Michaelmas Term

[2016] UKPC 27

Privy Council Appeal No 0043 of 2015

JUDGMENT

Commissioner of Customs (Appellant) v Delta Petroleum (Caribbean) Limited (Respondent) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Kerr

Lord Wilson

Lord Reed

Lord Carnwath

Lord Hughes

JUDGMENT GIVEN ON

17 October 2016

Heard on 12 July 2016

Appellant	Respondent
James Guthrie QC	Sir Fenton Ramsahoye SC
	Naina Patel
(Instructed by Simons Muirhead and Burton)	(Instructed by Bankside Commercial Ltd)

LORD CARNWATH:

1.
This appeal from the Eastern Caribbean Court of Appeal (British Virgin Islands) concerns the lawfulness of the seizure by the appellant Commissioner on 20 September 2012 of Delta's fuel storage tank No 7 at Pockwood Pond, Tortola, together with its contents (some 248,000 US gallons). The seizure was in reliance on powers given by the Customs Management and Duties Act No 6 of 2010 ("the Customs Act"). The issue in short is whether the fuel was liable to forfeiture under that legislation, properly interpreted. The judge (Ellis J) upheld the forfeiture, but her decision was reversed by the Court of Appeal. The Commissioner appeals. (For convenience, I shall refer to the Commissioner and his department as "Customs".)

Facts

2.
Delta has imported fuel into the British Virgin Islands since at least 1992, including fuel for use by the British Virgin Islands Electricity Corporation (“BVIEC”). The importation of fuel generally attracts customs duty, but there are exceptions. Relevant in this case is section 20 of the British Virgin Islands Electricity Ordinance, which allows BVIEC to import free of duty petroleum products used in the generation of electricity.

3.
Procedures and conditions for the importation of goods had been set out in a letter from Customs to Delta, dated 21 January 1992. They included requirements for the advance notification of Customs, and for access by their officers for inspection. The letter indicated that outstanding duty payments could be cleared on a monthly basis, prior to the end of the calendar month in which importations took place. This was said to be a “concessionary arrangement”, given that the law required duty to be paid “at the time of importation”. This letter appears to have been concerned with importation of petroleum products generally, and made no specific reference to BVIEC.

4.
Tank 7 was added to Delta’s tank farm in 2008. A letter from Customs dated 25 August 2008 noted Delta’s request that it be “added to the BVIEC storage tank farm for an additional 250,000 gallons”. The letter stated that permission would be given “to utilize Tank 7 (under special requirements established and approved by HM Customs) for additional storage and delivery only to the BVIEC”. This was said to be “a privilege” which could be lost in the event of any contravention of “the Laws and guidelines of Customs”.

5.
Mr Sylvester, regional manager for Delta, gave further evidence (second affidavit para 4) about the use of Tank 7, which though not in terms mentioned by the judge, does not seem to have been disputed. He described it as “a bonded tank” containing fuel specifically for BVIEC. According to him it was “in the custody and control of HMS Customs who had the only keys for the locks which allowed fuel to be discharged into the tank as well as released to the BVIEC”.

6.
This account is consistent with the terms of a later agreement between Delta and BVIEC dated 3 August 2012, by which BVIEC agreed to purchase exclusively from Delta its requirements of specified fuel products, for a “supply period” from 1 September 2012 to 31 August 2014. Under clause 3(5) Delta was required to maintain a bonded tank filled with a minimum 100,000 US gallons of No 2 diesel at Pockwood Pool, Tortola, and -

“HM Customs in the British Virgin Islands shall retain custody of the keys required to open all valves to this tank and the fuel will be reserved solely for the use by [BVIEC].”

7.
On 23 July 2012 Customs wrote to Delta, following a meeting at which there was discussion of “a new procedure … which (would) eliminate the need for (Delta) to submit requests for refund of duty on fuel sold duty-free”. The letter made no specific reference to BVIEC. The new procedure described in the letter was subject to a number of “conditions”. They included requirements that Customs should be notified of the arrival of any vessel into the territory for Delta at least 72 hours in advance; notification should be given, and permission sought for the discharge of cargo, before commencement

of any unloading operation; Customs should attend the discharge process; imported cargo was permitted to be released “on a bond where necessary, provided that such bond is approved by Customs and remains current”; and in the case of duty free entries, “an authorised person from the eligible entity” must stamp and certify that the cargo was for the sole use of the entity. The letter concluded by reminding Delta that the Customs Act imposed substantial penalties for breach of certain conditions, including possible forfeiture. Reference was made to the possibility of penalties for breach (including forfeiture) under sections 22(1), 24 and 29, but not section 30.

