



19 June 2019

PRESS SUMMARY

OWD Ltd trading as Birmingham Cash and Carry (In Liquidation) and another (Appellants) v Commissioners for Her Majesty's Revenue and Customs (Respondent)

OWD Ltd trading as Birmingham Cash and Carry (In Liquidation) and another (Respondents) v Commissioners for Her Majesty's Revenue and Customs (Appellant)

[2019] UKSC 30

On appeal from [2017] EWCA Civ 956

JUSTICES: Lord Reed (Deputy President), Lord Sumption, Lord Hughes, Lady Black, Lord Briggs

BACKGROUND TO THE APPEAL

The Finance Act 2015 introduced a regulatory scheme requiring wholesalers supplying duty-paid alcohol to be approved by Her Majesty's Revenue and Customs Commissioners ('HMRC') under section 88C of the Alcoholic Liquor Duties Act 1979 ('the 1979 Act'). Approval may only be given if HMRC are satisfied that the person seeking to carry on the activity is a fit and proper person to do so.

OWD, Hollandwest and Budge Brands ('the wholesalers') were already involved in the wholesale supply of duty-paid alcohol when the scheme was introduced. They needed HMRC approval to continue to trade. HMRC refused as they were not satisfied that the wholesalers were fit and proper. Each wholesaler appealed to the First-tier Tribunal ('FTT') against the decision. They asked HMRC to permit them to continue trading whilst the appeals were pending. HMRC refused to do so and the wholesalers brought judicial review proceedings in the High Court challenging that refusal. The High Court dismissed their claims.

The Court of Appeal held that temporary approval can be granted to a person under section 88C of the 1979 Act, but not under section 9 of the Commissioners for Revenue and Customs Act 2005 ('the 2005 Act'). Contrary to the wholesalers' argument, it held that considerations of hardship and the impact on the person's appeal rights were irrelevant to the decision on temporary approval. The Court of Appeal further held that if HMRC was not able or willing to permit trading pending the appeal, the High Court was able to grant injunctive relief under section 37 Senior Courts Act 1981. Relief (i.e. a mandatory injunction requiring temporary approval of the wholesalers) would only be granted in rare circumstances, including where there was a clear and properly evidenced claim that a failure to grant interim relief would render the appeal to the FTT futile.

The wholesalers appeal and HMRC cross-appeal to the Supreme Court. The two questions considered are:

- (1) What power does HMRC have to permit a person to carry on trading pending the determination of an appeal to the FTT?
- (2) If HMRC does not have such a power or refuses to exercise it, what interim relief can the High Court grant?

JUDGMENT

The Supreme Court unanimously allows HMRC's appeal against the Court of Appeal's conclusion that HMRC has the power to permit temporary trading under section 88C of the 1979 Act. It unanimously dismisses the wholesalers' appeal against the Court of Appeal's determination that HMRC does not have that power under section 9 of the 2005 Act. Lady Black gives the judgment of the court. Lord Hughes gives a concurring judgment, with which Lord Sumption agrees.

The Supreme Court of the United Kingdom

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REASONS FOR THE JUDGMENT

Issue 1A – the powers of HMRC under section 88C of the 1979 Act

HMRC has concluded that the wholesalers were not fit and proper, regardless of any conditions that could be imposed, including a time limit on the approval. In those circumstances, HMRC do not have the power to grant temporary approval pending appeal. If the person is not fit and proper for even a limited period, that holds good whatever purpose the time limited approval would be designed to achieve. The Court of Appeal was right to conclude that considerations of hardship and the impact of maintaining the decision on the efficacy of the appeal were not material to the evaluation under section 88C of whether a person is “fit and proper” [38]. HMRC’s former practice of continuing approval during a winding down period does not prove the existence of the power for which the wholesalers contend [40].

Issue 1B – the powers of HMRC under section 9 of the 2005 Act

Section 9 permits HMRC to do anything which they think necessary or expedient in connection with, or incidental or conducive to, the exercise of their functions [42]. It is not concerned with ancillary powers that undermine or contradict those functions. Recourse cannot be had to section 9 to provide an alternative route to time limited approval, supplementing section 88C in the way that the wholesalers suggest. This is not only because section 88C itself only permits authorisation under that section, but also because of the attributes of the whole scheme of which section 88C forms a part [45]. By using section 9 powers to enter a wholesaler on the register, HMRC would appear to be holding out as fit and proper a person in relation to whom they have formed the opposite view [46]. The fact that HMRC’s decision is subject to an appeal is not a proper foundation upon which to conclude that it is necessary or expedient, incidental or conducive, to the exercise of their functions to assume a power to grant temporary approval [48].

Issue 2 – High Court powers

In the Court of Appeal, it was common ground that the High Court has the power to grant injunctive relief to assist a wholesaler pending his appeal to the FTT, but there was a dispute as to the basis on which relief could be granted [50]. The two judges at first instance were not satisfied that the evidence in support of injunctive relief was sufficient, and the wholesalers did not have permission to appeal to the Supreme Court in relation to the circumstances in which the High Court may grant injunctive relief [61-63]. The question that arose during the hearing was what form the High Court’s order could legitimately take, where a case for injunctive relief *was* made out [64]. If the High Court orders HMRC to grant temporary approval to the wholesaler where HMRC has concluded that the wholesaler is not fit and proper, it would necessarily be requiring HMRC to be satisfied of the opposite [70]. The High Court’s power to order a mandatory injunction is exercisable for the purpose of making a person do something that he has it within his powers to do, yet here there is nothing HMRC can properly do in the exercise of their statutory functions [71]. However, the absence of debate between the parties makes it undesirable to make a definitive pronouncement on this matter, and the fact that the case for relief was not made out in the present case means it is unnecessary to do so [72].

Lord Hughes adds that the legislation may be incompatible with the European Convention on Human Rights, where traders who had an existing business when the registration scheme was introduced, and who are refused approval but have good grounds for appeal, might be forced out of business before their appeal could be determined [77].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>