SUPREME COURT OF QUEENSLAND

CITATION:	*Collector of Customs v Palmer Steel Trading (Aust) Pty Ltd* [2003] QSC 434
PARTIES:	**COLLECTOR OF CUSTOMS** (plaintiff) v **PALMER STEEL TRADING (AUST) PTY LTD** **ACN 089 467 701** (defendant)
FILE NO/S:	SC No 8258 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2003
JUDGE:	McMurdo J
ORDERS:	**1. Judgment for the plaintiff against the defendant in the sum of $424,593.39;** **2. The defendant to pay the plaintiff's costs of the proceeding to be assessed.**
CATCHWORDS:	PRACTICE – SUMMARY JUDGMENT FOR THE PLAINTIFF – r 292 - where application for summary judgment of claim for unpaid duty on steel imported by defendant – where defendant claims Australian Customs Staff represented steel would not be subject to duty in question – where defendant submits plaintiff estopped from claiming duty because of prior representations – where representation if made was incorrect – whether plaintiff estopped from claiming duty – whether defendant has real prospect of success – whether plaintiff should be given summary judgment *Customs Act* 1901 (Cth), Part XVB, 269TEA, 269TD(4), s 269TG, s 269TG(1)(b) *Customs Tariff Act* 1995, Schedule 3 *Customs Tariff (Anti-Dumping) Act* 1975, s 8(2), s 8, s 8(3), s 8(5), (5A) and (5B) *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, cited *Chamberlain v DCT* (ACT) (1988) 164 CLR 502, cited *Commissioner of Stamp Duties (Qld) v Agenti Architects Pty*

Ltd [2003] QCA 265, cited
Commissioner of Taxation (Cth) v Ryan (2000) 201 CLR 109, cited
Commonwealth v Verwayen (1990) 170 CLR 394, considered
FCT v ANZ Savings Bank Ltd (1994) 181 CLR 466, cited
FCT v Wade (1951) 84 CLR 105, cited
Minister for Immigration and Ethnic Affairs v Kurtovic (1990) 21 FCR 193, considered
Waverley Transit Pty Ltd v Metropolitan Transit Authority (Unreported, Supreme Court Victoria, 2 June 1988), considered

COUNSEL: K A Mellifont for the plaintiff
D J Campbell for the defendant

SOLICITORS: Australian Government Solicitor for the plaintiff
Hemming & Hart Lawyers for the defendant

[1] **McMURDO J:** This is an application by the plaintiff for summary judgment for unpaid duty on steel imported by the defendant during 2000. The defence is that the plaintiff is estopped from claiming the duty. The question for determination is whether that defence has any real prospect of success.

[2] Before going to the facts, it is necessary to say something of the statutory scheme under which the monies in question, subject to the alleged estoppel, are payable. Part XVB of the *Customs Act* 1901 (Cth) ("the Act") provides for measures in respect of goods whose importation into Australia involves a dumping, meaning a sale to an Australian purchaser at a price lower than the normal value of the goods in the country of export. One of those measures is a declaration by the Minister that goods of a certain description should be goods to which a special duty of Customs, known as a dumping duty, is to be imposed, collected and paid. The Minister's declaration is made by a public notice under s 269TG of the Act, called a "dumping duty notice". By such a notice, the Minister declares that s 8 of the *Customs Tariff (Anti-Dumping) Act* 1975 applies to such goods. By that section, it is provided that:

> "(2) There is imposed, and there must be collected and paid, on goods:
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> (a) to which this section applies by virtue of a notice under subsection 269TG (1) or (2) of the *Customs Act*; and
> (b) in relation to which the amount of the export price is less than the amount of the normal value;
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> a special duty of Customs, to be known as dumping duty, calculated in accordance with subsection (6)."

The amount of the dumping duty is calculated according to the Minister's assessment of, broadly speaking, the difference between the export price and the normal value in the country of export.[1] Pending the final assessment of the

[1] Section 8(6)

dumping duty to be paid on goods the subject of a notice, an interim dumping duty is payable pursuant to s 8(3), calculated according to s 8(5), (5A) and (5B).