8.
I turn to the judge’s account of the events leading up to the actual seizure:

“On 29 August 2012, the vessel, M/T Charmer arrived in the Territory for the purpose of delivering approximately 117,000 gallons of fuel to (Delta). (Delta) notified (Customs) on 28 August 2012 of the vessels’ arrival and certain arrival documentation was submitted to (Customs) by Mr Damian Lettsome, on 29 August.

An attempt was made to discharge the fuel from the tanker into the bonded tank on 29 August 2012 but this had to be cancelled due to technical difficulties. On 5 September 2012 Mr Lettsome informed (Customs) that (Delta) would be attempting to discharge the fuel from the tanker within the next few days. (Customs) indicated that it would wish to be present to witness this process.

By emailed correspondence dated 12 September 2012, Mr Lettsome advised two officers of the Customs Department (G Romney and S Chinnery) that the discharge was due to take place on 13 September 2012 at approximately 10.00 am. However further technical difficulties ensued and this process was again postponed. Mr Lettsome advised the officers of this in an email on 13 September 2012 at 8.46 am in which he also indicated that they would be updated once alternative arrangements had been made.

Eventually on 16 September 2012 (Delta) commenced and completed the discharge process which saw the removal of fuel from the vessel at Pockwood Pond and its discharge into fuel Tank No 7.

(Delta) contends that several efforts were made to contact Mr Romney by phone both prior to and during the discharge process but these were futile. The result is that no customs officer or other representative of (Customs) were aware of or witnessed the discharge process.” (judgment paras 5-10)

9.
It seems that the problem of unloading was caused by the hose being too short. This was resolved by the use of the hose from M/V Ocean Princess, another Delta vessel which had arrived in the territory on 16 September.

10.
On 20 September 2012, Delta was served with a Notice of Seizure under section 131 of the Customs Act asserting that Tank No 7 and its contents were liable to forfeiture under section 30 of the Customs Act. The particulars set out in the notice were as follows:

“Petroleum fuel was discharged into storage tank No 7 a tank that was bonded by Customs to be used solely for the storage of fuel for British Virgin Islands Electricity Corporation. This tank was accessed by Delta Corporation (Caribbean) Ltd without receiving permission from Customs and without customs supervision which is contrary to the Customs Management and Duties Act No 6 of 2012.”

11.
On or about 24 September 2012 Delta gave notice of its intention to commence proceedings in the High Court for return of its goods and damages. On 2 November 2012 Customs responded by lodging an application in the High Court for a forfeiture order for the tank and its contents. The hearing was fixed for 6 December 2012 before Mrs Justice Ellis.

The legislation

12.
The Customs Act is a comprehensive piece of legislation dealing with the collection and management of customs revenues, including duties on importation (Part III).

13.
The following provisions provide the background. The "time of importation of any goods" when brought by sea is "deemed to be … the time when the vessel carrying them comes within the limits of the territorial waters" (section 3(2)). The importer of goods by sea is required within 14 days to deliver an "entry" to the proper office in the form and manner directed by Customs (section 25(1)). Duty is levied "at the time of first importation into the Territory or delivery from customs charge" (section 54(1)); and, except as permitted under the Act or any other relevant enactment, imported goods may not be removed on importation until the importer has paid the duty chargeable on them (section 54 (2)). Duty is payable by the owner of the goods at the time of making the entry (section 58(1)).

14.
More directly relevant to the issues in the appeal are sections 29, 30, and 69. Section 29 enables the Commissioner "by direction in writing" to impose "conditions and restrictions" in respect of the movement of imported goods. A person who contravenes or fails to comply with such a direction, or a requirement imposed under it, is guilty of an offence and liable on summary conviction to a fine not exceeding $10,000, and "any goods in respect of which the offence was committed are liable to forfeiture".

