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Condemnation Proceedings, a practical synopsis

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Challenging the legality of a seizure

This article is intended to be an addendum to two articles previously published in *De Voil Indirect Tax Intelligence*, the first article entitled “The world of excise: Challenging a HMRC seizure” and the second “Developments in the means of challenging a HMRC seizure”.

Both of the above articles have introduced the reader to the means of challenging a seizure by appealing the decision of the seizing body (either HM Revenue and Customs (HMRC) or UK Border Force (UKBF) in the First-tier Tribunal (Tax Chamber) on the grounds of reasonableness.

However, this article touches upon the legal framework involved in challenging the legality of the seizure either through the Magistrates' Court or through the High Court. These proceedings are known as condemnation proceedings.

The owner of seized goods may challenge the legality of the seizure and/or request an internal review and if unhappy with the outcome of the review, request that the Tribunal review the same. The two hearings — condemnation proceedings and Tribunal appeal — are unique proceedings, independent of each other, adjudicating on two separate and individual issues.

Further to the above, it is settled law that the Tribunal does not have the jurisdiction to consider the legality of the seizure. In the case of *HMRC v Jones and another* [2011] EWCA Civ 824, Mummery L J states as follows:

“The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the Respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the Respondents”.

Condemnation hearing

1. Commenced at request of the owner of the goods as per CEMA 1979, Sch 3.
2. HMRC or UKBF may commence proceedings at Magistrates Court or High Court in England and Wales, which have sole jurisdiction of the matter, see *HMRC v Jones* and also CEMA 1979, Sch 3, para 8(a).

Tax Tribunal appeal

1. A request for internal review is made to the department. The Reviewing Officer cannot consider the legality of the seizure.
2. If unhappy, an appeal can be made to the Tribunal for a further review.
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3. The Tribunal may only review the internal review decision and make an assessment as to the reasonableness of the decision. The Tribunal cannot consider the legality of the seizure.

In light of the above, it is strongly advised that both routes are commenced at the same time. In such a scenario, the Tribunal may, though there is no direct authority, wait for the decision of the Magistrates' Court in the condemnation proceedings. Should one succeed at the Magistrates' Court then the Tribunal hearing is no longer required. However, should one fail at the Magistrates' Court then the Tribunal may continue to hold a hearing to determine the reasonableness of the review officer's decision.

Should one succeed at the Magistrates' Court then it is advisable to seek a determination from the Tribunal on the reasonableness of the review officer's decision and, should the facts allow, seek wasted costs.

Returning to the condemnation proceedings, The Customs and Excise Management Act 1979, Sch 3, para 8(a) clarifies that condemnation proceedings may be commenced at either the High Court or the Magistrates' Court:

"8 Proceedings for condemnation shall be civil proceedings and may be instituted —
 (a) in England or Wales either in the High Court or in a Magistrates' Court."

Condemnation proceedings are commenced by the owner of the seized goods by writing to HMRC or UKBF indicating his clear intention to challenge the legality of the seizure by way of condemnation proceedings. HMRC or UKBF will then commence an appeal at the Magistrates' Court, though, as stated above, the appeal can alternatively be instituted in the High Court. The lay Justices hear the appeal under their civil jurisdiction.

It is the present practice of HMRC and UKBF that condemnation proceedings are commenced at the Magistrates' Court nearest to the point of seizure. Herein lies the first issue.

Transfer of condemnation proceedings

It is often the case that the owner of the seized goods, in challenging the legality of the seizure, learns that the Magistrates' Court nearest to the point of seizure is located some considerable distance from himself. One faces incurring heavy costs in running the case.

In order to avoid incurring such costs and to ensure fairness in the proceedings, it is advisable that at the time of challenging the legality of the seizure by letter, a preferred Magistrates' Court is indicated. Should the claim be issued by the seizing body at their preferred court then it would be prudent to submit an application to transfer the proceedings to a Magistrates' Court in proximity to the complainant.

