IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2011-485-1943
[2012] NZHC 3279

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	an application for judicial review
BETWEEN	DFS NEW ZEALAND LIMITED Applicant
AND	NEW ZEALAND CUSTOMS SERVICE Respondent

Hearing: 6 September 2012

Counsel: I T F Hikaka with K L J Simcock for Applicant
P H Courtney with A B Muir for Respondent

Judgment: 5 December 2012

JUDGMENT OF THE HON JUSTICE KÓS

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[1] The Customs Service proposes a change to licence conditions of duty-free retailers. A decision in principle to abolish a particular concession is made, subject to consultation. Consultation takes place. It is extensive. Unfortunately both Customs and the retailers may have misunderstood the effect of the governing legislation. They both think that the economic impact of the change on the retailers can substantially be defrayed by what is called "duty drawback". The change is then notified. Two months later both sides discover that duty drawback is only possible for a much narrower range of sales transactions.

[2] Did Customs err in law or fact in deciding to effect the change? Is that a reviewable error? Should relief be denied because the applicant did not take advantage of a statutory appeals process? Alternatively, should relief be denied

because a new Chief Executive of Customs, reconsidered the original decision after these proceedings were issued (and confirmed the original decision)?

Background

The Customs Duty Scheme

[3] Duties payable in respect of imported goods are governed by the Customs and Excise Act 1996 (the Act). When goods are imported into New Zealand the importer must specify the customs value of the goods, determined in accordance with Schedule 2.[1] Duties are then collected by the respondent under Part 8 of the Act. There are three relevant qualifications to the scheme.

[4] First, "drawback" of duty may be allowed on goods imported to New Zealand, duty-paid, but which are later re-exported. In such cases the duty paid may be reclaimed. Drawback is governed by s 117(1)(a).

> **117 Drawbacks of duty on certain goods**
>
> (1) Subject to this section, drawbacks of duty may be allowed, at such amounts and subject to such conditions as may be prescribed, on—
>
> (a) goods imported into New Zealand that are later exported from New Zealand

On its face it only applies to goods that are re-exported.

[5] Secondly, goods may be imported into and held at "Customs-controlled areas" without duties and tariffs needing to be paid. Licences for such Customs-controlled areas are granted under s 12. Goods held in those areas may then be sold without paying duty ("duty-free sales"), but only where sold to members of the travelling public either departing or arriving in New Zealand. An example was given in evidence, contained in a procedure statement issued to DFS. The location and boundaries of the licensed Customs-controlled areas are set out in site plans attached to the statement. Clause 4 records that duty-free sales may be made only to the following: persons arriving and persons departing for overseas by air or by ship;

1 Section 60(1).

persons entitled to diplomatic privilege or seconded to the New Zealand Armed Forces; and ships' stores. A detailed procedure is set out for the presentation of tickets or other proof of travel, and where goods may be delivered to purchasers. In most cases that is on the "international side" of Immigration and Customs control.

[6] Thirdly, there was what was known as "over the counter sales" (OTC sales). These are at the heart of the present proceeding. OTC sales occur when the licensee is permitted to sell goods imported without the payment of duty to non-travelling persons. The price paid by such purchasers must include tax and duty. Five working days after the end of each month in which products were sold on an OTC sales basis, the licensed vendor would account to customs for the tax and duty received.

[7] The OTC sales exception is set out in a "procedure statement". The 2001 statement was in evidence. The OTC sales provision was as follows:

> **9. Sales to Non Travelling Customers:**
>
> Sales of certain imported goods on which duty (including GST) has not been paid may be made to persons not travelling overseas. The duty and GST on the value as determined in accordance with the Customs and Excise Act 1996 (including section 12 of the Goods and Services Tax Act 1985) of such sales is to be accounted for by a monthly import entry (Form C4). This entry is to be made within 5 working days from the end of the month in which the goods are removed from the Customs controlled area.

As it says, only certain imported goods may be the subject of OTC sales. Alcohol and tobacco, for instance, could not be sold on an OTC basis.

[8] The OTC sales scheme was introduced in September 1997, anticipating the 2000 America's Cup defence in Auckland. It enabled downtown outlets to sell stock either to international travellers (on a duty-free basis) or to non-travelling persons (but on the basis that duty and tax was charged). It seems only three businesses were licensed to undertake OTC sales: DFS, Louis Vuitton New Zealand and Christian Dior New Zealand. DFS's principal competitor, JR Duty Free (formerly known as Regency Duty Free) may have been licensed, but does not appear to have made OTC sales.