15.
Section 30 provides so far as material:

"30. (1) Without prejudice to any other provision of a customs enactment, where

(a) imported goods, being goods subject to duty on their importation, are without payment of that duty

(i) unloaded at any port,

(ii) unloaded from any aircraft,

(iii) removed from their place of importation or from any approved wharf, examination station, transit shed or customs area,

(b) goods (are) imported, landed or unloaded contrary to a prohibition or restriction that is in force with respect to them under or by virtue of an enactment,

…

those goods shall … be liable to forfeiture."

16.

Section 69(1) provides for relief from duty for certain categories of goods. “Subject to conditions as may be prescribed by the Commissioner”, such goods may be “imported free or partially free from any duty”. They include (b) goods imported for charitable work or (c) goods imported by the holder of a “duty free franchise” in respect of those goods, and -

“(d) goods imported by or on behalf of a person entitled to full or partial relief in respect of the goods under this Act or any other enactment;”

17.
Section 131 and Schedule 2 deal with the procedure for seizure of goods liable to forfeiture, including service on the owner of notice of the seizure and the grounds (Schedule 2 paragraph 1(1)). By section 132, where a thing has become liable to forfeiture under a customs enactment, liability to forfeiture extends to any vessel or container used for the carriage or deposit of that thing, and “any other thing mixed … with the thing so liable”. By section 134(2), in any proceedings against the Commissioner on account of the seizure, he is protected from any liability to pay damages or costs if the court is satisfied that “there were reasonable grounds for seizing or detaining” the goods in question.

18.
Finally, the British Virgin Islands Electricity Corporation Ordinance of 1979 (“the BVIEC Ordinance”) provided for the establishment of BVIEC to take over the government’s functions for the generation and supply of electricity. Section 19 provided for the vesting in BVIEC of the government’s electricity undertaking, and assets and liabilities associated with it. Section 20 (“exemption from import duties and taxes”) provided that the corporation “shall be entitled to import free of duty into the Territory” materials set out in the first schedule, such materials not to be sold or used for other purposes within five years of importation save with ministerial approval. The materials listed in the schedule include “petroleum products used in the generation of electricity …”

The courts below

19.
Before Ellis J in the High Court the case proceeded on affidavit evidence without cross-examination. In her judgment given on 14 February 2013, she rejected an objection by Customs to the form of Delta’s notice. She also considered but rejected Customs’ case relying on section 30(1)(b). Customs had relied on the letters of January 1992 and July 2012 as imposing conditions or “directions” under section 29, which, it was contended, should be read with section 30(1)(b), so that -

“… (Delta) unlawfully discharged fuel from the vessel M/T Charmer sometime between 29 August 2012 and 21 September 2012 without the permission of the Customs Department and in the absence of the customs officer to witness the said discharge, contrary to the said Directions and therefore contrary to section 29 and 30(1)(b).” (judgment para 44)

The judge was not persuaded by this argument. She thought it inappropriate and unnecessary to extend section 30(1)(b) by reference to section 29, given that the latter imposes clear criminal penalties, including possible forfeiture for contravention. Section 30(1)(b) is no longer relied on before the Board.

20.
With respect to section 30(1)(a), she noted what she called the “duty free concession” granted to BVIEC “in respect of fuel imported for its use”. But she reverted to her earlier findings as to established procedure:

“(Customs’) evidence is that the established procedure where fuel is imported on behalf of the BVIEC dictates that any duty on the fuel intended to be sold to the BVIEC is to be paid upfront by (Delta). Once the Customs Department is presented with evidence verifying such sale, any duty which would have been paid would then be refunded to (Delta).

As indicated, this has not been disputed by (Delta). It follows, that upon arrival in the Territory the fuel in question was dutiable.” (paras 70-71)

21.
She summarised the area of dispute as she understood it:

“In those circumstances, (Customs) alleges that the fuel was removed from its place of importation at Pockwood Pond without the payment of such duty. (Delta) does not dispute that at the time that the fuel was removed, no duty had been paid. Instead (Delta) contends that the fuel was discharged into a bonded tank used for the storage of fuel intended for the BVIEC and that if duty was payable, it would only accrue when fuel is removed or discharged from the bonded tank. The implication here is that (Delta) would not have been obliged to pay customs duty in circumstances where the fuel was being removed to be stored in a bonded facility.” (para 72)

22.
She noted that under section 58(3) imported goods may be entered for “warehousing” without payment of duty (para 73). Although the Act did not apparently permit warehousing of fuel (section 42 Schedule 1), she accepted that in respect of Tank 7 the parties had been operating pursuant to “a practice” under which the tank was used to store fuel intended for BVIEC, “which in the words of the Commissioner would ‘become duty-free when (BVIEC) verifies that the fuel was received for its use’” (paras 79-80).

