ extended to raising an otherwise statute barred cause of action. Since the leave granted by Newman AJ was (as I understand it) to file the Re-amended Statement of Claim in the form in which it is presently pleaded, that query must be answered against Mr Parker. Leave was granted to plead all causes of action as they appear in the Re-amended Statement of Claim. Senior counsel for the Comptroller informed me that he believed Mr Parker appeared unrepresented in the proceeding before Newman AJ, and it may be that this point was not taken. Certainly, there is no reference in his Honour's judgment (which was given ex-tempore) to any argument that leave ought to be refused on the ground that the proposed amendment brought into play a cause of action otherwise statute barred. Even if it could reasonably be argued that Newman AJ was wrong to grant the leave that he did, this is neither the time nor the forum for a challenge to his Honour's decision.

80 The defence based upon an asserted statutory bar to the prosecution fails.

(ii) estoppel

81 The doctrine of estoppel was the subject of consideration and explanation by Mason CJ in **The Commonwealth v Verwayen** [1990] HCA 39; 170 CLR 394. There, his Honour said:

"... that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid."

82 Incorporated in this passage are the three elements generally accepted as necessary before the doctrine of estoppel can be activated to protect the party claiming its benefit. These are:

(i) a representation by one person as to a present, past or future state of affairs (including a legal state of affairs);

(ii) inducing another person to act in a particular way (sometimes called reliance);

(iii) detriment suffered by the second person in the event of subsequent denial of the representation by the first person.

83 The defence of estoppel is, in this case, based upon the payment made by Mr Parker to the Comptroller, through Mr Hedrick, on 31 May. The payment was in the sum of approximately $84,000. The contention now made on his behalf is that, Mr Hedrick having accepted that payment, the Comptroller is now estopped from pursuing additional claims for payment of duty or other remedies in respect of what are said to be defalcations.

84 The only evidence of the circumstances in which Mr Parker made the payment was that of Mr Hedrick. There is no evidence that Mr Hedrick made any representation to Mr Parker that that sum would be accepted in full satisfaction of any and all defalcations in the payment of applicable duty. There is no evidence that anything said or done by Mr Hedrick induced Mr Parker to act in any particular way. That is, there is no evidence that Mr Parker relied upon anything said or done by Mr Hedrick. Finally, it can scarcely be said that Mr Parker acted in any way to his detriment in making the payment. He did no more than was his legal obligation.

85 Counsel who appeared for Mr Parker referred to the decision of the High Court in **Verwayen**. He made particular reference to the judgment of Deane J which, relevantly for present purposes, under the sub-heading "Unconscientious conduct" contained the following:

"The doctrine of estoppel by conduct is founded upon good conscience. Its rationale is not that it is right and expedient to save persons from the consequences of their own mistake. It is that it is right and expedient to save them from being victimized by other people ... The notion of unconscionability is better described than defined ... The most that can be said is that 'unconscionable' should be understood in the sense of referring to what one party 'ought not, in conscience, as between [the parties], to be allowed' to do ... In this as in other areas of equity-related doctrine, conduct which is 'unconscionable' will commonly involve the use of or insistence upon legal entitlement to take advantage of another's special vulnerability or misadventure ... in a way that is unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair dealing. That being so, the question whether conduct is or is not unconscionable in the circumstances of a particular case involves a 'real process of consideration and judgment' ... in which the ordinary processes of legal reasoning by induction and deduction from settled rules and decided cases are applicable but are likely to be inadequate to exclude an element of value judgment in a borderline case such as the present." (internal references omitted)

86 Even the most cursory examination of the various components of this passage, by reference to the facts upon which Mr Parker bases the defence, makes it clear that it does nothing to assist him. In this respect it is of some significance that he himself did not give any evidence. The only evidence is that of Mr Hedrick, and other officers of Customs, all of whom denied ever having held out or made any representation to Mr Parker that acceptance of the sum proffered would absolve him of any other liability. Nor, given his failure to give any evidence, was there any evidence that he relied upon any such representation in order to alter his own position to his detriment. At best, all Mr Parker could be seen to have done in proffering the money was to make a payment that he ought already to have made. He has never suggested that the voluntary payment was one which he had, had he wished to do so, grounds to challenge. There is not the slightest evidence that he in any way did anything other than that which he was obliged to do. He could not therefore be said to have altered his position in any way to his detriment.