[9] The different schemes can be shown in tabular form:

Type of importation	**Duty paid on import**	**Can be sold to**	**Adjustment for duty**
1. Solely for domestic sale	Yes	Domestic public	None
2. Duty drawback	Yes	Persons re-exporting goods from New Zealand	Duty paid can be claimed via the drawback system
3. Duty-free sales	No	Passengers (A) departing or (B) arriving New Zealand	None
4. OTC sales	No	Passengers (A) departing or (B) arriving New Zealand; (C) domestic public	Duty on sales to domestic public (ie (C) – paid at month's end

[10] DFS's sales therefore fall into three distinct clauses:

(a) *Domestic sales*: sales to domestic public (which may be pure domestic sales or OTC sales);

(b) *International removed sales*: ie sales to international travellers taking the goods out of New Zealand: (either duty-free sales or – exceptionally – OTC sales to which duty drawback would then apply);

(c) *International non-removed sales*: being sales to international travellers who purchase or collect goods on arrival in New Zealand and bring them in to the country (all duty-free sales).

The applicant's business

[11] DFS is part of an international conglomerate. It operates in 14 countries and has an annual revenue of nearly US$4 billion. DFS New Zealand's annual revenue is approximately NZ$122 million. The majority of DFS's duty-free sales occur at Auckland International Airport. Some duty-free sales are made at the DFS Galleria Store on Customs Street in Auckland and via its website. Some 90.5 per cent of its sales are the sale of duty-free products to international travellers – category 3 in the table shown previously. Just 9.5 per cent of its sales were OTC sales from the DFS Galleria Store. That is the only outlet from which OTC sales were made.

[12] While OTC sales could be made, DFS imported all goods on a duty-free basis. No duty was payable on sales other than OTC ones. The duty payable on OTC sales from the Galleria Store was paid ex post facto. There were three important consequences of that:

(a) DFS gained a competitive cash flow advantage over other downtown retailers by being able to defer payment of import duties on what were purely domestic sales (albeit that was not the major focus of its business).

(b) The Crown had a corresponding cashflow disadvantage in receiving import duties later than otherwise would have been the case.

(c) DFS was able to operate a single inventory system, none of which was duty-paid. Running a dual inventory system (with some specific goods duty-paid and the others not) has, apparently, significant complexity and cost implications.

Abolition of OTC sales option

[13] The OTC sales option was reviewed by Customs officials between November 2007 and June 2008. A decision in principle to revoke the option was made in April 2008, subject to consultation. There was no challenge in the present case to the right

of Customs to revoke the OTC sales option, subject to due process, consultation and adequate notification. As Mr Isaac Hikaka for DFS put it, “It is not disputed that this was a decision open to [Customs]”. DFS’s point is that it was made on an incorrect understanding of the legislative context. Consultation between Customs and OTC sales participants (including DFS) continued between June 2008 and June 2010. In May 2010 Customs decided to revoke the option. That decision was notified formally on 15 June 2010.

[14] The OTC sales option was implemented as a condition of DFS’s s 12 license. Revocation of any condition may be effected in accordance with s 13:

> **Variation or revocation of conditions**
>
> (1) The chief executive may, by notice in writing, vary or revoke the terms, conditions, or restrictions to which the licence is subject or revoke those terms, conditions, or restrictions and impose new terms, conditions, or restrictions.
>
> (2) A licensee who is dissatisfied with a decision of the chief executive under this section may, within 20 working days after the date on which notice of the decision is given, appeal to a Customs Appeal Authority against that decision.

[15] It is not entirely clear on the evidence when revocation took effect. However a new procedure statement was issued and signed by DFS on 28 March 2011. That procedure statement omitted the OTC sales option.

[16] The statutory appeal right in s 13(2) was not pursued by DFS. I will have more to say about that later.[2]

Claim

[17] On 22 September 2011 DFS filed the present proceeding. The statement of claim advanced seven causes of action originally. Five of these concerned alleged errors of law relating to either relevancy or fundamental mistake of fact. Three were not pursued before me. Nor were the sixth and seventh causes of action

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[2] At [54]–[61].

(unreasonableness and breach of legitimate expectation). The principal claims are therefore two:

[18] First, DFS claims that in making the decision to revoke the OTC sales condition, Customs erroneously believed (as did DFS) that DFS would be able to claim a duty drawback on the sale of *all* goods other than those made to non-travelling customers. In fact, as I have already related, s 117(1)(a) clearly limits duty drawback to duty paid goods sold but re-exported out of New Zealand. It is therefore pleaded that Customs made its decision on the basis of an error of law (and an irrelevant consideration).

[19] Secondly, DFS also claims that Customs considered the financial impact of the decision to revoke the OTC sales condition on the plaintiff would be minimal (because of its ability to simply pay duty on all goods imported, and recover that duty for all sales except to non-travelling customers). That was said to be reviewable as a fundamental mistake of fact (and an irrelevant consideration). It is really the first argument restated to focus on its factual premise, although, that flowed directly from the first argument, the error of law, on DFS's case.