23.
Of the events surrounding the off-loading on 16 September she understood that Delta were under time pressure, and had made attempts to contact Customs, but she did not accept that this justified their pre-emptive action. She also rejected the Mr Sylvester’s suggestion that permission was implicitly given for “accessing” of the tank, when it was left open by Customs following an earlier discharge. She said:

“(Delta) is well aware of the legal and practical requirements for off-loading fuel into the Territory. Nevertheless, by 16 September 2012, (Delta) was clearly operating under what it felt were exigent circumstances … Once a solution had finally been arranged, in (Delta’s) view, time was of the essence. This is surely what motivated the pre-emptive action taken by (Delta) on Sunday, 16 September 2012.

From a purely commercial standpoint (Delta’s) action is perhaps understandable. However when it became clear that Customs officials could not be contacted, that express authorization was not forthcoming, and that a customs officer would not be in attendance at the offloading, it did not fall to (Delta) to act as it did. Indeed, given the draconian remedies available to (Customs) under the customs legislation it is surprising that (Delta) chose to do so.” (paras 91-92)

24.
She cited De Keyser v British Railway Traffic and Electric Co Ltd [1936] 1 KB 224, 230, where Lord Hewart CJ (speaking of the equivalent UK legislation) referred to “this undoubtedly rigorous statute” which gives the claimant “no opportunity of asking the court to take into consideration mitigating circumstances”. She concluded:

"The court accepts that at the point of arrival into the Territory, the fuel in question was dutiable. The court finds that at the time this fuel was removed from its place of importation and deposited into Tank No 7 no duty had been paid in respect of it …

… While it may well be that a more practical system for processing fuel intended to be imported for use by the BVIEC is on the horizon, at present the fuel becomes duty free not at the point of importation but rather when the necessary documents are presented to (Customs) evidencing sale to BVIEC. Until such time all fuel imported into the Territory is dutiable. Additionally or alternatively, (Delta) failed to demonstrate that it was authorized on 16 September 2012, to remove the fuel from its place of importation into Tank No 7 without the payment of duty and in the absence of a proper officer. The discharged fuel is therefore liable to forfeiture." (paras 98, 104)

She felt bound by section 132 to hold that other fuel in the tank, though not otherwise liable to forfeiture, was mixed with the fuel liable to forfeiture, with the result that both it and the tank itself were caught (paras 105-109).

25.
She concluded by observing that, since the fuel was allegedly intended for a duty-free concessionaire, the forfeiture would result in a "windfall" for Customs. She thought that "given the peculiar circumstances of this case this is certainly a matter which should have been resolved administratively"; and she regretted "the somewhat implacable positions adopted by the parties". However, she was obliged "with considerable reluctance" to rule in favour of Customs. (paras 110-113)

26.
The Court of Appeal allowed Delta's appeal. From the transcript of the argument before that court, it seems that the issue turned principally on the effect of section 20 of the BVIEC Ordinance, and in particular whether the "concession" extended to Delta as an importer on behalf of BVIEC. The Attorney-General was recorded as conceding, on behalf of the Commissioner, that once the fuel was in Tank 7 it was the property of BVIEC. In a short ex tempore judgment, the court concluded that, having regard to that concession, and "the concession by (Customs) of the entitlement of BVI Electricity Corporation to import fuel duty free", the judge's order that the tank and its contents were liable to forfeiture under section 30(1)(a) of the Customs Act could not stand. If the Commissioner considered that Delta had acted improperly in discharging the fuel into the bonded storage tank without specific authorisation at the time of that discharge, it was open to the Commissioner of Customs to institute proceedings against Delta under section 29 of the Customs Act.

