Neutral Citation Number: [2022] EWCA Civ 330

Case No: CA-2018-001593
(formerly A3/2018/0911)

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE UPPER TRIBUNAL**
**(TAX AND CHANCERY CHAMBER)**
**Mrs Justice Whipple and Judge Ashley Greenbank**
**[2017] UKUT 476 (TCC)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2022

**Before:**

**LORD JUSTICE NEWEY**
**LORD JUSTICE BAKER**
and
**LORD JUSTICE SNOWDEN**

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**Between:**

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| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS** | **Appellants** |
| **- and -** | |
| **MARTYN GLEN PERFECT** | **Respondent** |

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**Jessica Simor QC** (instructed by **The General Counsel and Solicitor to HM Revenue and Customs**) for the **Appellants**
**The Appellant** was neither present nor represented at the hearing

Hearing date: 23 February 2022

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# Approved Judgment

**Remote hand-down: This judgment was handed down remotely at 10:30am on 15 March 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.**

## Lord Justice Newey:

1. The respondent, Mr Martyn Perfect, is a lorry driver. On 6 September 2013, he collected from Calais a lorry which was loaded with 26 pallets of beer and with which there was documentation referring to an "Administrative Reference Code" (or "ARC"). When he reached Dover, Mr Perfect was stopped by UK Border Force officers who found that the ARC had been allocated to a previous consignment and that excise duty had not been paid on the goods he was carrying. In the circumstances, both the beer and the lorry were seized and the appellants, HM Revenue and Customs ("HMRC"), subsequently assessed Mr Perfect to excise duty in the sum of £22,779 pursuant to regulation 13 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010 ("the 2010 Regulations"). HMRC also imposed a penalty on Mr Perfect.

2. Mr Perfect appealed to the First-tier Tribunal ("the FTT"), which allowed his appeal and discharged both the excise duty assessment and the penalty. The FTT made findings to the effect that:

   i) Mr Perfect had no interest of his own in the beer, was not part of any conspiracy and had simply followed instructions;

   ii) The only information that Mr Perfect had was to be found in the documentation he collected when he picked up the goods;

   iii) That documentation appeared to be consistent with the movement of goods subject to a valid duty-suspended arrangement; and

   iv) Mr Perfect had no means of checking whether the ARC on the documentation had been used or not.

3. HMRC appealed to the Upper Tribunal ("the UT"). The appeal was dismissed, but HMRC then appealed to this Court. In a judgment given on 19 March 2019, Baker LJ, giving the judgment of the Court (which also included Patten LJ and Nugee J), dismissed the appeal in so far as it concerned the penalty which HMRC had sought to impose on Mr Perfect. As regards the assessment to excise duty, the Court concluded that the appeal raised a question of European Union ("EU") law which was not *acte clair* and so should be referred to the Court of Justice of the European Union ("the CJEU").

4. The CJEU received the reference on 3 April 2019. Advocate General Tanchev delivered his opinion on 21 January 2021 and judgment was given on 10 June 2021: see Case C-279/19 *Commissioners for Her Majesty's Revenue and Customs v WR* EU:C:2021:473. The matter was then listed for a further hearing in this Court, which took place before us on 23 February 2022. In the event, Mr Perfect was neither present nor represented at that hearing. Mr David Bedenham of counsel prepared a skeleton argument on Mr Perfect's behalf in December 2021 in which he addressed in appropriately measured terms, first, whether the fact that the United Kingdom has withdrawn from the EU has the consequence that this Court is not bound by the CJEU's decision and, secondly, if not, whether the Court should take a different approach to the CJEU. On 17 February 2022, however, Mr Perfect's solicitors informed the Court that, in the light of the decision of Nugee LJ, sitting as a first

instance Judge, in *Wilson v McNamara* [2022] EWHC 243 (Ch), Mr Perfect no longer sought to resist HMRC's appeal on the excise duty issue.

5. The judgment which this Court gave on 19 March 2019 ([2019] EWCA Civ 465, [2020] STC 705) explains the history much more fully. This judgment supplements that one.