Defence

[20] So far as relevant to the remaining causes of action, Customs' defence is that no error of law was made by it. The meaning of s 117(1)(a) is clear. Drawback cannot apply to goods not re-exported. It was for DFS to obtain its own advice about whether the system it was proposing to adopt met its needs.

[21] Secondly, the loss to the applicant is not a result of the removal of the OTC sales option, but a consequence of its own business decision to import all stock on a duty-paid basis, rather than operating a dual inventory system. That is a decision reached for its own convenience. It was adopted in order to continue using its pre-existing inventory system to sell to both travellers and the general public.

[22] Thirdly, judicial review should be denied as an appropriate statutory appeals process was available, was better suited to dealing with the issues that arose, and could provide more useful remedies. Yet that appeals process has not been used.

[23] Fourthly and finally, it would be inappropriate to grant relief, inasmuch as the decision has been reconsidered by the Chief Executive. As a result of that process, the same conclusion was reached. No useful purpose would be served by quashing the original decision, or ordering a further reconsideration, given that the same outcome is likely.

Issues

[24] This application for review gives rise to two issues:

(a) Issue 1: Did Customs err in law in deciding to abolish the OTC sales condition? This issue embraces the alleged taking into account of irrelevant considerations, and making of an alleged fundamental factual mistake.

(b) Issue 2: If Customs did err in law, what (if any) relief should be ordered? This issue embraces the defence propositions that either the non-exercise of the statutory appeal process or the remaking of the decision by the Chief Executive of Customs in May 2012 disentitles DFS to judicial relief.

Issue 1: Did Customs err in law in deciding to abolish the OTC sales conditions?

[25] I start with the process leading up to abolition of the OTC sales condition.

Abolition process

[26] It appears that towards the end of 2006 Customs had become concerned about the lawfulness or appropriateness of OTC sales. The particular concern

appeared to relate to the OTC sellers gaining the cash flow advantage referred to at [12](a) above. There was also concern as to legitimacy of the OTC sales conditions.

[27] A meeting of the Customs Executive Leadership Team on 22 April 2008 decided that OTC sales be revoked, and that this be done over a timeframe that allowed current OTC sellers to amend their business plans, and in consultation with those businesses. That has been described as a "decision in principle" only. There seems to be no contest over that characterisation. There then followed a process of briefing the Minister, followed by consultation with OTC sellers, such as DFS.

[28] On 4 July 2008 Customs wrote to DFS. It indicated that the OTC sales condition had been reviewed, and that Customs considered it to be inconsistent with New Zealand's taxation policy framework, at odds with the principle in the Act that duty should be paid at the time of import into New Zealand, and inequitable. The letter continued:

> As such, Customs is proposing to withdraw the OTC provision from your procedure statement. Please note that withdrawing the OTC provision will not prevent your company from selling goods to the non-travelling public where duty has already been paid.

The letter continued that Customs wished to consult before making a final decision on the proposal to remove the OTC sales condition from the procedure statement.

[29] A number of OTC businesses, DFS, Louis Vuitton and Christian Dior, then engaged KPMG to represent them in discussions with Customs. KPMG first wrote on their behalf to Customs on 17 September 2008. It challenged the logic behind the proposed change. It noted that to provide and maintain duty-free status for goods that would ultimately be exported, KPMG's clients would require separate warehousing. Louis Vuitton estimated its cost of doing that as in excess of $3.4 million, and

> The costs for DFS would be significantly greater given its greater size and product range. The maintenance of separate warehousing would simply not be financially viable.

The letter goes on to say:

> In the alternative, our clients would need to pay duty at the time of import on all goods and claim duty drawback on goods subsequently exported (with the associated cash flow, operation and compliance issues associated with that).

[30] At that stage at least, KPMG were conscious that duty drawback was confined to goods exported – or what I have called "international removed sales" in [10](b) above. However, at some point that awareness, perhaps never very deeply seated, evaporated. Subsequent correspondence from KPMG to Customs show that KPMG proceeded on the basis that duty drawback would apply to all non-domestic sales. That is, in terms of the tripartite analysis in [10] above, to both international removed sales and international non-removed sales. It is readily apparent from letters sent by KPMG (on behalf of the group of OTC sellers) and separate correspondence from Louis Vuitton that the OTC sellers were proceeding on the assumption that duty drawback was available for all non-domestic sales, not just those exported. In other words, they thought duty drawback would apply if duty was pre-paid on international non-removed sales also – sold at airport duty-free stores to travellers taking those goods into New Zealand. But s 117(1)(a) is clear: it did not.