Mr Sylvester's second affidavit

27.
Before turning to the proceedings before the Board, it is necessary to comment on one aspect of the evidence on which the record is somewhat confused. The papers lodged with the Board included an affidavit by Mr Sylvester, for Delta, sworn on 28 September 2012. At the hearing before the Board there was produced a second affidavit by Mr Sylvester, sworn on 8 November 2012. This responded to the affidavits filed for Customs, including the first affidavits of Mr Wade Smith and Mr Romney. Mr Sylvester refers to those affidavits as having been filed on 24 October 2012, although the copies in the bundle lodged with the Board are stamped as filed on 5 December 2012. (It is possible that the discrepancy arises because there were initially two parallel sets of proceedings, one begun by Delta and one by the Commissioner.) The judge mentioned Mr Sylvester's "affidavit evidence" (para 3) but

without stating whether it was one affidavit or two. Her judgment appears to contain no specific reference to the contents of the second affidavit.

28.
Two particular points in the affidavit, not mentioned by the judge, are of some significance. The first relates to the formal documents or “manifests”, relating to this importation. In his first affidavit for Delta (para 7), Mr Sylvester had stated that M/T Charmer had arrived in the BVI on 29 August 2012 -

“for the purpose of delivering approximately 117,000 US gallons of fuel to (Delta) for direct discharge into the bonded fuel storage tank at Pockwood Pond for use by the Corporation.”

In response the Commissioner, Mr Wade Smith, referred to the manifest relating to the arrival of the vessel M/T Charmer, received by his department on 29 August 2012, which referred to 122,000 US gallons of fuel for Delta, but with no reference to BVIEC.

29.
In his second affidavit, Mr Sylvester explained that the August document had been the “nomination” inward manifest drawn up by the captain of the vessel, which on delivery was superseded by the “final” inward manifest, to be lodged with Customs within 24 hours of discharge. This showed the exact amount delivered and the entity which received it. He exhibited the final manifest for this delivery, lodged with Customs on 17 September, which showed 117,074.56 gallons “imported solely for the use of (BVIEC)”. As far as appears from the papers before the Board, this account was not challenged.

30.
The other point concerns the procedure for payment of duty on importation. The judge began her discussion of section 30(1)(a) with what she understood to be undisputed matters of fact. Having noted that Delta imported fuel both for BVIEC and for its own commercial use, she said:

“The parties also agree that while fuel imported for and on behalf of the BVIEC will not generally attract customs duty, any fuel otherwise imported by (Delta) would.

(Customs) contends that regardless of the intended user, fuel is not automatically duty free upon importation. (Its) evidence is that the established procedure where fuel is imported on behalf of the BVIEC dictates that any duty on the fuel intended to be sold to the BVIEC is to be paid upfront by (Delta). Once Customs Department is presented with evidence verifying such sale, then the duty which has been paid is thereafter refunded to (Delta).

This rather convoluted procedure is apparently under review by Customs officials who have as yet not prescribed an alternative process. However, presently fuel intended to be sold to the BVIEC only becomes duty free when it is clear that the fuel has been sold on a duty free basis. This is not disputed by (Delta).” (paras 56-59)

31.
Her source for the “convoluted procedure” of payments and refunds of duty was the evidence of Mr Romney, Assistant Commissioner. After referring to Customs’ letter of 23 July 2012, he had said:

“Refunds are given to the respondent after it sells fuel duty free; thus, the respondent is aware that fuel is not automatically duty free on importation. Fuel is duty free when it can be verified that it was sold on a duty free basis.” (para 6)

32.

As appears from the quotation, the judge thought this was undisputed. However, she did not mention Mr Sylvester's response in his second affidavit (para 20):

"… fuel stored in Bonded tank No 7 remained at all times under the control of HMS Customs same being bonded to HMS Customs as such there was no issue of the payment of duty on same a fact which (Customs) was very much aware with the filing of the Final Manifest as previously set out in my affidavit." (emphasis added)

Allowing for the defects of grammar, this appears to be a clear assertion that, as far as concerned this particular delivery, Customs was aware at least by the time of the final manifest (delivered to them on 17 September) that it was intended for BVIEC, and that no duty was accordingly payable. It was not a case where duty would be payable initially by Delta and then refunded.

33.
There was discussion of this point in the Court of Appeal (transcript p 44ff). Mr Neale, for Delta, (who had also appeared before Ellis J) was recorded as saying that Delta had known Mr Romney's account to be wrong, but that, due to the late filing of his affidavit, Delta had been unable to file evidence in response. For the Commissioner, the Attorney General was recorded as objecting to Mr Neale "giving evidence", but adding: "there is nothing that was before the Court below as to whether or not duty has ever been paid". Surprisingly, there was no reference by either side to the second affidavit of Mr Sylvester on this point. The court itself evidently found it unnecessary to clarify the matter.

