Trinity Term
[2014] UKSC 34
On appeal from: [2012] EWCA Civ 15; [2012] EWCA Civ 689

JUDGMENT

R (On the application of Eastenders Cash and Carry plc and others (Respondents) *v* The Commissioners for Her Majesty's Revenue and Customs (Appellant)

R (on the application of First Stop Wholesale Limited) (Appellant) *v* The Commissioners of Her Majesty's Revenue and Customs (Respondent)

before

Lord Neuberger, President
Lord Mance
Lord Sumption
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

11 June 2014

Heard on 27 and 28 November 2013

Appellant
Jonathan Swift QC
Neil Sheldon
James Puzey
(Instructed by HMRC Solicitors Office)

Respondent
Geraint Jones QC
Marc Glover
Niraj Modha
(Instructed by Rainer Hughes Solicitors)

Appellant
James Pickup QC
Marc Glover
Niraj Modha
(Instructed by Rainer Hughes Solicitors)

Respondent
Jonathan Swift QC
Neil Sheldon
James Puzey
(Instructed by HMRC Solicitors Office)

LORD SUMPTION AND LORD REED (with whom Lord Neuberger, Lord Mance and Lord Carnwath agree)

1. Indirect taxes have always posed particular problems of enforcement, which account for the wide powers of investigation and seizure conferred by statute on the Commissioners charged with their collection. The exercise of these powers has given rise to dispute ever since Johnson's Dictionary offered its famous definition of excise in 1755 ("a hateful tax, levied by wretches"), and its author was threatened by the Commissioners with a libel action. The powers of the Commissioners of Customs and Excise were originally contained in a large number of enactments dealing with different aspects of an exceedingly complex legal scheme. The first modern consolidation was the Customs and Excise Act 1952 ("the 1952 Act"). The system is currently administered by Her Majesty's Commissioners of Revenue and Customs under the Customs and Excise Management Act 1979 ("the 1979 Act"), which re-enacts much of the 1952 Act, with substantial amendments. Some significant amendments have been made to the Act by the Finance Act 2013, but these were not in force at the relevant times, and we therefore refer throughout this judgment to the Act as it stood before they were made.

2. These two appeals are about the circumstances and the manner in which customs officers are empowered to detain goods on which duty has not been paid, or may not have been paid.

The Eastenders appeal

3. In the *Eastenders* appeal, customs officers entered Eastenders' warehouses and inspected consignments of alcoholic goods found there. They were acting under section 118C(2) of the 1979 Act, which authorises customs officers to enter and inspect business premises which they have reasonable cause to believe are being used in connection with the supply, importation or exportation of goods chargeable with excise duty and to inspect any goods found there. Section 118C(2) was repealed by the Finance (No 3) Act 2010 and replaced by other provisions, but we refer to the Act as it stood at the material time. Under section 118B, the officers may also require the production of documents. Eastenders' employees were unable to provide documentary evidence, such as purchase invoices, demonstrating that duty had been paid on the goods. Inspection of such documents as were produced indicated that duty might not have been paid. The officers decided to detain the goods pending the outcome of further enquiries into the question whether the appropriate duties had been paid: in particular, enquiries into the supply chains relating to the goods. The goods remained on Eastenders' premises pending the outcome of those enquiries but

were subject to a direction given under section 139(5) of the 1979 Act, in terms of which the Commissioners can direct the manner in which any thing detained under the customs and excise Acts must be dealt with pending the determination as to its forfeiture or disposal. In subsequent correspondence, the Commissioners stated that the goods had been detained under section 139, subsection (1) of which empowers the Commissioners or their officers to seize or detain "any thing liable to forfeiture under the customs and excise Acts". By virtue of section 49, things liable to forfeiture include any dutiable goods imported without payment of duty.

4. Following their enquiries, the Commissioners seized most of the detained goods and returned the remainder. All of the seized goods were subsequently condemned as forfeited, and no issue arises about those. The present appeal relates to the goods which were detained but were subsequently returned, the officers' enquiries having proved inconclusive.

5. Eastenders applied, as the owners of the goods in question, for judicial review of the decision to detain them. The judge, Sales J, found that the officers had reasonable grounds to suspect that duty had not been paid on the goods that were detained. It was also found that the detention of the goods had not exceeded a reasonable period of time. Those findings were not challenged on appeal.

6. In these circumstances, Sales J held that the Commissioners had acted lawfully in detaining the goods, on the basis that they had the power to detain goods for a reasonable time, pending enquiries as to whether duty had been paid, where they had reasonable grounds to suspect that the goods might be liable to forfeiture. Sales J considered that that power was conferred by section 139(1) of the 1979 Act. No other possible source of the power had been suggested. The application for judicial review was therefore dismissed: [2010] EWHC 2797 (Admin); [2011] 1 WLR 488.

