SUPREME COURT OF QUEENSLAND

CITATION:	*Comptroller-General of Customs v Yip; Comptroller-General of Customs v So; Comptroller-General of Customs v Johal* [2016] QCA 339
PARTIES:	**In Appeal No 18 of 2016** **COMPTROLLER-GENERAL OF CUSTOMS** (applicant) **v** **YIP, Lun Shing** (respondent) **In Appeal No 19 of 2016** **COMPTROLLER-GENERAL OF CUSTOMS** (applicant) **v** **SO, Chi Ho** (respondent) **In Appeal No 20 of 2016** **COMPTROLLER-GENERAL OF CUSTOMS** (applicant) **v** **JOHAL, Jaspreet Singh** (respondent)
FILE NO/S:	CA No 18 of 2016 CA No 19 of 2016 CA No 20 of 2016 DC No 1655 of 2015 DC No 1656 of 2015 DC No 1657 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane – [2015] QDC 334
DELIVERED ON:	16 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	14 October 2016
JUDGES:	Margaret McMurdo P and Fraser and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In each of CA Nos 18, 19 and 20 of 2016:** **1. Grant leave to appeal.**

2. **Allow the appeal.**

3. **Set aside the orders made in the District Court on 18 December 2015 and 29 January 2016.**

4. **Dismiss the appeal to the District Court.**

5. **The respondent is to pay the costs of the appellant, Comptroller-General of Customs, of the appeal to this Court and of the appeal to the District Court on the standard basis.**

CATCHWORDS: TAXES AND DUTIES – CUSTOMS AND EXCISE – GENERALLY – INTERPRETATION OF CUSTOMS AND EXCISE LEGISLATION – where the respondents each intentionally failed to declare jewellery and Rolex watches attempting to evade payment of duty after arriving in Brisbane from Hong Kong – where the undeclared jewellery and watches were seized – where the magistrate ordered fines and, in addition, an order for condemnation under s 205D(3) of the *Customs Act* – where, on appeal, the judge of the District Court concluded that the magistrate failed to give adequate reasons – where the District Court judge, in finding legal error, proceeded on the footing that s 205D(3)(c) reposed in the court a discretion and that it fell to him to exercise the discretion afresh and concluded that a condemnation order ought to be made with respect to the undeclared jewellery but not the watches – where the applicant alleges that the judge of the District Court erred in law in his characterisation of s 205D(3) – whether such a characterisation was infected by legal error

Customs Act 1901 (Cth), s 203, s 203A, s 205A, s 205B, s 205C, s 205D, s 205G, s 229, s 239

Burton v Honan (1952) 86 CLR 169; [1952] HCA 30, cited
L Vogel & Son Pty Ltd v Anderson (1968) 120 CLR 157; [1968] HCA 90, cited
R v Weller (1988) 37 A Crim R 349, cited
So & Ors v Comptroller-General of Customs [2015] QDC 334, overruled
Whim Creek Consolidated NL v Colgan (1991) 31 FCR 469; [1991] FCA 467, cited

COUNSEL: E S Wilson QC, with C K Copley, for the applicant
J Hunter QC, with A Braithwaite, for the respondents

SOLICITORS: Australian Government Solicitor for the applicant
Russo Lawyers for the respondents

[1] **MARGARET McMURDO P:** I agree with Gotterson JA's reasons for granting leave to appeal, allowing the appeal, setting aside the orders below and, instead, dismissing the appeal to the District Court.

[2] This case concerns the construction of s 205D(3)(c)(ii) *Customs Act* 1901 (Cth)[1] and whether the District Court judge erred in setting aside the Magistrate's order for condemnation of the goods. It is uncontentious that s 205D(3)(a) and (b) were met. The phrase "in all the circumstances of the case" in s 205D(3)(c)(ii) must be construed in light of the long-established meaning of forfeiture and condemnation under the law relating to customs, as discussed by Gotterson JA at [48] – [52]. The phrase ordinarily has a broad meaning but in this legislative context its meaning is very narrow. Gotterson JA has given one example of a relevant circumstance under s 205D(3)(c)(ii) at [54]. Another example is where an innocent third party has an honest claim to the seized goods, for example, the importer has stolen them from the third party. What is clear is that the District Court judge erred in taking into account as relevant "circumstances of the case" under s 205D(3)(c)(ii) the respondents' intention not to sell the goods but merely to show them off; that no duty was payable on the Rolex watches; the potential effect of forfeiture on the respondents' employment; the disparity between the duty payable and the value of the goods; and the penalties imposed.

[3] This is a harsh result for the respondents. But that is and has long been the effect of customs laws which are deliberately drafted to deter those who would evade the duties and taxes upon which the Commonwealth relies to fund the running of the nation.

[4] I agree with the orders proposed by Gotterson JA.