## The legislative framework

6. At the material times, regulation 13 of the 2010 Regulations provided:

> "(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person—
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> (a) making the delivery of the goods;
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered …. "

7. "Excise duty point", as used in regulation 13(1) of the 2010 Regulations, was defined by section 1 of the Finance (No. 2) Act 1992 to mean "the time when the requirement to pay any duty with which goods become chargeable is to take effect".

8. The 2010 Regulations were designed to transpose chapters I to V of Council Directive 2008/118/EC concerning the general arrangements for excise duty and repealing Directive 92/12/EEC ("the 2008 Directive"). Recital 8 to the 2008 Directive explains that, "[s]ince it remains necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all Member States, it is necessary to make clear at Community level when excise goods are released for consumption and who the person liable to pay the excise duty is". Article 33, the key provision in the present context, states so far as relevant:

> "1. … where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.
>
> For the purposes of this Article, 'holding for commercial purposes' shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.

> 2. The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in that other Member State.
>
> 3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State …. "

## This Court's views in 2019

9. Having regard to the FTT's unchallenged findings to that effect, the UT correctly proceeded on the basis that Mr Perfect had had neither actual nor constructive knowledge of the fact that the beer in his lorry was being smuggled. However, HMRC appealed to this Court on the ground that Mr Perfect's innocence did not matter. HMRC contended that liability for excise duty is strict: in other words, that an individual in physical possession and control of excise goods need not be aware that excise duty is being evaded to be "holding" or "making … delivery of" the goods for the purposes of regulation 13 of the 2010 Regulations and article 33 of the 2008 Directive.

10. In its 2019 judgment, this Court saw considerable force in HMRC's submissions. It said in paragraphs 66-68:

> "66. We agree that the underlying policy of the 2008 Directive is, as identified by the Upper Tribunal in [*B&M Retail Ltd v Revenue and Customs Commissioners* [2016] UKUT 429 (TCC)], that it is the obligation of every Member State to ensure that duty is paid on goods that are found to have been released for consumption. It would be a distortion of the internal market were Member States not to take steps to ensure that goods in respect of which excise duty should have been paid cannot circulate freely within the single market alongside goods on which duty has been paid. As the Upper Tribunal further observed in [*Davison and Robinson Ltd v Revenue and Customs Commissioners* [2018] UKUT 437 (TCC)], in the absence of any relevant information relating to any prior release for consumption, HMRC must assess the person who it finds to be holding the goods in question, if that is the only excise duty point which can be established. We note HMRC's submission that where, as here, a driver is unable to identify the consignor, or the importer, or his employer, the only person who can be assessed for the duty is the driver himself. If he cannot be assessed in circumstances where HMRC or a Tribunal concludes that he was unaware that the goods were liable to duty, the opportunities for smuggling and fraud are manifestly greater. Accordingly, strict liability appears to have been an accepted feature of the regime under successive Directives, as explained initially by Lord Hoffmann in

> [*Greenalls Management Ltd v Customs and Excise Commissioners* [2005] UKHL 34, [2005] 1 WLR 1754].
>
> 67. This policy is, to our eyes, reflected in the terms of the Directive and the Regulations. We agree with Ms Simor's submission that the natural meaning of the words 'holding' or 'making delivery' of goods does not impute any requirement that the person is aware of the tax status of the goods. Although fairness and proportionality are, of course, cornerstones of EU law, as they are of the common law, they do not invariably exclude the imposition of strict liability. We consider that there is very considerable force in the argument that, given the policy underlying the Directive, the imposition of strict liability on a driver in these circumstances does not offend the principles of fairness or proportionality.
>
> 68. One view is that the scheme of the legislative provisions, considered as a whole, may draw a distinction between liability for payment of duty and liability for criminal sanctions. Taxing statutes, unlike statutes creating criminal offences, do not usually impose a liability to tax by reference to the state of mind of the taxpayer — what is taxed are usually objective events or transactions without regard to the state of mind of the taxpayer. The public interest in ensuring that excise duty is paid may require that anyone holding the goods is strictly liable for the duty. He or she may have a remedy against the consignors or the importers, provided their identities are known. The imposition of liability on mere couriers would act as a deterrent against a driver getting involved in such a venture without reliable information as to the identity of the person who engages his services. On the other hand, a criminal prosecution for an offence of dishonesty and, arguably, the imposition of a penalty under the tax laws, should require that the driver knew that duty had not been paid on the goods he was carrying. The fact that paragraph 20 of Schedule 41 to the Finance Act 2008 provides a defence to a penalty under paragraph 4(1) where the taxpayer establishes a reasonable excuse, whereas the provisions imposing liability under the 2008 Directive and the 2010 Regulations do not include any such exception, is consistent with this interpretation of the overall scheme."