[31] Customs then slipped into the same misconception. The assumption that duty drawback would apply to all non-domestic sales, if the OTC sellers responded to the change by pre-paying duty, is apparent from a letter dated 18 March 2009 written by the Deputy Comptroller to KPMG (the italicised text quotes KPMG back; the non-italicised comments are from Customs):

- *'The new regime would require our clients to pay duty up front on all imported goods and implement systems to subsequently claim drawback on goods exported. In addition to the funds that would be 'locked up' in import duty and GST on goods to be exported (estimated to be over $1 million) our clients would also incur the annual ongoing costs associated with managing the process and compiling a high volume of drawback claims estimated at over $400k per annum.'* This situation is a commercial decision for your clients and as discussed Customs offers a deferred payment scheme for duty and GST to approved credit worthy companies. Subject to using the deferred payment scheme we believe that GST could be managed in a cash flow neutral fashion. We repeat our offer for our Chief Financial Officer John Kyne to work with your client's accounting staff on inventory, systems and financial matters if this will be of assistance.

- *'The majority of the duty cost and all of the GST paid under this regime will subsequently be refunded to our clients'.* This point is covered

> above in terms of the commercial model that your clients might decide to adopt.
>
> - *'There is no incremental revenue gain to Customs under the proposed changes'.* We agree with this point, no gains are being sought.

[32] The common assumption as to the ability to use a duty drawback system in place of OTC sales, and that that would mean little if any extra cost for the former OTC sellers, continued in correspondence between KPMG and Customs. For instance, in an email dated 10 August 2009, a senior Customs official noted:

> Risk and cost to your client and the Crown, although not totally eliminated, would always be very minor and in a swings and roundabout system should be close to nil to both parties over time. Admin costs would not seem to vary and the policy objectives Customs seeks to achieve would be achieved at no additional cost to your clients, excepting that there might be a catch-up transition period that should also work in a close to cost-neutral way.

[33] An earlier email in the same string from the same official said:

> From this we have deduced that the real issue boils down to is [sic] the cash flow and costs associated with drawbacks of duty associated with imports not on-sold for home consumption in New Zealand.

That passage again reflected a broader duty drawback scheme than s 117(1)(a) permitted.

[34] The only point in the course of the correspondence where the scales seemed to fall from anyone's eyes occurred on 14 August 2009, but in an internal communication at Customs. On that day the same senior official advised colleagues of a "potential breakthrough". It was as follows:

> In short what we would agree is that they would no longer retain OTCS status. Instead the [sic] at least two of the three companies would declare all goods in the normal way and claim back a drawback for a pre-determined percentage of the import duty activity to be squared away at an agreed future date. Subject to claims being submitted within an agreed timely drawback for the duty component only would be paid on or around the 20th of the month i.e. at the same time we direct debit their accounts.

[35] One of the officials to whom that email was sent responded. His response included the following sentence:

> I understand that a drawback facility may not apply to a duty-free store ... particular [sic] to DF sales to arriving pax.

[36] Despite the warning in the official's email of 14 August 2009, Customs quickly lost sight of that reservation. In an undated financial and business analysis, prepared between September and November 2009, the same senior Customs official identifies the costs associated with operating separate inventory systems, and accepts that it is not a viable option. The official then says:

> I am strongly of the view that the firms would not operate a separate inventory and warehouse and incur the attendant capital and operating costs. Instead they would take the alternative option, pay duty and GST on all imports and subsequently process drawbacks on the duty, having already claimed GST input tax against the monthly GST output tax liability with Inland Revenue.

[37] The analysis is notable, first, for assuming the availability of duty drawback, and for not identifying, and distinguishing between, the three relevant categories of sales noted in [10] above. It is notable, second, for inferring that the sole cost of moving to the new arrangement would be a loss of the OTC sales cash flow advantage, calculated at $38,000 per annum. From which it must follow, absent a dual inventory system, that duty drawback was perceived as available for all non-domestic sales.

[38] In due course, on 30 April 2010, the Deputy Comptroller of Customs briefed the Minister. That analysis continued to agglomerate all non-domestic sales (i.e. categories (b) and (c) in [10]). It was not suggested in the briefing to the Minister that dual inventory systems would be introduced. Officials had already accepted that that was not financially practicable. The briefing advised the Minister that "discontinuing the OTCS would not generate the level of additional costs as previously claimed and depending on how the OTCS companies organised their affairs it is Customs' view that they could be significantly reduced if not eliminated". The modelling attached to the briefing assumed that drawback would apply to all "export sales".

[39] In due course, on 5 May 2010, the Minister wrote noting his understanding that the expensive dual inventory system and system changes would not be required; that standard input entry and drawback model procedures could be used and:

> The main compliance costs involved is the time value of money costs associated with cash locked up in duty and GST that can be claimed back and one-off costs associated with setting up drawback arrangements.
>
> I also understand that you are working with Customs to develop systems to minimise the cost of funding locked up and that there may be inexpensive changes that you can make to reduce the lock up costs associated with GST. With these changes I understand the time value of money costs may in fact be not much different from the bond you are suggesting.