[5] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Gotterson JA. I agree with those reasons and with the orders proposed by his Honour.

[6] **GOTTERSON JA**: Each of Lun Shing Yip, Chi Ho So and Jespreet Singh Johal is a respondent to separate appeals which the Comptroller-General of Customs desires to institute. The appeals are against orders made by a judge of the District Court at Brisbane on 18 December 2015 in three separate proceedings before him. Those proceedings were by way of appeal pursuant to s 222 of the *Justices Act* 1886 (Qld) from orders made by a magistrate at Brisbane on 22 April 2015 in separate proceedings brought by the Comptroller-General against the current respondents.

Circumstances of the respondents' offending

[7] The respondents arrived at Brisbane on 7 April 2015 on a flight from Hong Kong. They declared certain jewellery on a Carnet[2] which caters for the temporary importation of goods, without duties or taxes, pending their re-exportation.[3] However, the respondents concealed, and failed to declare, some 944 jewellery items[4] and four Rolex watches.

[8] The respondents made certain false written statements on incoming passenger cards. These statements were false by omission to refer to the undeclared jewellery and Rolex watches.[5] They also made certain false oral statements to Customs officers. They told officers falsely that there was no jewellery in their bags that was not listed on the Carnet; that empty watch boxes they were bringing with them were for display; and that they were not bringing in any watches.[6]

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1 Set out in Gotterson JA's reasons at [13].

2 AB95-107. Some 513 jewellery items were listed on the Carnet.

3 Statement of Facts paras 1-5; AB74.

4 Listed at AB108-128.

5 Statement of Facts para 3. The respondents answered question 3 on their incoming passenger cards "No". This question asked if they were bringing into Australia goods obtained overseas with a combined total price of more than AUD900.

6 *Ibid* paras 11-13; AB75. On examination, one Rolex watch was found in a computer bag and then Mr So produced three Rolex watches from a jacket pocket: paras 14, 15.

[9] The undeclared jewellery and Rolex watches, once identified, were seized by Customs officers on 20 April 2015 under a seizure warrant as reasonably suspected of being forfeited goods.[7] The value of the jewellery items was $134,848.93 and that of the Rolex watches, $59,270. The duty payable on the jewellery was $6,742.45 whereas no duty was payable on the Rolex watches.

The Magistrates Court proceedings and orders

[10] On 21 April 2015, each respondent pleaded guilty to the following summarily-charged offences:

- on 7 April 2015 intentionally making a written statement to an officer of Customs reckless as to the fact that the statement was false in a material particular, in contravention of s 234(1)(d)(i) of the *Customs Act* 1901 (Cth);
- on 7 April 2015 intentionally making an oral statement to an officer of Customs reckless as to the fact that the statement was false in a material particular, in contravention of s 234(1)(d)(i) of the *Customs Act*; and
- on 7 April 2015 attempting to evade payment of the duty payable on 944 articles of jewellery and parts thereof of precious metal or of metal clad with precious metal, in contravention of s 234(1)(a) of the *Customs Act*.

[11] Prior to the commencement of the hearing, the respondents had been served that day with seizure notices for the undeclared jewellery items and watches. They immediately made claims in writing for return of those goods from Customs officers.[8]

[12] A penalty hearing took place after the pleas of guilty were taken. On the following day, the magistrate made orders that:

(i) each respondent be fined $13,484.90 for the attempted evasion offence – this amount was twice the duty payable on the undeclared jewellery items and the minimum fine that could have been imposed;

(ii) the respondent, Mr So, be fined $1,250 in respect of each false statement offence and that the other respondents each be fined $750 in respect of each of those offences – the difference was to reflect "the difference in criminal responsibility and culpability and the slightly different roles";[9] and

(iii) each respondent pay costs in the amount of $737.50.

[13] Section 205D(3) of the *Customs Act* provides:

> "(3) If:
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> (a) goods seized otherwise than as special forfeited goods have not been dealt with under section 206; and
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> (b) proceedings of the kind referred to in paragraph (2)(b) or (c) are commenced in respect of an offence involving the goods; and

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7 The warrant was issued under s 203 of the *Customs Act*.
8 AB29 ll27-30.
9 AB63 ll18-19.

(c) on completion of the proceedings, the court:

(i) finds that the offence is proved; and

(ii) is satisfied, in all the circumstances of the case, that it is appropriate that an order be made for condemnation of the goods as forfeited to the Crown;

the court must make an order to that effect."

(It is common ground that the undeclared jewellery items and watches were not seized as special forfeited goods and that they were not dealt with under s 206. It is also common ground that the proceedings in which the respondents pleaded guilty were proceedings of the kind referred to in s 205D(2)(b) and that they were in respect of offences involving the undeclared jewellery items and watches.)