[3] The Minister usually acts after receipt of a report from the Chief Executive Officer of Customs[2] ("CEO") following an investigation by the CEO of relevant issues.[3] In the course of the CEO's investigation, the CEO has power to make what is called a Preliminary Affirmative Determination in respect of goods, if it appears that there are or will be sufficient grounds for the publication of a dumping duty notice.[4] Such a determination has an impact upon the importation of relevant goods, because it empowers Customs to require and take securities in respect of interim duty that may become payable upon the publication of a dumping duty notice.[5] If a dumping duty notice is published, the Minister may by that notice declare that it shall apply to goods exported to Australia after the date of the CEO's determination.[6]

[4] In the present case, the CEO made the relevant Preliminary Affirmative Determination on 14 September 1999, the public notification of which advised that securities would be imposed in respect of relevant goods entered for home consumption from that date. On 29 October 1999, the CEO gave the relevant report to the Minister, and the Minister accepted the recommendation in that report when, on 4 February 2000, she declared by a dumping duty notice dated 17 February 2000 that s 8 of the *Customs Tariff (Anti-Dumping) Act* applied to the relevant goods being "hot dip, galvanised, welded, circular hollow section, steel pipe in nominal sizes DN 15-100" exported to Australia from Thailand after 14 September 1999.

[5] Between January and August 2000 the defendant imported eight consignments of steel product. The defendant now concedes that the goods were within the dumping duty notice, and that accordingly, subject to any estoppel, interim dumping duty was payable on the entry of those goods. But each consignment was entered upon an incorrect classification by or on behalf of the defendant, under which the goods were classified by reference to an item in schedule 3 to the *Customs Tariff Act* 1995 for which a lower rate of duty was applicable. Duty was paid according to that classification in amounts which, in total, are $315,615.48 less than the interim dumping duty which should have been paid. There is a further amount of $5,003.65 in relation to GST on the last of the consignments,[7] which added to that $315,615.48, results in the plaintiff's claim of $320,619.13.

[6] The defendant's case is that the plaintiff is estopped from claiming any of that sum because staff of the Australian Customs Service are said to have represented to the defendant, prior to and on the first of these consignments, that the correct classification of these goods was that upon which they were entered and duty was paid, instead of the goods being subject to the interim dumping duty. There is a factual contest as to whether such representations were made, which would have to be resolved at a trial if it is relevant. For the purposes of this application, the defendant's version should be assumed to be correct. According to its case, there

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2 By s 7 of the Act, the CEO has the general administration of the Act, and by s 8, a reference to the Collector, or to a Collector of Customs is reference to, amongst others, the CEO.

3 Section 269TEA of the Act.

4 Section 269TD of the Act.

5 Section 269TD(4); The securities are required and taken under s 42 of the Act, which provides that security can be required or taken in respect of goods imported after the CEO's determination.

6 Section 269TG(1)(b)

7 Being the only consignment after 1 July 2000

was a practice between the parties whereby the defendant would make telephone enquiries of Customs as to how goods proposed to be imported should be classified for the purpose of calculating duty. The defendant would rely upon advice in response to those enquiries to import the goods and to calculate the price at which the goods should be sold in Australia, taking into account the anticipated import duty. In accordance with that practice, an enquiry was made of Customs on 22 December 1999 as to the appropriate classification for the subject goods, and the defendant's employee was then told by a Customs officer that the goods should be imported under a certain classification. The advice was confirmed in a second telephone conversation in late December 1999. The defendant says that in reliance upon that information, it imported these eight consignments of steel and set its price for the sale in Australia of those goods. In addition, the defendant says that its director, Mr Palmer, attended at the offices of Customs in Brisbane to pay the required duty upon the first consignment when he was told that no dumping duty was payable. Mr Palmer says that if the defendant had been then informed that the steel was subject to dumping duty, the defendant would not have imported any steel after the first consignment and it would have attempted to return the first consignment.

[7] The defendant's argument encounters a considerable body of cases which deny the availability of an estoppel against the operation of a statute, and in particular, against the impact of a revenue statute: *FCT v Wade* (1951) 84 CLR 105 at 117 per Kitto J; *Chamberlain v DCT* (1987-88) 164 CLR 502 at 510 per Deane, Toohey and Gaudron JJ; *FCT v ANZ Savings Bank Ltd* (1994) 181 CLR 466 at 479 per Brennan, Deane, Dawson and Toohey JJ; *Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 124 per Gleeson CJ, Gummow and Hayne JJ; *Commissioner of Stamp Duties (Qld) v Agenti Architects Pty Ltd* [2003] QCA 265 at [28] per White J (de Jersey CJ and Jerrard JA agreeing). And insofar as the conduct of the plaintiff is concerned, the argument seeks to raise an estoppel against the performance of a public duty, which is the Collector's duty to collect what is payable according to the statute. Just as the executive cannot by a contract disable itself or its officers from performing a statutory duty or exercising a discretionary power according to law,[8] nor can it do so by a representation and the operation of an estoppel: *Attorney-General v Quin* (1989-90) 170 CLR 1 at 17-18 per Mason CJ; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 207-211 per Gummow J. No Customs officer has power to affect the operation of the legislation by making not payable what the legislation, specifically s 8(3) of the *Customs Tariff (Anti-Dumping) Act*, requires to be paid. To apply the doctrine of estoppel according to this submission would be to legitimate action which is ultra vires and to permit the executive to override a law of the Parliament.[9]

[8] Of course there are situations in which the doctrine of estoppel will operate against a Government or a public authority. In so far as *Commonwealth v Verwayen* (1990) 170 CLR 394 was decided upon the basis of estoppel, it provides an example. The defendant's submission is that the present case falls within a category for which an estoppel can operate. It is a category described in the judgment of Gummow J in

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8 *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 74-5 per Mason J; *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520.