[40] It is unclear when exactly the decision to revoke the OTC sales condition was made. Remarkably, there is no document recording it.

[41] However, on 15 June 2010 Customs wrote to DFS advising that the OTC sales condition was revoked pursuant to s 13. Attention was drawn to the appeal rights under s 13(2). At that stage, though, the error in analysis remained unidentified.

[42] The penny dropped for both sides soon after. A meeting took place on 3 August 2010. The minutes of that meeting record:

> [Customs] advised the requirement for all goods claiming drawback to be physically exported – and that a recent legal opinion excluded goods picked up on arrival from DFS from the drawback scheme.
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> DFS were greatly concerned at the impact of that requirement and stated that if so, they could not successfully operate the Galleria or some of their airport stores. They had assumed that all duty-paid goods sold to passengers would be subject to drawback, and advised that a similar situation in Australia had been approved by Australian Customs.

[43] That legal analysis was of course the very point identified almost a year earlier, on 14 August 2009 by the Customs official referred to at [35]. That qualification had been lost sight of by both parties, and they proceeded on a different basis until the issue reared its head again on 3 August 2010.

Error of law?

[44] Ms Pauline Courtney for Customs submits that there can be no error of law if Customs' interpretation of the law is correct. Section 117 of the Act only allows a duty drawback on goods that have been exported from New Zealand.

[45] I do not however accept that submission. There is no argument in this case as to what s 117(1)(a) requires. Ms Courtney's submission assumes classical error of law grounds. In the present case, however, the error goes to relevancy: the false common assumption (that I have found occurred) as to the availability of duty drawback for all non-domestic sales. Error here did not go to jurisdiction. Nor did it go to a matter that Customs was necessarily required to form a view on in making its decision. Rather, it was a collateral error of law that led to a false assumption being made as to the economic consequences of the proposed decision. It is very clear from the correspondence that the economic consequences for the OTC sellers was an important consideration. Consultation was extensive. So was the economic analysis. It is clear that officials were focused on finding, if they could, a solution which did not impose significant costs on current participants. And they thought they had found one. Into that consultation the Minister was drawn, both by officials and by the OTC sellers writing to him directly. The error here as to consequence was one of mixed law and fact. The error made as to legal context produced an economic projection that was wrong. Error of law led to error of fact. Whether viewed as error of law, consequential error of fact or an irrelevancy, the impact of the error or irrelevancy was substantial. It concerned the very matter that Customs was seeking to form a view upon, and advise the Minister on.

[46] Neither counsel advanced any authority on point. However it is clear that error of law is a free-standing ground of review.[3] The error of law need not be jurisdictional.[4] As Brewer J said in *Dorbu v Lawyers and Conveyancers Disciplinary Tribunal*:[5]

> It is fundamental that decision-makers must apply the law correctly and base their findings on sufficient evidence. The Courts hold a central constitutional role to rule on questions of law and to ensure that public bodies comply with the law. A decision will be reviewable if it is based on a material error of law: that is, an error in the actual making of the decision, which affected the decision itself. An unreasonable finding of fact may support a finding of error of law, as may inadequacy of reasons, or a failure to make a finding of fact on a key issue for decision. There is a presumption that an authority's decisions will be reviewable where a statute requires it to

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3 Matthew Smith *New Zealand Judicial Review Handbook* (Brookers, Wellington, 2011) at 709.
4 *Peters v Davison* [1999] 2 NZLR 164 (CA) at 181.
5 *Dorbu v Lawyers and Conveyancers Disciplinary Tribunal* HC Auckland CIV 2009-404-7381, 11 May 2011 at [16]. (Footnotes omitted).

> apply an "ascertainable test", but not where there is legitimate scope for the authority to exercise judgment and discretion.

[47] I see no reason why that should not also apply to a collateral legal question considered by a statutory decision-maker in the course of analysis of the costs and benefits of a proposed decision. If the legal premise for costing is flawed, so that the consequent analysis is also flawed, that is a reviewable error of law. Of course, the extent of the Court's willingness to intervene will depend on the materiality of the error. Here, however, there is no question that the error was material. It directly affected Customs' analysis that the cost of the proposed change to OTC sellers would be minor.

Conclusion

[48] It follows that the answer to Issue 1 is, "Yes".

Issue 2: If Customs did err in law, what (if any) relief should be ordered?