7. The Court of Appeal by a majority (Elias and Davis LJJ, Mummery LJ dissenting) reversed that decision. They held that section 139(1) applied only where goods were actually liable to forfeiture, and it had not been established that the goods in question were so liable. A declaration was accordingly granted that the goods not liable to forfeiture were unlawfully detained: [2012] EWCA Civ 15; [2012] 1 WLR 2067. There was again no contention that the power to detain goods on suspicion might be derived from any source other than section 139(1). It was subsequently decided that Eastenders could not be awarded costs, by reason of section 144(2) of the 1979 Act, which provides, in substance, that where a court holds that a seizure or detention was unlawful, no award of damages or costs may be made against the Commissioners if the court is satisfied that they acted on reasonable grounds: [2012] EWCA Civ 689; [2012] 1 WLR 2912. The Commissioners appeal to this court against the first decision. Eastenders were refused permission to appeal against the

second decision. The point in relation to costs has however been argued in the *First Stop* appeal, as we shall explain, and whatever we decide about it must necessarily apply in both appeals.

The First Stop appeal

8. In the *First Stop* appeal, customs officers entered a warehouse and retail premises used by First Stop. They were acting under section 112(1) of the 1979 Act, which authorises customs officers to enter the premises of "revenue traders" as defined in section 1 of the Act (in substance, persons who deal in goods liable to excise duty) and to search for and examine any goods or materials connected with that trade. Under section 112A, inserted by the Finance (No 3) Act 2010, that power includes the power to examine documents. At the retail premises, the officers seized a small quantity of spirits on the ground that the "duty paid" stamps on them were defective. They also detained a much larger quantity of alcoholic drinks, whose provenance was unclear, while enquiries were made into the question whether duty had been paid. One of the directors of First Stop was informed by an officer that the goods were being detained pending further enquiries into their duty status. Written notices were provided stating that the goods had been detained "pending evidence of duty status (CEMA 1979, section 139)". Most of the detained goods were subsequently seized. The remainder were returned to First Stop. Condemnation proceedings in respect of the seized goods remained pending at the time of the hearing of these appeals.

9. First Stop were granted permission to apply for judicial review of the detention of those goods which were still detained, pending the outcome of enquiries, about four months after their initial detention. By the time the application was heard, all of those goods had been seized. The application came before Singh J after the decision of the Court of Appeal in *Eastenders.* The judge gave a total of three judgments on different issues which arose from the application. In the first, he held that the detention of the goods had been unlawful, since the reason given for the detention was the need for investigation, and it followed in his view from the decision of the Court of Appeal in *Eastenders* that goods could not lawfully be detained under section 139(1) of the 1979 Act for that purpose. That was so even if the goods might subsequently be found to be liable to forfeiture: in his view, goods could not lawfully be detained under section 139(1) for the purpose of ascertaining whether the power to detain them had been conferred by that provision: [2012] EWHC 1106 (Admin).

10. In a second judgment, Singh J held that section 144(2) did not protect the Commissioners against an award of costs, on the basis that the reason given for detaining the goods, being unlawful, could not amount to "reasonable grounds" within the meaning of that provision: [2012] EWHC 2191 (Admin).

11. In his third judgment, Singh J was concerned with the seizure notices. The question was whether a statement in the notices that "no evidence of UK duty payment has been provided" was a sufficient statement of the grounds for seizing the goods as "liable to forfeiture". The judge held that it was: [2012] EWHC 2975 (Admin).

12. All three judgments were appealed to the Court of Appeal. They allowed the Commissioners' appeal against the first two judgments. Beatson LJ, in a judgment with which Lewison and Jackson LJJ agreed, accepted that the judge's view that the power to detain under section 139(1) must not only exist, but must be exercised for the purpose intended by Parliament, gained powerful support from general principles of public law, but concluded that it was inconsistent with the judgments of the majority of the court in the first judgment in the *Eastenders* case. The court also considered that it followed from the first judgment in the *Eastenders* case that there was no duty to give reasons for the detention of goods under section 139(1). In their view, the effect of the *Eastenders* decision was that if the goods were in fact "liable to forfeiture", detention for a reasonable time was lawful under section 139(1) irrespective of any reason that might have been given. The appeal against Singh J's second judgment, relating to section 144(2), was allowed on the ground that the judge's decision was inconsistent with the decision of the Court of Appeal in its second judgment in the *Eastenders* case: [2013] EWCA Civ 183. First Stop appeal to this court against both decisions. The Court of Appeal upheld Singh J's third judgment, and no appeal on the adequacy of the notice of seizure is before us. It follows that in this case, as in *Eastenders*, we are directly concerned only with the power of detention.

