



HIGH COURT OF AUSTRALIA

Public Information Officer

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CHIEF EXECUTIVE OFFICER OF CUSTOMS v NAZIH EL HAJJE

The High Court of Australia today unanimously allowed an appeal by Customs relating to the way a prosecution case for excise evasion was handled by the Victorian Court of Appeal.

Mr El Hajje was driving a rented truck in Broadford, Victoria, in February 2000 when he was intercepted by police. He was allegedly carrying 691.48kg of cut tobacco which attracted excise duty of \$165,567.97 (\$239.44 per kilo). Section 117 of the *Excise Act* provided that no-one shall, without authority, have in their possession, custody or control any manufactured or partly manufactured excisable goods upon which excise has not been paid. Customs prosecuted Mr El Hajje for unlawful possession of excisable goods upon which excise duty had not been paid.

Customs' statement of claim (later amended) contained a number of averments, or allegations, detailing Mr El Hajje's lack of any licence under the *Excise Act*, his apprehension with the cut tobacco on which no duty has been paid, and the lack of any permission or authority to have the tobacco in his possession, custody or control.

Mr El Hajje was convicted and fined \$331,135 but successfully appealed to the Victorian Court of Appeal on the ground that the trial judge should not have found that cut tobacco is manufactured goods. The Court of Appeal held that an ultimate fact in issue cannot be averred, based on the proposition that tobacco leaf might be cut for purposes other than for manufacture into a product suitable for consumption. It held that with the facts constituting manufacture not being averred, and no facts other than the ultimate fact in issue being averred, the ultimate fact in issue was not properly the subject of an averment. Customs appealed to the High Court.

The Court allowed the appeal. It held that the averment provisions of the *Excise Act* do not distinguish between the ultimate fact in issue and other facts. Averments are of material facts alleged in the pleading, not of evidence proving those material facts. References to the ultimate fact in issue in excise prosecutions may suggest there will always be a single determinative issue of fact, which is seldom so. The Court held that, in this case, demonstrating a contravention of section 117 required proof that: Mr El Hajje had certain goods in his possession, custody or control; he was not a manufacturer; he had no authority to have the goods in his possession, custody or control; the goods were manufactured or partly manufactured; and the goods were of a kind attracting excise. None of these facts were more significant than others. Any not admitted by Mr El Hajje could be described as an ultimate fact in issue. The Act provides that what is averred is prima facie evidence of the matter averred. It remained for the trial judge and the Court of Appeal to say whether the facts averred were established to the requisite degree of proof. However the Court of Appeal did not consider whether the necessary facts were established to the requisite degree and Mr El Hajje's contention, that the trial judge erred in finding that the tobacco in his possession, custody or control was manufactured or partly manufactured, remained undetermined. The Court remitted the matter to the Court of Appeal for further hearing and determination.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*