[14] At the hearing, the magistrate had been asked by the Comptroller-General to make an order under s 205D(3) of the *Customs Act* for condemnation of the undeclared jewellery items and Rolex watches as forfeited to the Crown, in addition to the fines. A condemnation order to that effect was made. The magistrate gave the following reasons for making it:

> "As to the condemnation order, I've considered the provisions in section 239 and section 205D, subsection (3) of the Act. I've also considered the other provisions in the Act about concealed dutiable goods. I have considered the facts of the matters. It seems to me that is what I must squarely consider in determining whether to make a condemnation order and not, as was submitted on your behalf, to consider the penalty otherwise imposed.
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> I note, in any event, the obligation to pay customs duty is upon the owner of the goods, which actually applies to you men, having regard to the provision in section 4. Having regard to the fact that you were conversant with your obligations to declare and the fact that some jewellery was declared but this jewellery and watches were not, you lied and denied responsibility such that a thorough search had to be undertaken and the amount of duty you attempted to evade was significant, I do consider it appropriate and I will make the order sought to be made."[10]

The appeals to the District Court and orders made

[15] On 23 April 2015, each of the respondents appealed to the District Court against the condemnation order made against him. The judge who heard the appeals concluded that the magistrate had failed to give adequate reasons for making the orders.[11] According to his Honour, the magistrate had "failed to refer to the following important circumstances relied on by the appellants' solicitor:

(a) the fact that the intention was not to sell the goods but merely to show them off;

(b) the fact that no duty was payable on the watches;

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10 AB65 ll14-27.

11 Reasons [71]; AB278.

(c) the potential effect of forfeiture on their employment;

(d) [t]he disparity between the duty payable and the value of the goods."[12]

[16] Furthermore, his Honour was of the view that the magistrate ought to have specifically taken into account the penalties imposed by way of fines in considering whether to make the condemnation orders.[13] This he had not done.

[17] His Honour concluded that the orders below were infected by legal error. He proceeded on the footing that s 205D(3)(c) reposed in the court a discretion and that it fell to him to exercise the discretion afresh.[14]

[18] Significantly, his Honour considered that the expression "in all the circumstances of the case" in the section envisaged that the range of circumstances that might be considered in exercising this discretion was a wide one.[15] The penalty imposed was one of them.[16] In addition to the matters he listed as not having been considered by the magistrate, such circumstances would, he thought, include public interest based considerations such as the notorious difficulty in detecting Customs offences, the "porous nature" of Australia's borders, general deterrence and the benefit to the administration of justice in cooperation and pleas of guilty.[17]

[19] His Honour concluded that a condemnation order ought to be made in the case of the jewellery but not in the case of the watches. He reasoned to that conclusion in the following way:

"[123] In conclusion my determination is to allow for condemnation of the jewellery but not the watches. In reaching this conclusion I have taken into account the matters mentioned above.

[124] With respect of the jewellery, in particular, it seems to me that the factors in favour of condemnation are that it was of a high value, the amount of duty attempted to be evaded was significant, there was deliberate dishonesty on the part of each of the appellants, it is important that Australia protect its Customs interests, the offences are very difficult to detect and the appellants well knew they were evading duty by engaging in this deception.

[125] On the other hand, it is my determination that the watches not be forfeited. Firstly, even though the watches were referred to in the particulars of charge 1, they were not referred to in charge one obviously enough because no duty was payable. It seems to me that a significant factor to be taken into account was that no duty was payable. Secondly, I also take into account the stated intention in bring the watches into the country.[18]

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12 *Ibid*.
13 Reasons [83], [85]; AB280.
14 *Ibid*.
15 Reasons [114]; AB290; also at [83]; AB280.
16 Reasons [115]; AB290; also at [83]; AB280.
17 Reasons [116], [118]-[122]; AB290.
18 That is the stated intention which was to show them to solicit orders: Reasons [21]; AB271.

> [126] As I noted earlier even though the penalty was the minimum on charge 1 it was still a significant sum – two times the duty payable on the jewellery and six times when one considers all appellants.
>
> [127] In those circumstances, in the exercise of the Court's discretion I have determined that no condemnation order should be made regarding the watches."[19]

[20] Orders were made on 18 December 2015 in each appeal allowing the appeal, varying the condemnation order by removing the four Rolex watches, but otherwise confirming the condemnation order. Later, on 29 January 2016, orders were made that the Comptroller-General pay costs of $3,000 in each appeal within 30 days. On the same day, his Honour ordered that the costs order be stayed pending the determination of the applications to which I now turn.[20]

The applications for leave to appeal to this Court

[21] On 18 January 2016, the Comptroller-General filed applications for leave to appeal to this Court pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) against the orders made by the District Court judge on 18 December 2015.[21] These applications are pursued. On 19 January 2016, the respondents filed their own applications for leave to appeal against the same orders.[22] Those applications were abandoned at the hearing of the Comptroller-General's applications on 14 October 2016.