9 Wade: *Administrative Law* (8th Edition) at 243; *Maritime Electric Co v General Dairies Ltd* [1937] AC 610 at 621 cited by Kitto J in *Wade* at 117 and by Gleeson CJ, Gummow and Hayne JJ in *Ryan* at 124 and cited and applied by McPherson ACJ in *Commonwealth v Hamilton* [1992] 2 Qd R 257 at 267.

Kurtovic in a passage at 215-216 at 21 FCR. To discuss that passage, it is necessary to put it in context. In *Kurtovic*, the Minister had ordered the deportation of the respondent, who then sought judicial review of that decision.[10] The primary judge quashed the deportation order on grounds which included an estoppel arising from what he saw as a previous representation by the Minister that he would not order deportation absent some further crime being committed by the respondent. An appeal to the Full Court was dismissed on the basis that the decision was reviewable on the alternative ground found by the primary judge, which was a denial of natural justice. The Full Court held that the Minister's conduct grounded no estoppel, for several reasons. The conduct involved no representation as alleged, and it did not cause the respondent to act to his detriment. Gummow J held that in any case the Minister could not be estopped from exercising a discretionary power in a free and unhindered manner. He began his discussion of that issue by noting that the respondent sought to prevent the appellant Minister from making a decision within the Minister's power which would have the effect of altering a previous intra vires decision. He noted that the case was not one where the party alleging an estoppel was seeking performance of some action which would be ultra vires as exceeding the powers given by or pursuant to a statute.[11] In such a case, Gummow J said that:

> "Any doctrine of estoppel in that context would threaten to undermine the doctrine of ultra vires by enabling public authorities to extend their powers both de facto and de jure by representations beyond power, which they would then be estopped from denying."

[9] In *Kurtovic*, there was no questioning of the propositions that an estoppel cannot apply against the operation of a statute or against the performance of a duty imposed by a statute. Indeed, the conclusion by Gummow J that an estoppel cannot be raised to prevent or hinder the exercise of a discretionary power as required by a statute was reached by reference to the proposition that an estoppel cannot affect the performance of a statutory duty.[12] The performance of a statutory duty was likened to the due exercise of a discretionary power in this passage at 210:

> "In a case of a discretion, there is a duty under the statute to exercise a free and unhindered discretion and an estoppel cannot be raised (anymore than a contract might be relied upon) to prevent or hinder the exercise of the discretion; the point is that the legislature intends the discretion to be exercised on the basis of a proper understanding of what is required by the statute, and that the repository of the discretion is not to be held to a decision which mistakes or forecloses that understanding."

This passage was cited with approval by Mason CJ in *Attorney-General v Quin*: 170 CLR at 17.

[10] The passage relied upon by the defendant is at 215, when Gummow J said:

> "In the United States, a distinction has been drawn expressed in terms of the "proprietary" as opposed to the "governmental"

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10 Under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

11 At 208.

12 At 210.

> capacities of public bodies. The result is that if the public body is acting in its proprietary capacity, and if its representative has been acting within the scope of his authority, then an equitable estoppel may arise: *United States v Georgia-Pacific Co* 421 F 2d 92 at 100-101 (1970); *Air-Sea Brokers Inc v United States* 596 F 2d 1008 (1979). Recent decisions in the Courts of Appeals are divided on the question of whether such a distinction may still be drawn after the Supreme Court decision in *Heckler v Community Health Services of Crawford County Inc* (supra). The Eleventh Circuit and the Federal Circuit have continued to apply the distinction and to allow estoppels (see *Federal Deposit Insurance Corp v Harrison* 735 F 2d 408 at 411 (1984); *USA Petroleum Corp v United States* 821 F 2d 622 at 625-7 (1987) while the First Circuit has taken the contrary position (see *Phelps v Federal Emergency Management Agency (supra); Federal Deposit Insurance Corp v Roldan Fouseca* 795 F 2d 1102 at 1108 (1986). The planning or policy level of decision making wherein statutory discretions are exercised has, in my view a different character or quality to what one might call the operational decisions which implement decisions made in exercise of that policy; cf the distinction drawn by Lord Wilberforce (albeit in a different context) in *Anns v Merton London Borough Council* [1978] AC 728 at 754. Where the public authority makes representations in the course of implementation of a decision arrived at by the exercise of its discretion, then usually there will not be an objection to the application of a private law doctrine of promissory estoppel. It must, however, be recognised that it may be difficult, in a given case, to draw a line between that which involves discretion and that which is merely "operational". As Lord Wilberforce said in the passage referred to above:
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> > "Many statutes also prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many 'operational' powers or duties have in them some element of 'discretion'. It can safely be said that the more 'operational' a power or duty may be, the easier it is to superimpose upon it a common law duty of care."
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> In my view, the same may be said of the super-imposition of the operation of the doctrines of promissory estoppel.