"Customs and Excise Management Act 1979, Schedule 3, paragraph 9(b):

9. Proceedings for the condemnation of anything instituted in a Magistrates' Court in England or Wales, may be so instituted —

- b. in any such court having jurisdiction in the place where the claimant resides or, if the claimant has specified a solicitor under paragraph 4 above, in the place where that solicitor has his office; or
- c. in any such court having jurisdiction in the place where that thing was found, detained or seized or to which it is first brought after being found, detained or seized."

The Magistrates' Court has the power to transfer the proceedings either before or after the hearing has commenced, see the relevant provision below:

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"Magistrates Court Act 1980:

57A Power to transfer civil proceedings (other than family proceedings)

- (1) A Magistrates' Court may at any time, whether before or after beginning to hear a complaint, transfer the hearing to another Magistrates' Court.
- (2) But if the court transfers the matter after it has begun to hear the evidence and the parties, the court to which the matter is transferred must begin hearing the evidence and the parties again."

Should one win the case

Should one succeed in establishing that the goods were incorrectly seized then the seizing body will arrange for the goods to be returned unless those goods have been destroyed or disposed of by the seizing body in the interim. In this case, the seizing body is under an obligation to compensate for the damage suffered.

The Customs and Excise Management Act 1979, s 144 states as follows:

“144 Protection of officers, etc. in relation to seizure and detention of goods etc

....

(3) Nothing in subsection (2) above shall effect any right of any person to the return of the thing seized or detained or to compensation in respect of any damage to the thing or in respect of the destruction thereof.”

In addition to the above, a request for the release of goods must be made promptly. Should the seizing body decide to appeal the decision then they have the right to hold the goods pending the outcome of the appeal by virtue of para 12 of Sch 3 to Customs and Excise Management Act 1979:

“Where an appeal, including an appeal by way of case stated, has been made against the decision of the court in any proceedings for the condemnation of any thing, that thing shall, pending the final determination of the matter, be left with the Commissioners or at any convenient office of customs and excise.”

Should one lose the appeal

For reasons stated in the section below, one must give serious consideration to appealing the decision of the Magistrates' Court in condemnation proceedings. Such appeals are “de novo” appeals; we touch upon this below.

De novo appeal

HMRC/UKBF, should they lose in condemnation proceedings, are usually prompt in appealing the decision if the court of first instance has found against them. This gives them the obvious second bite at the cherry. In the case of *ANPA Limited and ADRENA SP Z O OK v Border Force* (unreported 2015), UKBF appealed the decision of the Magistrates' Court to the Crown Court. The Crown Court found again in favour of the claimant.

As indicated above, from the Magistrates' Court, the appeal lies to the Crown Court under its civil jurisdiction. The main feature of this appeal is that it is heard de novo, whereby the judge effectively hears the full appeal again (see *Supreme Court Act 1981, s 79(3)*). A written notice communicating one's intention to appeal should be sent to the Magistrates' Court within 21 days.

Costs in relation to condemnation proceedings

Should the owner of the goods win, HMRC/UKBF typically promptly apply for a certificate from the Magistrates to effectively state that despite the seizure being found to be illegal, the seizure in itself, given the circumstances, was reasonable. It is their present practice to arrive at the court with a pre-typed order

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which asks for a certificate to be issued stating that the initial seizure was reasonable. In such a scenario, unless arguments are presented to oppose this proposal, the court may issue a certificate confirming the same.

Section 144(1) of the Customs and Excise Management Act 1979 refers to the said certificate, the relevant provision is as stated below:

“144 Protection of officers, etc. in relation to seizure and detention of goods, etc.

(1) Where, in any proceedings for the condemnation of any thing seized as liable to forfeiture under the customs and excise Acts, judgment is given for the claimant, the court may, if it sees fit, certify that there were reasonable grounds for the seizure.