[22] Before setting out the grounds on which each application is based, I propose to refer to certain other provisions of the *Customs Act*. I do so in order to give legislative context for consideration of the issues of interpretation of s 205D(3) to which those grounds give rise.

Legislative context

[23] The term "forfeited goods" is defined for the purposes of Part XII Division 1 of the *Customs Act* (ss 183UA-218A inclusive) to mean goods described as forfeited to the Crown under a number of sections of that Act and of the *Commerce (Trade Descriptions) Act* 1905 (Cth). One of the sections mentioned in the definition is s 229 in Part XIII of the *Customs Act*.

[24] Section 229(1) of the *Customs Act* provides that "the following goods shall be forfeited to the Crown". There follows a lengthy list of differently described categories of goods. It is unnecessary to set them out.[23] It is uncontentious here that the undeclared jewellery items and watches fell within at least one of the categories mentioned and were forfeited to the Crown by operation of s 229(1).[24]

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19 AB291.

20 AB360.

21 AB361-362; 363-364; 365-366.

22 AB367-368; 369-370; 371-372. These applications sought to have the condemnation orders set aside.

23 The list includes unlawfully imported goods (paragraph (a)) and dutiable goods concealed in any manner (paragraph (o)). The undeclared jewellery items and watches were unlawfully imported goods by virtue of the false statements made with respect to their importation. Dutiable goods include all goods in respect of which any duty of Customs is payable: s 4. As goods imported into Australia, duties of Customs were imposed on these jewellery items and watches at the applicable prescribed rates: *Customs Tariff Act* 1995 (Cth) ("Tariff Act") ss 15, 16. The prescribed rate of duty for the jewellery was five per cent of value and for the watches it was "Free": Tariff Act Schedule 3; s 10(1). The undeclared jewellery items were clearly dutiable goods. Arguably, the undeclared watches were not.

24 Respondent's Outline of Submissions, para 5.

[25] Section 203(1) of the *Customs Act*[25] authorises a judicial officer to issue a warrant to seize goods on particular premises if satisfied by information on oath, firstly, that an authorised person has reasonable grounds for suspecting that the goods are forfeited goods and are or will, within the next 72 hours, be on the premises and, secondly, that an authorised person has demonstrated the necessity, in all the circumstances, for seizure of the goods. Once a warrant is issued, s 203A authorises seizure of the goods concerned. There is no issue in this case that the undeclared jewellery items and watches were lawfully seized under a validly issued warrant.

[26] Part XII Division 1 Subdivision G of the *Customs* Act (ss 203SA-s 209A) is concerned with dealing with goods seized as forfeited goods. Section 205(1) therein requires service on the owner of goods of a seizure notice setting out the matters listed in s 205A. The seizure notice must be served within seven days after the seizure. Section 205B of the *Customs Act* permits a person whose goods are seized under a seizure warrant to make a claim in writing for the return of the goods. As noted, a seizure notice was duly served and a claim for return was duly made in this case.

[27] Section 205C thereof relates to the treatment of goods seized if no claim for return is made. It has no application for the present case. Section 205D, however, is concerned with the circumstance where a claim for return is made in respect of goods seized.

[28] Section 205D(1) states the circumstances that must exist for the section to apply. Relevantly for present purposes, they are that goods are seized under a seizure warrant, a claim for return may be made under s 205B in respect of them; and, within the 30 day period immediately following service of the seizure notice, a claim for return of the goods is made. These circumstances were satisfied in this case.

[29] Section 205D(2) relevantly provides that the authorised person who seized the goods must return them unless, not later than 120 days after the claim for their return is made, proceedings in respect of an offence involving the goods have been commenced and, on completion of the proceedings, a court has made an order for condemnation of the goods as forfeited to the Crown.[26] Thus, a condemnation order made at the completion of the proceedings in respect of the undeclared jewellery items and watches would relieve the authorised person from a statutory obligation to return them. Such an order was made by the magistrate under s 205D(3), the terms of which are set out above.

[30] Sections 205D(4) and (5) deal with goods seized as special forfeited goods. Such goods include narcotics and prohibited imports.[27] It is common ground that the undeclared jewellery items and watches were not special forfeited goods. Whilst these provisions therefore have no application to the seized goods here, it is noteworthy that they are structured differently from s 205D(3) in certain respects. Under these provisions, the court must order condemnation if offence proceedings involving goods seized as special forfeited goods are commenced and if, on a completion of the proceedings, the court is satisfied that the goods are special forfeited goods. The order must be made whether or not the court finds the offence approved.

[31] Section 205G of the *Customs Act* legislates for the effect of forfeiture. It does so in the following terms:

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25 In Part XII Division 1 Subdivision D thereof.