The statutory scheme

13. We have referred to the provisions of the 1979 Act that were central to the judgments below, namely sections 139(1) and 144(2). Before considering the effect of these provisions, it is necessary to say something more about them, and about the broader statutory scheme of which they are part.

14. The 1979 Act confers extensive powers on the Commissioners. These include the express power to examine goods and documents relating to goods, or to require information about them. This power is conferred by many provisions of the 1979 Act, the relevant provision depending on the location of the goods and sometimes their type. In particular, section 112(1) confers on customs officers a power to enter the premises of revenue traders, such as First Stop, and to inspect the premises and search for, examine and take account of any goods or materials belonging to or in any way connected with that trade. By virtue of section 112A, the power conferred by section 112 includes power to inspect any business documents that are on the premises. Section 118C(2) applies where an officer has reasonable cause to believe

that any premises are used in connection with the supply, importation or exportation of dutiable goods and that such goods are on the premises. It confers on the officer the power, exercised in the *Eastenders* case, to enter and inspect the premises and inspect any goods found on them.

15. A number of the powers conferred by the 1979 Act are expressly exercisable when the relevant officer has reasonable grounds for believing or suspecting something. Section 118C(2) is an example. There are many others. Thus under section 84, which is concerned with unlawful signals to smugglers, an officer may board a ship, aircraft or vehicle or enter a place from which he has "reasonable grounds for suspecting" that a signal is being or is about to be sent; under section 113, officers are empowered to break open premises where they have "reasonable grounds to suspect" that secret pipes or other conveyances are being used for goods subject to excise duty; under section 138, a person may be detained if there are "reasonable grounds to suspect that he has committed [an] offence under the customs and excise Acts"; under section 161, an officer may enter and search any place where there are "reasonable grounds to suspect" that property liable to forfeiture is being kept or concealed; and under sections 163 and 164 there are corresponding powers to stop and search vehicles, vessels or persons suspected of being involved in breaches of the customs and excise legislation.

16. The 1979 Act contains many sections providing for the forfeiture of property, including property whose importation is prohibited, property in respect of which duty has been evaded, or property (such as vehicles or vessels) which have been used for the purpose of infringements of various kinds. For present purposes, the relevant power of forfeiture is conferred by section 49, which can be treated as the paradigm case. It provides, among other things, that "goods chargeable upon their importation with customs or excise duty" which are imported without payment of that duty shall, subject to specified exceptions, be "liable to forfeiture".

17. Section 139 of the 1979 Act contains provisions relating to the detention and seizure of goods. Section 139(1) provides:

> "Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard."

It can be seen that section 139(1) confers two distinct powers on the Commissioners, a power of seizure and a power of detention. Neither power is expressly said to be exercisable on the basis of reasonable grounds for suspicion or belief. In this respect they differ from some of the other powers to which we have referred.

18. The effect of seizure is apparent from other provisions of the 1979 Act. It is the first stage of a statutory process leading to forfeiture. The process is governed by Schedule 3, to which effect is given by section 139(6). Paragraph 1 of Schedule 3 requires the Commissioners to give notice of "the seizure of any thing as liable to forfeiture", and of the grounds for it, except in cases governed by paragraph 2. The exceptional cases are broadly speaking those in which the seizure was carried out in the presence of the relevant interested party. Under paragraph 3, the owner of the goods has one month from the date of the notice (or the date of seizure in a case within paragraph 2) in which to serve a notice claiming that "anything seized as liable to forfeiture is not so liable". If no notice is served within that period, then the seized goods are deemed to have been duly condemned as forfeited (paragraph 5). If, on the other hand, a notice is served, the Commissioners must take proceedings for condemnation in the High Court or a magistrates' court, "and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited" (paragraph 6). If the court holds that the goods were not liable to forfeiture, paragraph 17 provides for the Commissioners to tender to the owner a sum representing their value. The owner may then accept the tender, in which case "he shall not be entitled to maintain any action on account of the seizure, detention, sale or destruction of the thing". Or he may reject it, in which case the assumption is that such a right of action will remain available.