## The CJEU decision

11. The CJEU judgment of 10 June 2021 accords with the views which this Court was inclined to favour in its 2019 judgment. The CJEU ruled that article 33(3) of the 2008 Directive:

> "must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise

> duty, is liable for that excise duty, under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty".

12. The CJEU explained in its judgment:

> "24 The concept of a person who 'holds' goods refers, in everyday language, to a person who is in physical possession of those goods. In that regard, the question whether the person concerned has a right to or any interest in the goods which that person holds is irrelevant.
>
> 25 Moreover, there is nothing in the wording of Article 33(3) of Directive 2008/118 to indicate that the status of person liable to pay the excise duty, as being 'the person holding the goods intended for delivery', depends on ascertaining whether that person is aware or should reasonably have been aware that the excise duty is chargeable under that provision.
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> 26 That literal interpretation is borne out by the general scheme of Directive 2008/118.
>
> …
>
> 31 Furthermore, an interpretation limiting the status of person liable to pay the excise duty as being 'the person … holding the goods intended for delivery', within the meaning of Article 33(3) of Directive 2008/118, to those persons who are aware or should reasonably have been aware that excise duty has become chargeable would not be consistent with the objectives pursued by Directive 2008/118, which include the prevention of possible tax evasion, avoidance and abuse (see, to that effect, judgment of 29 June 2017, *Commission v Portugal*, C-126/15, EU:C:2017:504, paragraph 59)."

## The effect of the CJEU decision

13. As a result of the United Kingdom's withdrawal from the EU, Courts in this jurisdiction are not generally bound by decisions of the CJEU made after 31 December 2020: see section 6(1) of the European Union (Withdrawal) Act 2018 ("the 2018 Act"). Section 6(2) of that Act states that a Court "may have regard" to such decisions.

14. However, the agreement between the United Kingdom and the EU setting out the arrangements for the United Kingdom's withdrawal from the EU ("the Withdrawal Agreement", Treaty Series No. 3 (2020)) provides for judgments of the CJEU handed down after 31 December 2020 to have "binding force in their entirety on and in the United Kingdom" if given in respect of references made by United Kingdom Courts and Tribunals before the end of 2020. Thus:

i) article 86 of the Withdrawal Agreement, headed "Pending cases before the Court of Justice of the European Union", states in article 86(2), "The Court of Justice of the European Union shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period"; and

ii) article 89 of the Withdrawal Agreement, headed "Binding force and enforceability of judgments and orders", states in article 89(1), "Judgments and orders of the Court of Justice of the European Union handed down before the end of the transition period, as well as such judgments and orders handed down after the end of the transition period in proceedings referred to in Articles 86 and 87, shall have binding force in their entirety on and in the United Kingdom".

15. The other relevant provision of the Withdrawal Agreement is article 4, headed "Methods and principles relating to the effect, the implementation and the application of this Agreement". So far as relevant, article 4 reads:

> "1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.
>
> Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
>
> 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation."

16. It follows that, under the terms of the Withdrawal Agreement, judgments of the CJEU on references from United Kingdom Courts and Tribunals made before the end of 2020 are to have "binding force in their entirety on and in the United Kingdom" even if handed down in 2021 or later. Further, the United Kingdom is required by article 4(2) to ensure compliance with article 4(1) "through domestic primary legislation".

