HIGH COURT OF AUSTRALIA

Public Information Officer

12 February 2009

STEPHEN EDWARD PARKER v COMPTROLLER-GENERAL OF CUSTOMS

A man charged with evading duty on imported Scotch whisky was not denied procedural fairness by the New South Wales Court of Appeal when he was not invited to make submissions about an earlier decision of a lower court, the High Court of Australia held today.

An Australian Customs Service investigation between 1987 and 1990 into suspected contraventions of the *Customs Act* and *Spirits Act* found that some importers were mixing local spirits made from grain and/or molasses into imported brandy before bottling. It was an offence to describe as brandy any spirit not wholly distilled from wine produced from grapes. Customs formed the view that two companies controlled by Stephen Parker – Lawpark Pty Ltd which imported and distributed alcoholic spirits and Breven Pty Ltd which ran a warehouse for imported spirits – and a third company, Kingswood Distillery Pty Ltd, were involved in such a scheme. In March 1990 Customs, relying upon notices to produce issued under section 214 of the *Customs Act,* sought books and documents covering the previous five years relating to a particular bottle of Cheval Napoleon Old French Brandy and all other imports. When this requirement was apparently not met, they carried out a search and seizure at Lawpark's premises at Wetherill Park in Sydney using warrants issued under section 214 (which has since been repealed). Mr Parker was ultimately charged with other offences uncovered during the investigation into adulterated brandy.

In 1992, the Comptroller-General of Customs (now known as the Chief Executive Officer of Customs) began proceedings in the New South Wales Supreme Court against Mr Parker, Lawpark, Breven, and another individual, Gary Thomas Lawler. Mr Parker was charged with the removal, without Customs' authority, of almost 93,000 litres of Scotch whisky from the Breven warehouse and 13 counts of evasion of duty on the whisky totalling more than $3 million. Proceedings against him finally came on for hearing in April 2005. Proceedings against the other defendants had already been concluded. Mr Parker challenged the admissibility of the documents seized from Lawpark's premises and contended that evidence had been obtained improperly or in contravention of an Australian law. He said the search and seizure power had not been enlivened because the notice to produce was invalid and that the documents seized did not relate to the bottle of brandy identified in the notice to produce. Under section 138 of the NSW *Evidence Act,* such evidence obtained improperly or in contravention of the law cannot be admitted unless the desirability of admitting it outweighs the undesirability of admitting it. The Comptroller-General conceded the notice to produce was deficient because it was imprecise about the documents to which it applied.

Justice Carolyn Simpson adopted a 1988 ruling by the NSW District Court, *In the matter of Lawrence Charles O'Neill,* which held that section 214(3) authorising search and seizure was limited to documents pertaining to goods on which the notice to produce was based. She held that the range of documents went well beyond what was authorised by section 214 of the *Customs Act.* Although the seizure was unlawful she admitted the evidence under section 138 of the *Evidence Act*. Justice Simpson convicted Mr Parker on all 14 charges. She ordered him to pay a penalty of more than $10 million, which was 3.25 times the duty evaded, and a penalty of $12,000 for the

Address: PO Box 6309, Kingston ACT 2604 Telephone: (02) 6270 6998 Fax: (02) 6270 6868
Email: fhamilton@hcourt.gov.au

unauthorised movement of goods, plus costs. Mr Parker appealed unsuccessfully to the NSW Court of Appeal, which held that Justice Simpson was mistaken in accepting the construction of section 214 in *O'Neill*. However, she correctly admitted the evidence. Customs had not shown wilful disregard of the *Customs Act.*

The High Court granted Mr Parker special leave to appeal on the ground that the Court of Appeal had denied him procedural fairness by finding against him without notifying him of its intention to depart from the *O'Neill* decision and giving him an opportunity to respond. The High Court, by a 4-1 majority, dismissed the appeal. It held that Mr Parker was not deprived of the possibility of a successful outcome. The Court held that although the Court of Appeal disagreed with *O'Neill*, it decided the appeal on the basis that *O'Neill* was correctly decided which meant there was no prejudice to Mr Parker. Consideration by a court of the weight to be given to decisions that were not authoritative did not necessarily attract an obligation to invite submissions by the parties about those decisions. What was required was that the Court of Appeal gave the parties sufficient opportunity to be heard on all the issues and there was no relevant unfairness.

- *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.*