19. There are no corresponding provisions relating to the power to detain goods. Indeed, until the Act was amended in 2013, it contained no provisions at all dealing with the procedure for detaining property or its consequences. There can, however, be little doubt about what detention involved, even before the amendment. Detention is a temporary assertion of control over the goods, which does not necessarily involve any seizure with a view to ultimate forfeiture. What is the purpose of detaining goods without seizing them? The obvious answer is to enable the goods to be examined, or secured pending investigations which might lead to their seizure later. This was the view of the Court of Common Pleas in *Jacobsohn v Blake and Compton* (1844) 6 Man. & G 919; 13 LJ CP 89, a case to which we shall return, and of the majority of the Court of Appeal in *Gora v Customs and Excise Commissioners* [2003] EWCA Civ 525; [2004] QB 93.

20. In his judgment in the *Eastenders* case, at para 30, Sales J said this:

> "It does not require much imagination to see that there may be many cases in which there is uncertainty when HMRC officers inspect goods whether duty has been paid on them or not, and to see that in such cases the effective and fair implementation of the relevant tax and its associated enforcement regime will require that goods are held for a period while investigations are carried out in an effort to remove that uncertainty. In general (and without seeking to level criticism against the claimants in the present cases), Parliament cannot have intended

> that an owner of goods should be able, just by obfuscating and creating uncertainty at the point of inspection in relation to his supply chain and whether duty has or has not been paid, to avoid the full rigour of the machinery for the enforcement of payment of taxes, including by forfeiture of goods on which duty has not been paid."

We agree.

21. We have already pointed out that neither the power of seizure nor the power of detention conferred by section 139(1) is expressly said to be exercisable on the basis of reasonable grounds for suspicion or belief. However, the reasonableness of the exercise of those powers does come into it by virtue of section 144, which provides:

> "144.—(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."

Where an officer detains property under section 139(1) because he reasonably considers that it is "liable to forfeiture", section 144(2) assumes that that he may be liable if he turns out to be wrong about that, but protects him against an order for financial relief.

"Liable to forfeiture"

22. The first question on these appeals concerns the condition for the exercise of the power of seizure or detention under section 139(1), that the property should be "liable to forfeiture". Does this mean that it must actually be liable to forfeiture? Or is it enough that the relevant officer believed or suspected that it was liable to forfeiture? Or that he wished to investigate whether it was or not?

23. We consider that the answer to this is straightforward. The right to seize or detain property under section 139(1) is dependent on that property actually being liable to forfeiture under one of the various forfeiture provisions of the Act. This turns on the objectively ascertained facts, and not on the beliefs or suspicions of the Commissioners or their officers, however reasonable. Our reasons are as follows:

(1) Throughout the 1979 Act, the draftsman has said in terms when statutory powers may be exercised on the basis of suspicion or belief rather than objective fact. A particularly striking example is section 138, which is the power corresponding to section 139 relating to the detention of persons who are "liable to be detained" under the Customs and Excise Acts. The power of detention is exercisable if there are "reasonable grounds to suspect" that the person has committed an offence. The omission of any such language from section 139 must have been deliberate.

(2) The expression "liable to forfeiture" is used in no less than thirty sections of the 1979 Act. It would be wearisome to go through them all to make exactly the same point, which is that they are almost all sections providing that property is liable to forfeiture in defined circumstances, or in some cases providing that it is not to be liable to forfeiture in defined circumstances when it otherwise would be. In these sections, the words can only refer to actual liability to forfeiture. In all of the other sections in which the expression is used, with the possible exception of sections 139(1) and 144(2), it is equally clear that the reference is to an actual liability to forfeiture.

(3) In section 139(1) it is a precondition for both seizure and detention that the goods should be "liable to forfeiture". There is no difference in the way that the precondition applies to the two measures. In relation to seizure, the expression must mean actually liable to forfeiture, since seizure puts in train the procedural provisions of Schedule 3, which is wholly concerned with the condemnation of property as forfeit. On the face of it, therefore, the expression must mean the same when applied to detention. The same point can be made

about the use of the expression in relation to both seizure and detention in section 144(2).

(4) More generally, if "liable to forfeiture" does not mean actually liable to forfeiture, it is difficult to discern what it can sensibly be thought to mean. The Commissioners' submission is that it refers to goods of a kind legally capable of being forfeited. This would mean that all dutiable goods were "liable to forfeiture". While that is a linguistically possible meaning of the words, it is hardly the natural one. Its adoption would have the effect of conferring on customs officers a power to detain any goods which were in law dutiable, subject to no restrictions whatever other than those arising from the general principles of public law. So far as the 1979 Act is concerned, it would not even be necessary for the Commissioners to show that there were reasonable grounds for suspicion or belief.