17. As the explanatory notes in respect of it confirm, section 5 of the European Union (Withdrawal) Act 2020 was designed to give effect to article 4 of the Withdrawal Agreement. Section 5 provided for the insertion into the 2018 Act of a new section 7A. Section 7A states:

> "(1) Subsection (2) applies to—
>
> (a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and

> (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement,
>
> as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.
>
> (2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—
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> (a) recognised and available in domestic law, and
>
> (b) enforced, allowed and followed accordingly.
>
> (3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2) …. "

18. Ms Jessica Simor QC, who appeared for HMRC, argued that section 7A of the 2018 Act operates to make the CJEU's judgment on the 2019 reference binding within the United Kingdom regardless of its withdrawal from the EU. That submission is consistent with *Wilson v McNamara*, where, as Nugee LJ explained in paragraph 41 of his judgment, there was no dispute that judgments given by the CJEU on references made before the end of 2020 are binding.

19. Someone wishing to construct an argument to the contrary might focus on the words "without further enactment" in section 7A of the 2018 Act, as amended. Section 7A provides for the recognition and enforcement of such rights and obligations "as in accordance with the withdrawal agreement are *without further enactment* to be given legal effect or used in the United Kingdom" (emphasis added). It might be suggested that article 4(2) of the Withdrawal Agreement confirms that CJEU judgments on pre-2021 references are not to be treated as binding "without further enactment", but rather that the United Kingdom was to ensure compliance with article 4(1) "through domestic primary legislation".

20. Such an interpretation of section 7A would make no sense, however. The point of section 7A is evidently to make provisions of the Withdrawal Agreement effective in the United Kingdom. Were, however, the reference to "without further enactment" to mean that section 7A is applicable only where no "further enactment" is necessary, it would be redundant. The very fact that an enactment such as section 7A was needed would mean that the section could not apply. On that basis, the United Kingdom would have failed to comply with its obligation under article 4(2) of the Withdrawal Agreement to put in place legislation ensuring compliance with article 4(1).

21. In the circumstances, Ms Simor must, I think, be correct that, despite the inclusion of "without further enactment", section 7A of the 2018 Act serves to make CJEU judgments such as that in point in the present case binding in the United Kingdom. The fact that section 7A speaks of aspects of the Withdrawal Agreement being given legal effect "without further enactment" cannot imply that, wherever domestic legislation is requisite for the Withdrawal Agreement to be effective within the United Kingdom, the provision does not operate. The draftsman will have been well aware that, as a matter of domestic law, international obligations such as those which the

United Kingdom undertook in the Withdrawal Agreement are not directly applicable (see e.g. Halsbury's Laws, volume 20, at paragraph 556) and so that implementation of the Withdrawal Agreement would necessitate legislation. The reference to "without further enactment" must therefore, as it seems to me, relate not to the domestic position, but to that on the international plane, as between the parties to the Withdrawal Agreement, namely, the United Kingdom, the EU and the European Atomic Energy Community. If, by the Withdrawal Agreement, the United Kingdom has undertaken an unconditional obligation, which is not under the terms of the Withdrawal Agreement itself to be the subject of "further enactment" as between its parties, section 7A will be in point, in my view.

22. That being so, it seems to me that we are bound by the CJEU's judgment of 10 June 2021 to hold, as was anyway this Court's inclination in 2019, that article 33 of the 2008 Directive and, hence, also regulation 13 of the 2010 Regulations:

> "must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty".

In other words, a person need not be aware that excise duty is being evaded to be "holding" or "making … delivery of" goods for the purposes of regulation 13 of the 2010 Regulations or article 33 of the 2008 Directive.

23. It follows that the fact that Mr Perfect had neither actual nor constructive knowledge of the smuggling of the beer he was carrying cannot exempt him from liability from excise duty.

## Conclusion

24. I would allow HMRC's appeal as regards the excise duty issue.

**Lord Justice Baker:**

25. I agree.

**Lord Justice Snowden:**

26. I also agree.