

Breaches of directors' duties in managed investment schemes

Amy Campbell reports on *Comptroller General of Customs v Zappia* [2018] HCA 54

The High Court has held that employees who are subject to the direction of others can have 'possession, custody or control' of dutiable goods for the purposes of s 35A of the *Customs Act 1901* (Cth) (Act) and thereby be required to pay customs duty not received by reason of a failure to keep those goods safe.

Background

Zaps Transport (Aust) Pty Ltd (Zaps) operated a warehouse pursuant to a licence issued to it under the Act. During a break-in, tobacco products were stolen from the warehouse. Zaps, John Zappia (the sole director of Zaps) and Domenic Zappia (both the son of John and the 'general manager' and 'warehouse manager' of Zaps) were each served with notices of demand by a collector for customs duty that would have been payable on the stolen goods if they had been entered for home consumption. The notices asserted that they had failed to keep the stolen goods safely, as required by s 35A(1)(a) of the Act.

Each of the recipients of the notices was unsuccessful in the Administrative Appeals Tribunal in their review of the decision to demand payment from them. In affirming the Collector's decision, the Tribunal found that the tobacco products had not been kept safely and that Domenic had exercised control over the tobacco products, albeit that his control was subordinate to that of his father and Zaps.

Domenic appealed from the Tribunal's decision to the Federal Court, constituted by a Full Court. (John, who was a bankrupt, and Zaps, which was in liquidation, did not appeal). By majority (White and Moshinsky JJ; Davies J dissenting), the Full Court set aside the decision of the Tribunal and declared the demand served on Domenic to be 'invalid and of no effect'. White and Moshinsky JJ found that an employee of a licensed warehouse did not have the necessary 'possession, custody or control' of the dutiable goods for the purposes of s 35A(1) of the Act, not having exclusive possession



or physical control of the goods.

Davies J concluded that the application of the provision depended upon the measure of control exercised by the person over the dutiable goods. Her Honour concluded that the Tribunal erred in law as it failed to address specifically whether the operational control of Domenic was such that it could be said that he failed to keep the stolen goods safely on the occasion of the break-in (a course that White and Moshinsky JJ would also have taken if their conclusion had been wrong).

The High Court's decision

The High Court unanimously allowed an appeal from the Full Court's decision.

In a joint judgment, Kiefel CJ, Bell, Gageler and Gordon JJ, held that the expression 'possession, custody or control' had to be read in light of its statutory purpose, namely, ensuring customs duty was paid before delivery of dutiable goods into home consumption, and the affirmative obligations imposed by s 35A (at [28]-[29]). Their Honours observed that none of the terms had a fixed legal meaning, and that the power or authority of a person in relation to a thing in that context was a question of degree that was not closely confined and which was able to arise from a range of sources (at [30]).

Their Honours considered that there was no reason why power or authority over the goods needed to be exclusive or paramount (at [36]) and that several persons may each possess power or authority to the requisite degree within a chain of commerce or hi-

erarchy (at [37]). The mere fact that one or some of the persons might act subject to the direction of another did not disqualify them (at [39]). Further, there was no inconsistency between that conclusion and the principle that criminal liability should be certain and ascertainable, with their Honours noting that, in any event, the provision was not quasi-penal in character (at [40]).

Their Honours concluded that the facts found by the Tribunal were sufficient to establish that Domenic had the requisite 'possession, custody or control' over the stolen goods and failed to keep those goods safely, given he had authority to direct what was to happen to the goods on a day-to-day basis during the period of the break-in (at [41]).

Nettle J agreed. His Honour observed that a range of contexts may inform the meaning of the expression 'possession, custody or control' and, in the present case, this was a provision that was concerned with the ability of persons in fact to control goods rather than the legal relationship of those persons and the goods. His Honour contrasted the present case with other provisions which had the object of attributing to a person in possession, custody or control of specified goods an intent to sell which, therefore, implied that the person needed the legal power to sell those goods (at [45]-[46]).