87 Further, the conversation he had with Mr Hedrick is, at least on one construction, capable of being seen as an attempt to maintain some kind of secrecy, or even concealment. He invited Mr Hedrick not to send him a bill, but simply to accept payment of the amount Mr Hedrick had calculated.

88 The defence of estoppel fails.

substantive issues

89 I pause to make some preliminary observations. Firstly, it was common ground that the applicable standard of proof is the criminal standard; that is, it is necessary for the Comptroller to prove each of the

offences beyond reasonable doubt: **Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors** [2003] HCA 49; 216 CLR 161. Secondly, a question arose during the course of submissions as to the significance, if any, of the fact that Mr Parker did not give evidence.

90 The evidence is very strong that Mr Parker was the person who undertook the day to day management of Breven's business, and, in particular, of its record keeping. That would suggest that, if anybody could throw any light on any doubts or discrepancies revealed in the records, Mr Parker was that person. From the reasoning in **Labrador**, it may be taken that prosecutions for offences against the Act are to be treated in a way which parallels the treatment of criminal cases generally. In **Azzopardi v The Queen** [2001] HCA 25; 205 CLR 50, the High Court considered the application of s20(2) of the *Evidence Act 1995 (NSW).* That section, it may be noted, applies only in criminal proceedings for indictable offences and so its counterpart in the *Evidence Act 1995 (Cth)*, which is in identical terms, has no direct application to the present charges which, while criminal in nature, are not indictable. However, the reasoning process in **Azzopardi** is instructive. S20(2) of the *Evidence Act (NSW)* expressly permitted a judge (or any party other than the prosecutor) to comment on the failure of a defendant to give evidence, but limited the comment that might be made by a judge by prohibiting any suggestion that the defendant failed to give evidence because he or she was, or believed that he or she was, guilty of the offence concerned. The fact that the section is concerned with comment that might be made to a jury is another reason why it is not directly applicable. It is not directly applicable to a trial where the tribunal of fact is a judge sitting alone.

91 Notwithstanding the terms of s20(2), the majority in the High Court held that cases in which a comment on the failure of an accused person to offer an explanation for facts in the prosecution case is permissible "will be both rare and exceptional". However, their Honours accepted that such cases might occur where the evidence is capable of explanation by disclosure of additional facts known only to the accused person.

92 In the present case counsel who represented Mr Parker identified four points of his argument. The first of these raised the possibility that the goods may have been shipped to somebody else, and duty paid by somebody other than he. Given his day to day involvement in Breven's business and record keeping, it is an obvious inference that Mr Parker had knowledge of the facts and circumstances relevant to that possibility. This therefore is one of those "rare and exceptional cases" in which such a comment to a jury might be acceptable.

93 In **HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler and Ors** [2002] NSWSC 171; 41 ACSR 72, Santow J (as his Honour then was) was dealing with civil prosecution proceedings for breaches of the *Corporations Act 2001 (Cth)* and breaches of the Corporations Law. His Honour held that an inference of the kind envisaged in **Jones v Dunkel** [1959] HCA 8; 101 CLR 298 could be drawn against the defendants who did not give evidence in the proceedings. This was not only because they were parties who were clearly available and not called, but also because of their personal involvement in the transactions in question.

94 In my opinion the same reasoning may be applied to the present proceedings. The absence of any explanation provided by Mr Parker does not fill any gaps in the Comptroller's case; but, where inferences adverse to Mr Parker are available on the Comptroller's evidence, those inferences may more comfortably be drawn having regard to the absence of any clarifying material from Mr Parker.

95 The documentation seized from the warehouse, and from Mr Parker, was subjected to the most extensive examination and analysis by Ms Tamara Lindsay, a chartered accountant, who provided a detailed report, and was cross-examined. It is largely from this report, supplemented by her cross-examination, and the cross-examination of other witnesses, that the complex trail of paper was unravelled to reveal the circumstances, a description of which follows.

96 The documents Ms Lindsay had available to her for the purpose of preparing her report are identified in Annexure B to the report. They include a large number of documents and records seized from Breven on 6

March 1990. They also include some of Castlemaine's records, and some of ALM's records.

97 Ms Lindsay undertook the most careful and painstaking analysis of the documentation. As a result, she was able to demonstrate (in a way that was not challenged) that two quantities of Scotch whisky that had been imported and warehoused at the Breven Bond were not "acquitted": the spirits could have been acquitted by being shown to have been (i) transferred (under bond, pursuant to a Continuing Permission or a Single Transaction Permission) to another licensed warehouse; (ii) entered for home consumption (and duty paid); (iii) exported (and duty paid thereon); (iv) still in the Breven Bond; (v) part of the stock seized by Customs in April 1990; (vi) recorded as spillage or breakage.