34.
In spite of this apparent confusion, Mr Guthrie QC, appearing for the Commissioner, did not dispute that the second affidavit was (or must be taken to have been) part of the evidence before the judge, and that it can be considered as such by the Board. The Board will proceed on that basis.

Arguments before the Board

35.
Mr Guthrie criticises the Court of Appeal for engaging neither with the judge's reasoning, nor with words of the relevant statutory provisions. He notes in particular her findings, on undisputed evidence, that fuel for BVIEC was not automatically duty free; that the established procedure was for duty to be paid upfront by Delta and later refunded on evidence of its sale to BVIEC; that accordingly on arrival into the Territory the fuel was dutiable; and that when it was removed from the ship the duty had not been paid. On these findings, he submitted, the terms of section 30(1)(a)(iii) of the Customs Act were clearly satisfied. The entitlement of BVIEC to a duty-free concession was never in issue, but the importer in this case was Delta not BVIEC.

36.
For Delta, Sir Fenton Ramsahoye SC with Miss Naina Patel (neither of whom appeared below) submit that the issue is one of law, and does not depend on findings of fact by the judge. The simple question is whether the fuel discharged into Tank 7 was dutiable. The Court of Appeal correctly found that it was not. Counsel rely not simply on section 20 of the BVIEC Ordinance, but also on section 69(1)(d) of the Customs Act (set out above) which applies to goods imported "by or on behalf" of a person entitled to relief. On the undisputed evidence of Mr Sylvester, the fuel carried by M/T Charmer was imported for the purpose of directly discharging it into Tank 7 for use by BVIEC. Furthermore the Commissioner's present case was inconsistent with the terms of the notice of seizure, which alleged, not that the fuel was dutiable, but that it was discharged without permission or supervision. By a

cross-appeal they submit that the Court of Appeal should have ordered damages for the wrongful seizure, made without reasonable grounds.

Discussion

37.
The statutory provisions for forfeiture are modelled on the equivalent UK legislation, which has a long history. They are potentially draconian, but such strong powers are no doubt justified by the need to deal with and deter serious cases of customs evasion. As the authorities cited by the judge make clear, where the requirements are made out, the statutory consequences follow. The court is not concerned with issues of mitigation or discretion. However, as Mr Guthrie accepts, the burden lies on the Commission to show that the conditions for forfeiture are clearly established.

38.
Notwithstanding that legal position, the Board shares the concern of the judge that the Commissioner should have elected to proceed by way of forfeiture in the present case. This was not on any view a case of deliberate evasion of customs duties. There seems to have been no doubt that the fuel was intended for sale to BVIEC, in accordance with Delta’s regular practice. Had it not been for the unfortunate, and apparently unforeseen, problem of the hose, the fuel would presumably have been handled in accordance with the established procedures, and no dispute would have arisen. By the time the notice of seizure was served, Customs had received the final manifest, which should have removed any doubts about the intended destination of the fuel. The notice of seizure referred to the accessing of the tank without customs supervision. But, as the Court of Appeal said, if the Commissioner was concerned by Delta’s failure to comply with the proper procedures, the natural course would have been to proceed against them for an offence under section 29 of the Customs Act, under which the penalty would have been a matter for the court. Mr Guthrie was unable, when asked, to offer any explanation for the course adopted, or to respond to the concerns expressed by the judge.

39.
However, the answer to the appeal must depend on the correct interpretation of the relevant statutory provisions, as applied to the facts. It is perhaps unfortunate that the courts below seem to have been given little assistance on this critical aspect. The judge started from what she understood to be the common ground that the fuel was initially dutiable; she was unable to discern any legislative mechanism by which, absent specific authorisation by Customs, it had subsequently acquired duty-free status. The Court of Appeal started from the other end. Given the apparent concessions by the Attorney-General that once in the tank the fuel was owned by BVIEC, and that in their hands it was duty-free, they were unable to see how prior irregularities by Delta could render it liable to forfeiture. Neither line of reasoning, with respect, pays adequate attention to the analysis of the statutory scheme.