[49] As Ms Courtney properly acknowledged, if a public decision-maker is found to have erred in law, the general principle is that the applicant is entitled to relief unless extremely strong reasons apply for refusal. The discretion to be exercised is very narrow. This was explained by the Court of Appeal in *Air Nelson Ltd v Minister of Transport:*[6]

> [59] Public law remedies are discretionary. In considering whether to exercise its discretion not to quash an unlawful decision or grant another remedy, the court can take into account the needs of good administration, any delay or other disentitling conduct of the claimant, the effect on third parties, the commercial community or industry, and the utility of granting a remedy.
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> [60] Nevertheless, there must be extremely strong reasons to decline to grant relief. For example, in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 (HL), Lord Bingham of Cornhill described the discretion as being "very narrow" (at 608) whereas Lord Hoffmann said cases in which relief would be declined were "exceptional" (at 616).
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> [61] In principle, the starting point is that where a claimant demonstrates that a public decision-maker has erred in the exercise of its power, the

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6 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26; [2008] NZAR 139 (subsequently recalled: [2008] NZCA 26 but immaterially for present purposes).

> claimant is entitled to relief. The usual assumption is that where there is "substantial prejudice" to the claimant, a remedy should issue: *Murdoch v New Zealand Milk Board* [1982] 2 NZLR 108 at 122 (HC). This is evident from *Unison Networks Ltd v Commerce Commission* CA284/05 19 December 2006, where this Court refused to grant relief, notwithstanding a finding that the Commerce Commission had acted unlawfully, on the basis that overturning the Commission's decision would occasion considerable disruption to the electricity industry and its consumers. The majority nevertheless took note of "strong cautions against exercising the discretion not to set aside an unlawful decision": at [81].

[50] Customs advanced three reasons why relief should be denied in this case.

Own business decision?

[51] Ms Courtney submits that the financial impact or loss to DFS was a consequence of its own business decision to import all stock on a duty-paid basis, rather than operating a dual inventory system.

[52] I do not accept that argument. In fairness, it was not advanced with much force. It has perhaps a superficial appeal. But the reality is that relatively early on in the consultation process Customs appears itself to have accepted that to create a dual inventory system would not be viable, and would be financially prohibitive. I have already quoted an example of its acceptance of that proposition at [36]. The OTC sales scheme enabled sales to all-comers at non-airport venues – i.e. the Galleria and the downtown Louis Vuitton and Dior outlets – even though duty had not been paid on entry and would be accounted for after the event. Without the OTC sales option, DFS had a binary choice. Either sell solely on a duty-free basis (which would mean only international removed sales at the Galleria) or pay duty on all goods.

[53] I accept that DFS would have made the choice least costly to it overall. I accept also that the change has had substantial cost for it as Customs recognised at the time. I accept also that to implement a dual inventory system was not a feasible option for DFS, again as Customs itself recognised. So if DFS wished to sell over the counter at all at the Galleria, it would have to import all goods on a duty-paid basis. Which is what it has done.

Statutory appeal instead?

[54] Ms Courtney submits that under s 13, DFS was entitled to appeal to the Customs Appeal Authority against the decision to remove the licensed condition allowing OTC sales from DFS's procedure statements. Ms Courtney relies on the Supreme Court decision in *Tannadyce Investments Ltd v Commissioner of Inland Revenue*.[7] That case involved a privative clause in s 109 of the Tax Administration Act 1994. There is no such clause here. She also relied on *Terminals (NZ) Ltd v Comptroller of Customs*.[8] There Gilbert J said:[9]

> The Court must be vigilant in ensuring that the statutory process contained in the Act is not undermined by inappropriate recourse to judicial review. The Court should not lend its assistance to duty payers who seek to avoid their obligations by gaming the system. That would be contrary to the public interest and unfair to other members of the public who meet their duty payment obligations in a timely manner. But this cannot mean that the discretion should not be exercised in an appropriate case. Mr Palmer acknowledged this but submitted that the discretion should be reserved for exceptional cases.

In that case, however, Gilbert J did conclude that the integrity of the statutory dispute procedure would not be undermined by granting interim relief under s 8 of the Judicature Amendment Act 1972.

[55] Mr Hikaka submits that this was not a case for the exercise of the Court's discretion to refuse relief in the face of a clear error of law. The statutory appeal process, he submits, did not adequately protect DFS's interests. Although any appeal would be a de novo one to the Customs Appeal Authority, he submitted that such an Authority was not the place to challenge a structural change (such as the elimination of OTC sales altogether), as opposed to the piecemeal variation of a licence or procedure statement.

[56] It is clear that the existence of an alternative remedy, via a statutory appeal, is a consideration affecting the exercise of the Court's discretion to grant relief where a reviewable error is found. Review may be refused where the appeal rights are

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7 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158; [2012] 2 NZLR 153.

8 *Terminals(NZ) Ltd v Comptroller of Customs* [2012] NZHC 447.

9 At [57].

available, adequate and more appropriate.[10] But this discretionary consideration must not be taken too far. As Speight J said in *Wislang v Medical Practitioners Disciplinary Committee:*[11]

> [T]here is much to be said for the view expressed by Megarry J that where a man is entitled at law to a fair trial plus a right of appeal, his rights are not secured if he has an unfair trial and a fair appeal – for then he has had only one proper hearing and not two.