98 Since, by 31 May 1990, no spirits remained at the Breven Bond, the fourth possibility can be discounted. There is no need to be concerned with the liquor seized. Ms Lindsay was able to identify that by reference to its lodgement numbers and repack dockets. The fifth possibility can be put to one side. There does not appear to have been any exported. That disposes of the third possibility. It is not necessary here to consider spillage. Nor is there a need for concern about any entered for home consumption. An entry for home consumption triggered the payment of duty. It may be assumed that, if any of the liquor held in the Breven Bond had been entered for home consumption, that would have been demonstrated on the records. That disposes of the second possibility. There is no evidence of any recorded spillages of breakages. That means that the sixth possibility can be put to one side.

99 It is that liquor recorded as having been moved under bond that is here in question. Each recorded under bond docket (Continuing Permission or a Single Transaction Permission) ought to have been met with a corresponding receipt in the transferee warehouse.

100 The Comptroller alleges that twelve of Breven's recorded under bond movements, each purportedly pursuant to a Continuing Permission, did not find a corresponding record of receipt in the purported transferee warehouse. Ten of these were recorded as movements to Castlemaine (four of them to Castlemaine under its previous title, Bond Liquor Marketing); two of the movements were to ALM, one in Victoria, and one in NSW.

101 As a result of Ms Lindsay's exercise, employees of Castlemaine and ALM examined and undertook a reconciliation of the records of those organisations. That exercise showed, more directly than Ms Lindsay's, that the spirits referred to in the Breven documents as having been dispatched under bond to those organisations were not there received. The dockets that purport to record such movements are, therefore, at least inaccurate, and, at worst, deliberately false.

102 The next question is whether those circumstances disclose any of the offences charged. It is necessary to consider the terminology of the sections creating the offences.

103 S33 was in two parts. By s33(1):

"Except as authorised by this Act, a person shall not move, alter or interfere with goods that are subject to the control of the Customs."

It is under that sub-section that Mr Parker is charged.

104 It is, however, necessary to consider the offence created by subs(2). That is because that might have some relevance to the proper construction of subs(1).

105 Subs(2) provided:

"If a person who commits an offence against subs(1) does the act that constitutes the offence -
(a) on behalf of another person of whom he is an employee; or
(b) at the direction or with the consent or agreement (whether express or implied) of another person,

that other person commits an offence ..."

(Subs(3) provided a defence to the "other person" referred to in subs(2) where that person proved that he took reasonable precautions and exercised due diligence to prevent the commission of the offence by the first person.)

106 s33(2) may be said to create a kind of vicarious liability in an employer or a person at whose directions or request, or with whose consent, an offence against subs(1) is committed. The subsection is concerned with the circumstance where an offence against subs(1) is committed by a person who is an employee of, or who acts at the direction, or with the consent or agreement, of another person. The vicarious liability created by subs(2) is dependent upon the commission of a subs(1) offence by another person.

107 The relevance of subs(2) is as to the extent to which it is necessary that the Comptroller prove that the alleged offender in a subs(1) prosecution was the person who directly and physically did the acts said to constitute the offence.

108 Although, during the course of argument, some time was taken up with subs(2), it may now be put to one side. The offence Mr Parker is alleged to have committed is an offence against subs(1). He is alleged directly to have committed the offence.

109 Counsel for Mr Parker argued that, in order to succeed in the prosecution under s33(1), it is necessary that the Comptroller establish that it was he, physically, who moved, altered, or interfered with the goods. It is for that reason that the subs(2) offence is created. Notwithstanding subs(2), I do not accept the argument put on behalf of Mr Parker. In my opinion, in order to satisfy subs(1), and constitute an offence against that subsection, it is sufficient that the Comptroller establish that Mr Parker caused the unauthorised movement.