26 Paragraph (b).

27 See definition: s 183UA.

> "Where goods are, or are taken to be, condemned as forfeited to the Crown, the title to the goods immediately vests in the Commonwealth to the exclusion of all other interests in the goods, and the title cannot be called into question."

The vesting of title to the exclusion of all other interests ensures that the Commonwealth may subsequently dispose of the goods by conveying a title to them which is free of such other interests.

[32] It remains to mention s 239 in Part XIII of the *Customs Act*. It provides that all penalties shall be in addition to any forfeiture.

The grounds of the application

[33] The grounds on which the application is based are the same in each case. They are:

> "a) The learned judge erred in law, when considering s 205D(3) of the *Customs Act 1901*, in deciding that 'all the circumstances of the case' was to be characterised widely.
>
> b) The learned judge erred in law, when considering s 205D(3) of the *Customs Act 1901*, in failing to decide that 'all the circumstances of the case' was to be characterised narrowly, including in accordance with relevant authority.
>
> c) The learned judge erred in law, when considering s 205D(3) of the *Customs Act 1901*, in deciding that 'all the circumstances of the case' could include, *inter alia*, the imposition of penalty."[28]

[34] It is submitted in each application that leave to appeal to this Court ought to be granted because the appeal involves important questions of law and that leave is necessary to correct a substantial injustice to the applicant Comptroller-General.

The applicant's submissions

[35] The grounds stated in the applications contend that the District Court judge erred in two principal respects. Firstly, he erred as to the scope of the expression "in all the circumstances of the case" in s 205D(3)(c)(ii).[29] Secondly, and relatedly, he erred in concluding that the imposition of a penalty by way of the monetary fines was a circumstance for the purposes of the expression.[30]

[36] In written and oral submissions, counsel for the applicant elaborated upon the first error by challenging his Honour's approach of treating s 205D(3)(c) as a provision which confers a discretion. The applicant submits that it does not. The provision requires the court to decide whether it is satisfied that it is appropriate in all the circumstances that a condemnation order be made for the seized goods. If the court is so satisfied, then the provision mandates that it must make the order. No discretionary judgment is involved in deciding the issue on which the court is to be satisfied, nor in making the condemnation order if it is satisfied that such an order is appropriate.

[37] The applicant submitted that the scope of circumstances relevant to satisfaction is a narrow one. They are circumstances relevant to whether the seized goods in question

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28 AB362, 364, 366.
29 Grounds (a) and (b).
30 Ground (c).

have been forfeited to the Crown such that the title to the goods which vested in the Crown upon forfeiture is one that is apt to be vested against all other interests by a judgment of the court *in rem* by way of condemnation.

[38] It was urged for the applicant that when used in s 205D and associated provisions, the words forfeiture and condemnation have the meanings which had been traditionally attributed to them in the law of Customs and that, so interpreted, those words in context implied a narrow scope for the expression in question. There is no indication, it is submitted, in the terms of s 205D, in the legislation which enacted it,[31] or in the extrinsic material, of an intention that those meanings were to be displaced.

[39] So construed, a penalty imposed for the offence is not a relevant circumstance. His Honour's reasoning that because forfeiture "may be considered on the question of penalty, there is no reason why the reverse cannot apply, ie the penalty may be considered on the forfeiture application"[32] is flawed. Moreover, to have regard to the circumstances of the offending relevant to penalty in applying s 205D(3) would have the effect of coalescing condemnation and penalty in disregard for the express provision in s 239 that penalties are in addition to any forfeiture.

Respondents' submissions

[40] The respondents submit that s 205D(3)(c)(ii) clearly confers an exercisable discretion on the court. The combination of the phrases "in all the circumstances of the case" and "it is appropriate" as to whether condemnation should be made can only mean that the court has a discretion to consider any relevant fact of the case in determining whether title to seized goods ought to be "transferred" to the Crown.[33]

[41] This submission contends that title to forfeited goods "does not vest in the Commonwealth" until an order for condemnation is made under s 205D.[34]

[42] The respondents' reject the notion that traditional concepts of forfeiture and condemnation influence the meaning and application of s 205D(3). This provision was enacted in these terms in 1995 concurrently with the repeal of s 262 of the *Customs Act* which had provided that where the committal of any offence causes a forfeiture of any goods, the conviction of any person for such offence shall have effect as a condemnation of the goods in respect of which the offence is committed.

[43] The respondents submit that "no amount of statutory construction gymnastics or examination of the history of seized goods being condemned to the Crown can avoid what is… a clear legislative intent to vest discretion in the court".[35]

[44] The matters taken into account by his Honour in paragraphs 113 to 122 of the reasons for judgment were properly taken into account in determining whether he was satisfied that a condemnation order was appropriate. Specifically, it was open to him to have regard to penalty. To preclude reliance upon penalty would have required enactment in specific terms as, for example, in s 320 of the *Proceeds of Crime Act* 2002 (Cth).