[57] The Customs Appeal Authority is a District Court Judge.[12] The appeal hearing is a de novo one.[13] The power of the Authority under s 259 to deal with matters before it is confined to the powers of the District Court in the exercise of civil jurisdiction. That does not include the full review powers available to the High Court, both inherently and under the Judicature Amendment Act 1972. There is a live question, therefore, whether that appeal right would be adequate to enable challenge to the decision of the Chief Executive to abolish the OTC sales option. However, given the error in this case was an error of law, it is likely that the Authority could have addressed that question adequately by way of appeal.[14]

[58] At the end of the day, however, I am satisfied that this is not a case in which the statutory appeal rights would have been available, adequate or more appropriate. The relevant decision of Customs was made on a date that is not clear, because there is no record of the decision. But it was notified by letter dated 15 June 2010. That letter revoked the OTC sales condition. The letter states that revocation was undertaken pursuant to s 13 of the Act. A copy of that section was attached to the letter. As noted earlier, the letter then drew attention to DFS's appeal rights:

> You will note s 13 contains a provision for you to appeal should you be dissatisfied with this decision. Any appeal should be made within twenty (20) working days after the date on which the notice of the decision is given. Pursuant to s 285(2)(a) of the Act notice is deemed to have been given on 23 June 2010.

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10 *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA) at [31].

11 *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29 (SC) at 44, referring to the decision of Megarry J in *Leary v National Union of Vehicle Builders* [1971] Ch 34 (Ch D)

12 Section 244(3).

13 Section 255(1).

14 GDS Taylor *Judicial Review: A New Zealand Perspective* (LexisNexis, Wellington, 2010) at 148.

[59] DFS might, I suppose, have filed an appeal within 20 days of 23 June 2010. But at that stage it had no reason to do so. The common error as to the availability of duty drawback for international non-removed sales was not identified until 3 August 2010. That was beyond the 20 day period provided for. That period is in practical terms immutable. Section 256 provides that time for appeal may be extended, but only if application for extension is made within the 20 day period. The Authority has held that that precludes enlargement of time in any other case.[15]

[60] So, by the time DFS's appeal right period expired, it was neither aware that an error had been made at all in relation to the availability of duty drawback, nor aware of the material evidence available on discovery showing that the error was a common one. The latter it would have suspected, and might have inferred from communications from Customs, but the full extent of the evidence available was not before it.[16]

[61] I therefore conclude that the merely notional availability of a statutory appeal in this case does not displace the applicant's primary right to a remedy on review.

Reconsideration

[62] Ms Courtney submits that even if there was any unlawfulness in the original decision-making, the decision has been made again by the Chief Executive of Customs, in May 2012. The second decision took into account all information known to Customs. That included the information DFS had provided about the financial effects of the change. No different decision was made by the Chief Executive in May 2012. She confirmed the original May/June 2010 decision to abolish the OTC sales option. No error of law in the second decision has been identified by DFS. Relief should be declined because were the original decision quashed and directed to be reconsidered, the outcome would likely be, again, the same.

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15 *Case 5/99* (1999) 1 NZCC (Digest) 53-027 (CAA); *A v Chief Executive of New Zealand Customs Service* [2000] NZAR 252 (CAA).

16 The Authority has the power to require production of documents: s 261(1)(b).

[63] Ms Simcock (who addressed me on this issue for DFS) submits that the Court should be hesitant to accept a purported reconsideration, undertaken unilaterally after judicial review proceedings have been issued and that comes to the same result, as a basis to decline relief. She submits that if the Court were too willingly to accept such reconsideration, "it could see decision makers sidelining the important supervisory role of the Court by purporting to 'fix up' any problems identified in the statement of claim by a second decision". She submits there would be a real risk that such unilateral reconsiderations could be "manicuring exercises driven to cut off the Court process whilst retaining the same decision, or that such a perception may be generated". In any event in this case she submits that the reconsideration was not appropriately conducted. First, unlike the first decision, there was not extensive consultation with DFS before the second decision was made. Secondly, the proposal and its impacts were not discussed with the responsible Minister, unlike the first decision.

[64] The process adopted on the May 2012 reconsideration exercise is deposed to by Carolyn Tremain, who has been Chief Executive since September 2011. She was not involved in the first decision to abolish the OTC sales option. Ms Tremain deposes that, despite a comprehensive search, no record of the first decision to abolish the OTC sales option could be located. Remarkably, too, there was no record of what information was before the decision makers in making that decision. Indeed, it is not clear from her affidavit exactly who those decision makers were. Quite correctly, she expresses concern that issues might thus arise as to whether the correct questions were before those decision makers, the accuracy of the factual information considered by them, and whether the decision was one reasonably open to them.