110 Subs(2) makes a person at whose behest an offence against subs(1) is committed also liable for that offence. IT does not eliminate the liability of an employee or other person who does the act that constitutes the offence. That is, subs(2) depends upon an offence having been committed by an employee (or a person who may generally be termed an agent). (By this I do not mean to imply that conviction of the second person under subs(2) depends upon conviction, or even prosecution, of the first; but it depends upon such an offence having been committed.) But that does not mean that subs(1) applies only to the person who physically moves or alters the goods. That would be an absurdity. In the movement of goods such as those the subject of the present proceedings, multiple individuals would, one would expect, be involved in the physical activity. Most would be entirely innocent agents, acting on instructions, quite unaware of the unlawfulness of what they were required to do. Two examples will suffice to make the point. The labourers or storemen who loaded the cartons of spirits onto trucks would, under the proposed construction of subs(1), be liable for an offence under that subsection, while the person who directed the movement would not. So too would be the truck drivers who transported the goods. But the person who ordered, directed or organised the movement and who bore the true responsibility for the movement, would not be so liable.

111 I reject the argument.

112 Before Mr Parker may be found guilty under s33(1), it is necessary that the Comptroller show that he was the person who took the steps that caused the movement. That is amply established by the evidence of his day to day control of the business and of the record keeping.

the s234(1)(a) offences

113 It is worth repeating the relevant parts of this section. They are:

"**Customs offences**

234 (1) A person shall not -

(a) Evade payment of any duty which is payable; ..."

The key to the relevant part of the section is the word "evade". There is nothing complex about the construction of this language.

114 What the word "evade" means was considered by the High Court as long ago as 1926, in **Wilson v Chambers and Company Proprietary Limited** [1926] HCA 15; 38 CLR 131. There Isaacs J said:

"The position so far is that 'evasion' is more serious than mere omission to pay and less serious than attempting to defraud the revenue. ... Now, what is the evasion which the statute places intermediately between simple omission and fraud on the revenue. Any trick or artifice or force which results in obtaining dutiable goods without payment of duty is a fraud on the revenue, and is, therefore, outside simple 'evasion.' Bringing to the solution what should in a doubtful case always be assumed, a presumption of just intention consistent with safeguarding the Customs revenue, the test must be whether the Crown debtor has acted honestly and reasonably in relation to his public obligations. It is the same test as the Privy Council has stated with regard to *mens rea*. If, legally owing the duty, the importer has not merely omitted to pay, but has omitted without any reasonable grounds for withholding payment, he has 'evaded' payment. If, however, he can show any reasonable excuse for omitting to pay, he does not evade payment. He may genuinely and without negligence be unaware of the facts constituting liability; he may have misunderstood a regulation or a law; he may, though perfectly cognizant of all necessary facts, be strongly advised that either on construction or constitutionally the law does not reach him. Such a man does not, in my opinion, 'evade' payment. On the other hand, if his ignorance of facts arises through his own unbusinesslike conduct, so as to be unreasonable in his case want of knowledge is no reasonable excuse. That, as already shown, is not because of the absence of *mens rea* as ordinarily understood. It is simply because what he ought to know in his situation when his public obligations are in question, he is taken to know. But the only test of what he *ought to know* is what a man in his position *acting reasonably* would know. Consequently, it all comes to a question of honesty and reasonable conduct. The conclusion is that s234(a) is contravened when there is intentional non-payment without honest and reasonable excuse of duty which is payable." (emphasis in original)

115 Higgins J said:

"To say the least, 'evade' would seem to connote the exercise of will in avoiding; whereas a mere failure to pay may be by accident or mistake."

His Honour, however, did not accept that the words "without reasonable excuse" were implied and considered it dangerous to attempt to frame a definition or "interpose a formula between the section and the facts of each situation".

116 Starke J said:

"Clearly, in my opinion, the word 'evade' in the Act does not necessarily involve any device or underhand dealing for the purpose of escaping duty; but on the other hand it involves something more than a mere omission or neglect to pay the duty. It involves, in my opinion, the intentional avoidance of payment in circumstances indicating to the party that he is or may be under some obligation to pay duty."

117 The word "evasion" was again considered by the High Court in **Denver Chemical Manufacturing Co v Commissioner of Taxation (NSW)** [1949] HCA 25; 79 CLR 296, where its meaning as it appeared in the *Income Tax (Management) Act 1936 (NSW)* (although not in the context of creating an offence). The section there under consideration permitted amendment to an assessment to be made at any time where the Commissioner was of the opinion:

"that there has been an avoidance of tax and that the avoidance is due to fraud or evasion."