Discussion

[45] Substantial amendments were made to Part XII Division 1 of the *Customs Act* in 1995.[36] They included the repeal of certain provisions and the enactment of Division 1

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31 *Customs, Excise and Bounty Legislation Amendment Act* 1995 (Cth), Schedule 4.
32 Reasons [83]: AB280.
33 Respondents' Outline, paragraph 12.
34 *Ibid*, paragraph 6.
35 *Ibid*, paragraph 10.
36 *Customs, Excise and Bounty Legislation Amendment Act* 1995 (Cth), Schedule 4.

provisions, particularly those in subdivisions beginning D and G thereof to which I have referred.[37] Some of these provisions have themselves been amended since enactment.

[46] The amendments made in 1995 were enacted in legislation which had, since 1901, employed the concepts of forfeiture and condemnation. The amendments themselves used those concepts and, significantly, they did not attribute to them a different meaning or connotation that departed from the meanings historically attributed to them. To the contrary, the terms in which s 205G was enacted reflect the historical meaning of condemnation.[38]

[47] In light of these legislative features, I consider it appropriate to have regard to the established meanings of forfeiture and condemnation in order to interpret s 205D(3). I now turn to those meanings.

[48] **The meanings of "forfeiture" and "condemnation"**: Writing in 1904, the learned author, Dr H N P Wollaston said:

> "The forfeiture is the statutory transfer or right to the goods at the time the offence is committed. The title of the Crown to the goods forfeited is not consummated until after judicial conviction for a breach of the Act, but the right to them relates backwards to the time the offence was committed."[39]

[49] Later, in 1952, Dixon CJ (with whom McTiernan, Webb and Kitto JJ agreed) explained the two concepts in *Burton v Honan.*[40] His Honour noted[41] that s 229 provided that the goods to which it referred, shall be "forfeited" to the Crown and that s 262 was in the terms to which I have referred. He then proceeded to explain forfeiture in the following way:

> "On authority it is clear that under the provisions of s 229, provided the facts exist which justify a forfeiture, **the title to the goods vests in the Crown when the forfeiture takes place in consequence of the occurrence of the facts.** No further proceedings are requisite to make title, although of course **further proceedings may be necessary either to vindicate the title of the Crown or to exclude the claim of some person asserting a right to the goods**."[42] (emphasis supplied)

[50] I infer that the Crown of which Dixon CJ, and before him, Dr Wollaston, spoke, is the Crown in the right of the Commonwealth. Consistently with that, s 205G speaks explicitly of title to forfeited goods vesting in the Commonwealth.

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37 The Division 1 amendments incorporated a recommendation of the Conroy Report published in December 1993 that, except in the case of prohibited goods, a Customs officer need obtain the sanction of a magistrate or judge in order to seize goods believed to be forfeited goods: Recommendation 6.26. The recommendation is reflected in the warrant requirement for seizure for goods other than special forfeited goods: ss 203B, 203C.

38 *Replacement Explanatory Memorandum* for the *Customs, Excise and Bounty Legislation Amendment Bill* 1995 explained that the new s 205G "merely states the case law on the effect of the condemnation of forfeited goods": para 296.

39 *Customs Law and Regulations* at p132.

40 (1952) 86 CLR 169.

41 At 175-176. Section 229 continues so to provide.

42 At 176.

[51] It is evident that Dixon CJ regarded condemnation as a process by which the Crown's title to goods which had vested on forfeiture, was vindicated by court order. His Honour observed that s 262 introduced the novel concept that a conviction should have effect as a condemnation, explaining that its purpose was to make the conviction of the offender decisive on all matters of fact upon which the forfeiture of the goods depended.[43]

[52] The concept of forfeiture as following directly from the existence of facts falling within s 229 of the *Customs Act* has been frequently endorsed judicially.[44] A notable example is in the decision of the Full Court of the Federal Court of Australia in *Whim Creek Consolidated NL v Colgan*.[45] In that case, O'Loughlin J (with whom Spender and French JJ agreed) distinguished the act of seizure from forfeiture[46] and went on to state that "the term 'condemnation' refers not to a proceeding which has the effect of vesting title in the Crown, but to a proceeding which determines that upon some cause previously arising title had vested in the Crown".[47] It is noteworthy that the two concepts of immediate forfeiture and subsequent condemnation were historically recognised in the United Kingdom.[48]

[53] **The interpretation of s 205D(3)(c)**: When these meanings are applied to s 205D(3)(c), there is, in my view, force in the applicant's submission that the matters about which the court is to be satisfied concern the perfection as a title *in rem* to goods to which title had already vested in the Crown upon forfeiture. The circumstances of the case to which the inquiry as to satisfaction is referenced, are all of those that may have relevance to whether the vested title ought to be perfected by a condemnation order.