[11] This passage suggests that an estoppel might have an impact upon what is described as "operational" decision making, for which Gummow J gave as an example V*erwayen*, then the subject of a decision by the Full Court of the Supreme Court of Victoria. Gummow J described the Commonwealth's promise in that case that it would not plead a limitation period defence as one not requiring the exercise of any statutory discretion and therefore as a case properly determined according to private

law rules. This discussion of 'operational' decisions followed his Honour's conclusion that an estoppel could not affect the exercise of a statutory discretionary power.

[12] The defendant's submission is that "the acts done by the relevant Customs officers in supplying the tariff (classification) on three occasions were operational and not planning or policy in nature.". The argument would seem to be that there was a decision by the officer in each case in responding to the defendant's request for advice as to the appropriate classification of the goods. The defendant points to the distinction between operational decisions and those involving "policy" or "planning", and says that as these decisions were not of the latter kind, they must be of the "operational" kind in relation to which the ordinary private law rules, including the doctrine of estoppel, should apply.

[13] In my view the submission misstates what Gummow J said. An 'operational' decision was distinguished from a planning or policy level of decision because the latter required the exercise of a statutory discretion. That is the difference which Gummow J saw between *Verwayen* and the other case discussed by him at 216, which was *Waverley Transit Pty Ltd v Metropolitan Transit Authority* (Unreported, Supreme Court Victoria, 2 June 1988). In that case, the defendant Authority was held to be estopped from resiling from its promise to exercise a discretionary power in favour of renewing the plaintiff's contract. The difficulty which Gummow J perceived in that result "is that decisions as to awarding and renewing contracts to private bus operators lay at the heart of the defendant's discretionary powers under the *Transport Act* 1983 (Vic)", in that "these were 'planning' or 'policy', rather than merely 'operational' decisions." As I have mentioned Gummow J said of *Verwayen* that the Commonwealth's promise in that case "did not require the exercise of any statutory discretion". The reason why an estoppel could operate in the context of an operational decision is that the due exercise of a statutory discretion would not be affected. But that is not to say that everything done in the administration of an Act, if it is not the exercise of a statutory discretion, must be a decision and an 'operational' decision which could give rise to an estoppel. There is nothing in the passage relied on by the defendant which questions or qualifies the propositions I have stated at [7] above.

[14] In the present case, the alleged estoppel would operate to prevent the Collector from seeking to collect what is payable under the relevant statute. Unlike the case of the operational decision instanced by *Verwayen*, in the present case there would be an inconsistency between the operation of the alleged estoppel and the operation of the relevant legislation. To allow such an estoppel to operate would be to permit Customs officers to extend or exceed their powers and, in an ad hoc fashion, to alter the prescribed effect of the statute. There is no support for this in *Kurtovic*.

[15] Accordingly, it is my view that the defendant has no real prospects of success and that there is no need for a trial. The plaintiff should have summary judgment upon the whole of its claim.

[16] There is a further issue as to interest, which the plaintiff seeks pursuant to s 47 of the *Supreme Court Act* at 9 per cent from the respective dates upon which the duty became payable. The defendant says that the plaintiff has been slow to prosecute this claim and it should not be rewarded by interest at that rate. It also relies upon the alleged representations the subject of its estoppel argument as providing what it

says is a reasonable basis for withholding payment in the context of what it maintains was a fairly arguable defence. I am not satisfied that the plaintiff has been guilty of inordinate delay. The defendant of course has had the benefit of the unpaid monies whilst it denied its liability, not just upon this estoppel ground, but on other grounds which it ultimately abandoned. In my view it is appropriate that the plaintiff have interest under s 47 from the dates of accrual of the respective causes of action. Those dates are set out in a schedule to the amended statement of claim. Interest on those amounts from those dates until the date of this judgment totals $103,974.26.

[17] There should be judgment for the plaintiff against the defendant in the sum of $424,593.39. The defendant must pay the plaintiff's costs of the proceeding to be assessed.