118 Dixon J (as he then was), with whom McTiernan, Williams and Webb JJ agreed, said:

"I think it is unwise to attempt to define the word 'evasion.' The context of [the section in which it appeared] shows that it means more than avoid and also more than a mere withholding of information or the mere furnishing of misleading information. It is probably safe to say that some blameworthy act or omission on the part of the taxpayer or those for whom he is responsible is contemplated. An intention to withhold information lest the Commissioner should consider the taxpayer liable to a greater extent than the taxpayer is prepared to concede, is conduct which if the result is to avoid tax would justify finding evasion."

119 For the purposes of the present case, it is important to bear in mind that the word is to be construed in a section which creates an offence giving rise to a penalty, and which is, on the authority of **Labrador**, to be treated as a section creating criminal liability.

I bear these principles in mind in reaching the conclusion I do.

120 There are two short routes to the conclusion that the Comptroller has established the facts pleaded in respect of each offence. The first is to be found in the s255 averment. S255 has been the subject of recent consideration by the High Court: **Chief Executive Officer of Customs v El Hajje** [2005] HCA 35; 79 ALR 1289.

121 As I have indicated above, the section makes the averment *prima facie* evidence of the matter or matters averred. All factual matters pleaded in the Re-amended Statement of Claim have been averred.

122 By s255(3) the strength of the averment is undermined if evidence in rebuttal of the factual proposition is given. That subsection would require independent examination of any rebuttal evidence given. The prosecution evidence does not gain any strength, where rebuttal evidence has been called, from averment.

123 But in this case no evidence was given in rebuttal of any of the essential features of the Comptroller's case. In saying this I have not overlooked the extensive cross-examination of a number of witnesses, most particularly Ms Lindsay. But scrutiny of that cross-examination reveals that no evidence was elicited that had the effect of rebutting any of her conclusions. I will deal shortly with the nature of the cross-examination of Ms Lindsay. I have concluded that the averment alone is sufficient to found a conclusion that all factual matters pleaded in the Re-amended Statement of Claim have been proved. (There remains, of course, a further step: it is necessary to consider whether those facts are sufficient to (and if so, do in fact) establish to the requisite standard, the commission of the offences charged.)

124 It is Ms Lindsay's evidence, including her report, that provides the second short avenue to the same conclusion. In her report Ms Lindsay exhaustively set out the manner in which she came to the conclusions that she did. She annexed to her report a large amount of supporting primary documentation. Analysis of the cross-examination of Ms Lindsay shows that no real challenge was made to any of the facts she asserted, or the conclusions which she drew from those facts. The cross-examination covered a number of areas, including identifying certain deficiencies in the TRACE system. Most notably, TRACE did not, at the relevant time, provide for, or show, movement of alcohol pursuant to Continuing Permissions or Single Transaction Permissions. Thus TRACE records would not have disclosed the destination of alcohol moved pursuant to one of those permissions from one licensed warehouse to another licensed warehouse. But that is something of a digression.

125 A good deal of the cross-examination was devoted to establishing that Ms Lindsay could have approached the task committed to her in an alternative way (or in alternative ways). It did not, however, undermine in any way the validity of the approach that she did take. Thus, I feel comfortably able to rely upon the conclusions stated by Ms Lindsay in her report.

126 In these circumstances I can deal with relative brevity with the individual offences charged.

127 It is convenient now to set out, in his own words, counsel for Mr Parker's "attack" upon the Comptroller's case. When asked to encapsulate the issues, counsel for Mr Parker identified "four points of attack" as follows:

"... firstly, that the goods may have been shipped to someone else and duty may have been paid by someone else; secondly, that one would ordinarily have expected that the expenses would, in part, point to that kind of activity; thirdly, that the cash received and the invoices issued would also point to that kind of activity; and, fourthly, that there is no dealing for human errors of which, on any view, there seems to have been many in relation to the records operated of (sic) the bond, particularly given the nature of the allegation of 234, ..."

128 From her examination of the documents Ms Lindsay concluded that 43,055 LALs (of Scotch whisky) were not accounted for. At paragraphs 3.2 and 3.3 of her report she set out, in two different ways, the manner in which she arrived at that conclusion. There is, on the evidence, no reason to doubt the accuracy of her approach or her conclusions. It is, then, a short step to conclude that that quantity of alcohol was moved, without authorisation, from the bond; it is an inevitable further conclusion that duty was not paid upon that quantity of alcohol. These are the facts alleged to constitute the first offence against s234(1)(a).