[65] A series of documents were therefore put before Ms Tremain in May 2012. That was, of course, after these proceedings were issued. They included a 20 page background paper, a supplementary 34 page background paper on the decision-making process, and the documents already before the Court in the form of affidavit evidence and pleadings. Ms Tremain also interviewed her predecessor (and two Deputy Comptrollers of Customs) as to their recollection of what had occurred. That consultation confirmed amongst other things:

> ... the discontinuing of OTC [sales] would not generate the level of additional cost claimed by the companies and depending on how the companies organised their affairs, Customs had identified opportunities to significantly reduce, if not eliminate, additional compliance costs ...

[66] Ms Tremain then says:

> Despite the Okorn and Satchell affidavits [the affidavits filed for DFS], and a meeting officials held with DFS, no additional information was provided to Customs that warranted any change from what had come out of the earlier extensive consultation process. DFS has made decisions for its own business reasons that have resulted in it incurring on-going costs of approximately $20,000 per month. Customs has not been able to identify, given the current legislative wording and policy considerations, any way that could be mitigated.

[67] The statement in Ms Tremain's affidavit as to a meeting between officials and DFS is puzzling. None of the officials who gave affidavit evidence deposed to such a meeting taking place. Neither did the DFS deponents. When it took place, in what circumstances, and what was discussed, is not clear. I was informed at the bar by Mr Hikaka that DFS was aware that a reconsideration was taking place, but did not participate in it. He said there was no invitation to make written or oral submissions. Certainly none is evident in the record, apart from the phantom meeting, the evidence as to the existence of which is unsatisfactory.

[68] It is certainly true that voluntary reconsideration of a prior decision, by an administrative decision maker concerned that it has entered into error, can be a discretionary consideration in declining relief. But I think Ms Simcock is right to say the Courts must be cautious in treating such reconsideration as displacing the ordinary remedial consequence of the initial error.

[69] As the Court of Appeal said in *Chiu v Minister of Immigration*,[17] the Court should be slow to deny remedy on the basis that a decision maker thinks it is likely to make the same decision all over again (in this instance, presumably, for the third time). As the Court of Appeal noted, there are five reasons for that. First, it is far from inevitable that if a matter is returned for reconsideration the result *will* be the same. Secondly, reconsideration is usually associated with an opportunity for fresh evidence and argument. That is a feature notably missing here. Thirdly, the

[17] *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA) at 552-553.

individual hearing the application afresh will not necessarily be the decision maker or other person who has deposed as to the likely outcome. Or, it might be added, who has undertaken a purported reconsideration in fact. In the present case that raises a potential issue in relation to the appropriateness of the Chief Executive undertaking a directed reconsideration. But it is premature to express a view on that now. Fourthly, that justice must be seen to be done. Fifthly, the availability of judicial review may have a deterrent function:[18]

> In at least some cases, decision makers may be encouraged to avoid error if they appreciate that their efforts can attract judicial scrutiny and intervention. It would be unfortunate if the idea gained currency that in the event of challenge, flawed procedures and decisions could be protected by the simple expedient of giving evidence which predicted the same result.

[70] In the present case there has been more than simply a prediction. Rather, a re-evaluation. But I consider that re-evaluation was unsatisfactory, and inadequate to displace relief on review.

[71] Certainly, in this case, I do not consider the fact that reconsideration took place on a unilateral basis (rather than the bilateral, consultative process that accompanied the first decision), and without significant input from DFS or other affected parties, can be seen to represent a satisfactory remedy in substitution for what might be directed by the Court. In particular, the unilateral nature of the exercise, relying substantially on material generated by officials associated with the initial decision, is inadequate to displace judicial relief.

[72] I do not however consider that the Minister necessarily must be engaged in any reconsideration. There is no issue that the decision whether or not to vary the licence condition permitting OTC sales is within the Chief Executive's authority.[19] Whether the Minister is re-engaged on the question will depend on the consultative process and upon election one way or the other by both the chief executive and the Minister.

[73] Accordingly, and although Ms Tremain's reconsideration was no doubt undertaken with the best of intention, it cannot be viewed by the Court as a

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18 At 553.
19 Section 13(1).

conclusive "dry-run" reconsideration. Its unilateral nature, in contrast to the original decision, is insufficient to compel the denial of judicial relief.

Conclusion

[74] It follows that the answer to Issue 2 is that there is no reason here not to grant judicial relief.

Result

[75] The decision by the respondent in or around May or June 2010 to revoke approval for OTC sales as a condition in the applicant's licence and procedure statement is quashed.

[76] The respondent is directed to reconsider that decision afresh. In doing so the respondent is to provide to the applicant a fair opportunity to be heard on the determinative options and their consequences.

[77] Beyond costs, which I order in favour of the applicant, no further relief is required or appropriate.

Stephen Kós J

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