[54] On this approach to s 205D(3)(c), the inquiry undertaken by the court would be a relatively narrow one. It would be an inquiry as to whether the court is satisfied that the goods that have been seized are all goods that had been forfeited and that it is therefore appropriate to make a condemnation order in respect of all of them. An instance of where the court would not be so satisfied can be given by the following example. If offence proceedings are commenced involving a large number of goods seized as goods forfeited under s 229 and if, in those proceedings, evidence establishes that several of the items were not the subject of forfeiture, then notwithstanding that the offence is proved in respect of the remaining items, the court could not be satisfied that it was appropriate to make a condemnation order in respect of those several seized items, title to them not having vested in the Crown upon a forfeiture. Those items would then have to be returned to the claimant pursuant to s 205D(2).

[55] By contrast, the relevant inquiry on this approach is not one as to whether title ought, as a matter of discretion, vest, or continue to vest, in the Crown in forfeited goods. Indeed, the absence of any provision in s 205D or elsewhere in the Act expressly empowering the court to deprive the Crown of title that vested on forfeiture is apt to suggest that such an inquiry was not envisaged by the Parliament.

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43 At 179. Section 262 was repealed by the 1995 amendments. The condemnation upon conviction concept in it was replaced with provisions, including those in s 205D, for condemnation by order of the court.

44 See, for example *Frost v Collector of Customs* (1985) 9 FCR 174 at 184 per Wilcox J; *Pearce v Button* (1986) 8 FCR 408 at 410 per Fox J; *Sandery v Commissioner of Police* (1986) 65 ALR 181 at 184 per Jackson J.

45 (1991) 31 FCR 469 at 477.

46 *Ibid*.

47 At 477-478, citing *Bert Needham Automotive Co Pty Ltd v Commissioner of Taxation (Cth)* (1976) 26 FLR 108 at 114 per Rath J.

48 *De Keyser v British Railway Traffic and Electric Co Ltd* [1936] 1 KB 224.

[56] The question that arises in this appeal is whether the interpretation of s 205D(3)(c) is to be controlled by the historically established meanings given to the concepts of forfeiture and condemnation. I would accept that the expression "in all the circumstances of the case" in paragraph (c), taken on its own, is apt to suggest some wide-ranging enquiry. Building on that, the reader might infer that some such enquiry is to be undertaken to underpin the exercise of a broad discretion as to whether the Crown should have, or continue to have, title to the goods that have been seized.

[57] Such a reading of the provision is the one that the respondents endorse. It is, however, a reading that pays little, if any, regard for the established meanings to which I have referred, notwithstanding the absence of any indication of legislative intent to depart from those meanings. Moreover, insofar as the respondents' submission contends that title to forfeited goods does not vest in the Crown until a condemnation order is made, it is without authority and unsustainable in light of the Australian authorities to which I have referred.

[58] To my mind, there are additional reasons why the provision ought not be interpreted as reposing such a discretion in the court. Firstly, paragraph (c) does not employ the language of discretion. The court must make the condemnation order if it is satisfied as to the specified matter.

[59] Secondly, the specified matter is that, in all the circumstances of the case, it is appropriate for a condemnation order to be made in respect of the seized goods. The word "appropriate" is not a legal term with an ascertained meaning in a legal context. In ordinary parlance, it means "suitable or fitting for a particular purpose".[49] It is not a synonym for words such as "just", "fair" or even "reasonable", each of which is apt to convey a sense of discretionary judgment in which relevant facts or circumstances are to be balanced in order to arrive at a just, fair or reasonable outcome.

[60] Thirdly, paragraph (c) gives no guidance as to what would, or would not, render it fair, just or reasonable that, in effect, the Crown's title to forfeited goods be affirmed or that the Crown be deprived of the title to them. In the absence of guidance on such a significant topic, it is, I think, unlikely that Parliament intended to confer a discretion of the kind suggested by the respondents.

[61] For these reasons, I would reject the interpretation of s 205D(3)(c) for which the respondents contend.

[62] I would mention that I have not overlooked the following statement in the *Replacement Explanatory Memorandum* for the *Customs Excise and Bounty Legislation Amendment Bill* 1995:

> "283. If proceedings for an offence are brought under new paragraphs 2(b) or (c) and the offence proved, a court may order that the goods are condemned as forfeited to the Crown if the court is satisfied that to do so is appropriate (new subsection (3) refers)."