129 The remaining offences against s234(1)(a) all concern the recording of movements of alcohol out of the warehouse, purportedly pursuant to identified Continuing Permission dockets. For example, Continuing Permission document numbered 2500 purports to be a record showing the movement of a total of 2,280 cartons of Glen Stag Scotch Whisky, bottled in 750 ml containers, despatched, under bond (that is, pursuant to the identified Continuing Permission) to the Castlemaine Bond Store in Coorparoo. The document identified as the source of the spirits that which had been imported and recorded in lodgement number 15724 58026K, the bottling having been recorded in repack document numbered 1187. The reconciliation of Castlemaine's records failed to disclose any corresponding receipt of that quantity of Scotch whisky from Breven. This was confirmed by direct evidence from employees of Castlemaine that the spirits referred to in the Continuing Permission dockets were not received by Castlemaine.

130 The same applies to a further eight Continuing Permission dockets (numbered CP2636, CP2638, CP2642, CP2827, CP2829, CP2860, CP2871, CP3016, CP3021) all nominating Castlemaine as the receiving warehouse. The remaining Continuing Permission dockets are numbered CP3019 and CP3023. These purported to show movement of spirits to the ALM bonds, the first in NSW, and the second in Victoria. The evidence also shows that these shipments were not received as purportedly shown in the Continuing Permission dockets. Accordingly, I am able to infer that the liquor was not sent as recorded in the dockets, and duty was not paid thereon. Since there is no evidence to suggest that, in any case, the liquor was moved under some other authorisation (and it was not retained in the Breven warehouse), it is an obvious inference that it was released onto the domestic market, whereupon duty became payable. I would also infer that the duty was never paid, either by Breven, by Lawpark, or by any recipient of the liquor.

131 I am also satisfied on the evidence that in each case, the incorrect record of the movement as pursuant to a Continuing Permission was done deliberately and with dishonest intent; and was done by Mr Parker himself. I am satisfied of all of these circumstances beyond reasonable doubt. One item of evidence supporting that conclusion is Mr Parker's denial, shown to be untrue, that he had any records at his home.

132 Accordingly, I am satisfied that all offences alleged against s234(1)(a) have been proved.

133 It follows from these conclusions that there was also movement of the liquor, constituting an offence against s33(1). I am also satisfied beyond reasonable doubt that that offence was committed.

134 I therefore make orders A and B claimed in the Re-amended Statement of Claim. It was agreed that, should I reach that conclusion, it would be appropriate to re-list the matter for further hearing on the question of penalty.

135 I order:

1. (i) that Stephen Edward Parker is convicted of the offence of moving or interfering, without authorisation of the *Customs Act 1901*, between 1 August 1987 and 31 May 1990, goods that were subject to the control of Customs;
(ii) that Stephen Edward Parker is convicted of the offence that, between 1 August 1987 and 31 May 1990, he evaded duty of $1,447,061.70 payable on 43,054.5 litres of alcohol liquid (being Scotch whisky);
(iii) that Stephen Edward Parker is convicted of the offence that, between 13 November 1987 and 31 May 1990, he evaded duty of $90,457.95 payable on 2,691.4 litres of alcohol liquid (Scotch whisky);
(iv) that Stephen Edward Parker is convicted of the offence that, between 17 June 1988 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky);
(v) that Stephen Edward Parker is convicted of the offence that, between 27 June 1988 and 31 May 1990 he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky);
(vi) that Stephen Edward Parker is convicted of the offence that, between 27 June 1988 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky);
(vii) that Stephen Edward Parker is convicted of the offence that, between 28 July 1988 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky);
(viii) that Stephen Edward Parker is convicted of the offence that, between 31 July 1988 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky);
(ix) that Stephen Edward Parker is convicted of the offence that, between 19 September 1989 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky);
(x) that Stephen Edward Parker is convicted of the offence that, between 6 October 1989 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky);
(xi) that Stephen Edward Parker is convicted of the offence that, between 25 January 1990 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky);
(xii) that Stephen Edward Parker is convicted of the offence that, between 29 January 1990 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky);
(xiii) that Stephen Edward Parker is convicted of the offence that, between 30 January 1990 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky);
(xiv) that Stephen Edward Parker is convicted of the offence that, between 31 January 1990 and 31 May 1990, he evaded duty of $143,259.26 payable on 4,262.4 litres of alcohol liquid (Scotch whisky);
2. I stand the matter over for further consideration as to the consequences of these orders.

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