40.
In the Board’s view, the starting point must be section 20 of the BVIEC Ordinance, which is the basis of the duty-free concession. Although the entitlement to import free of duty is given in terms to BVIEC, the section must be interpreted in the light of its context and purpose. It is unrealistic and unnecessary to read it as requiring BVIEC itself to be directly responsible for every stage of the process of importation. It must have been contemplated that BVIEC’s fuel might be imported through the agency of ordinary commercial operators, such as Delta. The critical question is not how or by whom importation is physically carried out. It is enough (at least) that importation has been arranged by BVIEC to meet its own requirements (as under the supply agreement in this case), and is used

solely for that purpose. Fuel imported under such an arrangement can, without distortion of language, be fairly described as “imported by” BVIEC.

41.

That is not only the common sense reading of the provision, but is also consistent with the way the provision has been interpreted in practice. The payment and refund procedure referred to by Customs is underlain by the assumption that fuel imported by Delta may be subject to duty initially, but then converted to duty-free status on receipt of evidence verifying the sale to BVIEC. However, if section 20 is read as permitting duty-free importation only on ships operated by BVIEC itself, then its dutiable status would be determined at the time of importation. There is nothing in the wording of the section which would permit fuel, imported by someone other than BVIEC (in that narrow sense) and therefore dutiable at that time, to become duty-free subsequently merely by means of a verified sale to the corporation. Even if this arrangement was in part concessionary (as implied by the letter of 21 January 1992), it is hard to reconcile with the contention that actual importation by BVIEC is a critical factor.

42.

Reliance was placed by the judge, and by Mr Guthrie in his submissions to the Board, on Customs’ letter to Delta dated 23 July 2012 (para 7 above). This does provide some support for the previous existence of a procedure for initial payment of duty by Delta followed by a claim for a refund. However, there is nothing in the letter to indicate the circumstances in which such a procedure was operated, or even to link it directly and solely to supplies to BVIEC. It is to be noted also that the letter refers generally to “the storage tanks at your facility”. It does not address the status of fuel discharged directly into Tank 7, which had been authorised specifically for fuel destined for BVIEC, and which was under the direct control of Customs. It is difficult to see any reason why a payment and refund procedure would have been needed for such fuel. Whether or not the Attorney-General was right to concede that fuel which had reached that tank was owned by BVIEC (on which the Board expresses no view), it was by then clearly destined for BVIEC. There is nothing in the letter which is inconsistent with Mr Sylvester’s evidence that for fuel discharged directly into Tank 7, as in the present case, the issue of payment of duty did not arise. There may have been a breach of the conditions laid down by Customs, but that in itself is not enough to bring section 30(1)(a) into play.

43.

If that is the correct interpretation of section 20 of the BVIEC Ordinance, Delta does not need recourse to section 69 of the Customs Act, on which counsel relied. That speaks in terms of goods imported “by or on behalf of” a person entitled to relief, but makes relief from duty “subject to conditions as may be prescribed”. Since this was not relied on in the courts below, there was no discussion of its place in the statutory scheme, nor of the kind of “reliefs” to which it might apply. In the circumstances the Board finds it unnecessary to express any view on the scope of the section, or the precise meaning of the words “by or on behalf of”.

44.

In conclusion, on the correct interpretation of section 20 of the BVIEC Ordinance, and in the light of all the evidence, the Board is satisfied that the Court of Appeal arrived at the correct conclusion. It has not been shown, for the purposes of section 30(1)(a) of the Customs Act, that goods “subject to duty on importation” have been unloaded or removed without payment of such duty. It follows that Customs’ appeal must fail.

45.

This leaves no defence to Delta's cross-appeal, unless the court could be satisfied that there were "reasonable grounds" for the seizure. As already noted, Mr Guthrie has rested his case on the strict construction of the statute, and has not sought to advance any independent reason to justify Customs' use of forfeiture rather than the less draconian powers otherwise available. In the Board's view these powers were adequate and appropriate to deal with any irregularities in the process of importation. The Board is not satisfied that there were reasonable grounds for the use of forfeiture powers.

46.

The Board will accordingly humbly advise Her Majesty that the appeal should be dismissed and the cross-appeal allowed. The respondent should be entitled to the costs of this appeal but the Board gives the respondent 21 days from the promulgation of this judgment, and the appellant 14 days thereafter, to make submissions as to costs, if they so wish.