(2) Where any proceedings, whether civil or criminal, are brought against the Commissioners, a law officer of the Crown or any person authorised by or under the Customs and Excise Acts 1979 to seize or detain any thing liable to forfeiture under the customs and excise Acts on account of the seizure or detention of any thing, and judgment is given for the plaintiff or prosecutor, then if either —

- a. a certificate relating to the seizure has been granted under subsection (1) above; or
- b. the court is satisfied that there were reasonable grounds for seizing or detaining that thing under the customs and excise Acts, the plaintiff or prosecutor shall not be entitled to recover any damages or costs and the defendant shall not be liable to any punishment.

(3) Nothing in subsection (2) above shall effect any right of any person to the return of the thing seized or detained or to compensation in respect of any damage to the thing or in respect of the destruction thereof.”

A claimant must oppose the issue of the certificate in order to be able to recover its costs and any damages, including loss of profit on the goods (if any). The starting point is simply that the successful party may apply to recover his costs from the unsuccessful party. The usual rule for civil proceedings applies, that is, “the winner takes all”.

In civil proceedings to which the Crown is a party, in this context 'proceedings to which the Crown is a party' includes proceedings to which any government department or any officer of the Crown as such is a party. The costs of and incidental to the proceedings are in the discretion of the court which is to be exercised in the same manner and on the same principles as in cases between subjects, and the court or arbitrator has power to make an order for the payment of costs by or to the Crown accordingly¹.

Probable cause

It is established law that where there is no probable cause justifying seizure of goods, the owner will be entitled to the release of the goods together with costs and damages².

Seizures are more often than not based on a suspicion, circumstances of suspicion³ (such as false papers⁴) or the hostile associations of the consignors or consignees⁵; and the onus of proof that the suspicion is unjustified will rest with the claimant⁶.

Law surrounding the submissions on costs

HMRC/UKBF argue that should the claimant win the case then it will not necessarily follow that he will obtain a costs award should the court find that HMRC/UKBF acted honestly, reasonably and properly, and in the public interest⁷. However, while this is correct, matters are not as simple as the HMRC/UKBF may put it.

Pursuant to the Magistrates' Courts Act 1980, s 64(1), the Justices have a discretion to order costs. Pursuant to

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s 62(2), the amount ordered to be paid shall be specified in the Order and s 62(3) confirms that the costs ordered shall be enforceable as a civil debt. In other words, it is not administered by the Magistrates' Court.

Should the claim fail, HMRC/UKBF are known to seek their full commercial costs in forfeiture proceedings. These can amount to several thousand pounds. It is usual for a schedule of costs to be submitted soon after a decision is handed down by the bench.

Conclusion

It is strongly advisable that upon a seizure of goods, an aggrieved party commences proceedings both through the review process and by way of condemnation proceedings. A correct litigation strategy, early on, can save on time and costs and may ensure a favourable result.

¹ Administration of Justice (Miscellaneous Provisions) Act 1933, s 7(2) (amended by the Crown Proceedings Act 1947, Sch 1; and the Crime and Courts Act 2013, Sch 9, para 52(1)(b), (2)).

² *The Baron Stjernblad* [1918] AC 173 at 175, PC. In proceedings to which the Crown is a party, both damages and costs may be awarded against the Crown or the officer who represents the Crown: *The Zamora* [1916] 2 AC 77, PC; *The Oscar II* [1920] AC 748, PC.

³ *The Baron Stjernblad* [1918] AC 173, PC; *The Gabbiano* [1940] P 166.

⁴ *The Lynger Fjord* (1916) 6 Lloyd Pr Cas 115; *The Sydland* [1917] P 161 n.

⁵ *The Unitas* [1948] P 205, [1948] 1 All ER 421; affd sub nom *Lever Bros and Unilever NV v HM Procurator General, The Unitas* [1950] AC 536, [1950] 2 All ER 219, PC.

⁶ *Conservas Cerqueira Lda v HM Procurator General, The Monte Contes* [1944] AC 6, PC.

⁷ *Perinpanathan v City of Westminster Magistrates' Court and two others* [2009] EWHC 762 (Admin) as confirmed by the Court of Appeal in, *R (on the application of Amaravathari Perinpanathan) v City of Westminster Magistrates' Court (2) Commissioner of Police of the Metropolis (2010)* [2010] EWCA Civ 40.