The use of the word "may" here is apt to confuse. Firstly, it misrepresents the clause in the Bill that became s 205D(3). Under the enacted provision, the court must order condemnation if it is satisfied that it is appropriate to do so. Secondly, to the extent that it might be ventured that the word is meant to imply an intended discretion, its use for that purpose is problematic. It is just as likely that the word was meant to

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[49] *Macquarie Dictionary.*

indicate that a condemnation order is an outcome that is open to occur, and will occur if the requisite satisfaction is reached.

[63] I would also note that the absence of a provision in terms similar to paragraph (c) in s 205D(3) from ss 205D(4) and (5) is explicable by the dual circumstances that, firstly, in neither is the requirement to order condemnation dependent upon proof of an offence and, secondly, in each, the requirement is dependent upon the court being satisfied that the goods that were seized are special forfeited goods. In my view, this feature of 205D is not an indicator that paragraph (c) was intended to enact a broad discretion.

[64] **Penalty**: On the interpretation of s 205D(3)(c) which I favour, neither the fact that a penalty is imposed for the offence proved nor the amount of such a penalty would be a circumstance relevant to the matter about which the court is to be satisfied.

[65] I would add that even if a different interpretation which attributed some measure of discretion to s 205D(3)(c) were adopted, I would not regard either of those factors as a relevant circumstance. I am influenced to that view by several reasons.

[66] Firstly, to have regard to either factor would, in my view, at least erode, if not contradict, the statutory injunction in s 239 of the Act that all penalties shall be in addition to forfeiture. This provision operates upon a premise that there will be a forfeiture of goods when a statutory fact or circumstance for forfeiture has occurred. Penalties, which are imposed at a later time, are additional. The forfeiture is not abrogated or moderated because there is a subsequent imposition of a penalty or because of its amount.

[67] Secondly, to have regard to those factors would undermine the policy considerations which inform the sanctioning of Customs offending by both forfeiture and penalty. These considerations were explained by Kitto J in the frequently cited passage from his judgment in *L Vogel & Son Pty Ltd v Anderson*.[50] His Honour observed:

> "…but the offences are in a field in which punishments for deliberate offences must be severe. The Customs laws represent the judgment of Parliament upon an important aspect of the economic organization of the community, and the object of the penal provisions is to make that judgment as effective as possible. It is important to remember that Customs officers have of practical necessity to rely extensively upon the information supplied to them by importers, for the flow of commerce could not be maintained if every importation had to be fully investigated. Moreover, detection of frauds is not always easy. No doubt ordinary conceptions of honesty and of civic responsibility suffice to ensure a great deal of fair dealing with the Customs, but for some people little seems to matter but fear of the consequences of discovery. The *Customs Act* makes those consequences potentially drastic. It is for the courts to make them, in suitable cases, drastic in fact, for otherwise traders who are not saved by qualms of conscience from willingness to defraud their fellow citizens may weigh the profits they hope for against the penalties they have cause to fear and find the gamble worthwhile."

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50 [1968] HCA 90; (1968) 120 CLR 157 at 164.

[68] Thirdly, and related to the first reason, that the amount of penalty may be fixed by a court having regard to forfeiture, as was acknowledged by the Full Court of the Supreme Court of South Australia in *R v Weller*,[51] does not imply a reciprocal relationship between penalty and forfeiture such that forfeiture or subsequent condemnation are to be influenced by the imposition of a penalty or its amount. Certainly, the decision in *Weller* is not to that effect.

[69] For all these reasons, I would reject the conclusion of the judge below that penalty is relevant to the matter about which the court is to be satisfied under s 205D(3)(c).

Disposition

[70] The applicant has established error in that conclusion and in the view taken by his Honour that, properly construed, s 205D(3)(c) reposes a broad discretion in the court. These are errors of law. Given that the interpretation of a provision in Commonwealth legislation concerning the jurisdiction of courts is involved, the errors concern matters of general importance. Leave to appeal ought therefore be granted.

[71] The appeal should be allowed and the orders made in the District Court, including the costs order, set aside. The effect of that would be to leave extant the condemnation order made in the Magistrates Court. Whilst the magistrate's consideration of s 205D(3) focused upon whether penalty was to be considered, the factual matters before him did not disclose any circumstance or circumstances which, upon a proper application of s 205D(3)(c), ought to have caused him not to have been satisfied that it was appropriate that an order for condemnation be made in respect of all of the seized goods, including the four Rolex watches. In these circumstances, the condemnation order made by the magistrate ought to be affirmed.

Orders

[72] I would propose the following orders in each appeal:

1. Grant leave to appeal.
2. Allow the appeal.
3. Set aside the orders made in the District Court on 18 December 2015 and 29 January 2016.
4. Dismiss the appeal to the District Court.
5. The respondent is to pay the costs of the appellant, Comptroller-General of Customs, of the appeal to this Court and of the appeal to the District Court on the standard basis.

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[51] (1988) 37 A Crim R 349.