(5) Section 144(2), as we have pointed out, assumes that where property has been detained which turns out not to be actually liable to forfeiture, the Commissioners or their officers may be held liable in an action in tort. It confers an immunity in that event from an award of damages and costs if they acted reasonably. If the Commissioners or their officers were entitled to detain goods under section 139(1) on reasonable suspicion, the situation envisaged in this provision could not arise. The action would fail on liability and no immunity from damages and costs would be required.

Some difficulties

24. This interpretation of section 139(1), although in our opinion correct, would nevertheless have troubling implications if the Commissioners and their officers had no other power to detain goods. The resultant difficulties include the following:

(1) As we have explained, and as Sales J recognised in the passage which we have cited, it is obviously essential to the effective implementation of the laws governing customs and excise that customs officers should be able to detain goods so as to enable them to be examined and secured pending investigations which might lead to their subsequent seizure. Sales J at first instance and Mummery LJ in the Court of Appeal inferred from that practical necessity (i) that Parliament must have intended that customs officers should have the power to detain goods where they reasonably suspect that the goods may be liable to forfeiture and require to make further inquiries, and (ii) that Parliament must therefore have intended section 139(1) to be construed as conferring such a power. The second proposition must be

rejected; but the argument in support of the first proposition remains a powerful one.

(2) On the hypothesis that the only power of detention is that conferred by section 139(1), and if that provision is interpreted as we consider it must be, it follows that the detention of goods is unlawful whenever the goods are not in fact liable to forfeiture. If that is so, then the detention of goods on the basis of suspicion is unlawful in all cases where the suspicion turns out to be unfounded. In the nature of things, that will be the position in a proportion of cases, even where reasonable grounds for suspicion exist. The customs officers may then be liable in damages for their interference with rights of property unless they can bring themselves within the scope of section 144(2). Even where section 144(2) applies, it only protects the officers against financial relief.

(3) A further difficulty with an approach based upon an acceptance that customs officers will behave unlawfully, but will be protected from liability by section 144(2), concerns its compatibility with EU law and the Human Rights Act 1998. Under EU law, the detention of goods by customs officers may require to be justifiable as an interference with the free movement of goods: something which would scarcely be possible if the interference was unauthorised by law, or if that law failed to comply with the EU principle of legal certainty.

(4) In relation to the Human Rights Act, the detention of goods by customs officers is an interference with the peaceful enjoyment of possessions within the meaning of article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: see for example *Islamic Republic of Iran Shipping Lines v Turkey* (2007) 47 EHRR 573. As such, it must be in accordance with law, and must therefore be authorised by domestic law. Furthermore, the domestic law must meet the requirement of legal certainty. If customs officers are not authorised to detain goods which are not actually liable to forfeiture, or to detain goods for the purpose of investigation into whether they are liable to forfeiture, it follows that their doing so is unlawful by virtue of the Human Rights Act as well as under the common law.

(5) The proposition that the only power of detention possessed by customs officers is that conferred by section 139(1) also raises a further difficulty. As we shall explain, there was no statutory provision in respect of detention, corresponding to section 139(1), until 1952. Can it possibly have been the position, prior to 1952, that the Commissioners and their officers had no power to secure goods, where

> there were reasonable grounds to suspect that they were liable to forfeiture and investigations had to be carried out, other than by pre-empting the outcome of such investigations by seizing the goods and setting condemnation proceedings in train, at the risk of behaving unlawfully and incurring a liability in damages? As we have explained, the contrary was the view of the Court of Common Pleas in *Jacobsohn v Blake and Compton.*

25. In view of these difficulties, it appears to us to be necessary to consider the legislative background, and some relevant authorities, in greater detail.

The background to the 1979 Act

26. Statutory regimes providing for the appointment of customs officers and vesting them with powers have existed for centuries. A thoroughgoing reform of the statute book was carried out in 1825, when almost all the statutes regulating the administration of customs and excise which were then in force, going back to the reign of Richard II, were repealed by the Act 6 Geo IV c 105, and new provisions were enacted in their place by several Acts, including the Acts 6 Geo IV c 107 and c 108. A further consolidation took place in 1833, when the 1825 legislation was repealed and replaced by a number of Acts, including the Acts 3 and 4 Will IV c 52 ("An Act for the General Regulation of the Customs") and c 53 ("An Act for the Prevention of Smuggling").

27. This legislation, like that of 1825, made provision for the "detention" of persons: see the Act 3 and 4 Will IV c 53, sections 48-53. It also made provision for the "seizure" of goods which were "liable to forfeiture": see the Act 3 and 4 Will IV c 53, section 32, which is a predecessor of section 139(1) of the 1979 Act. Provision was also made in respect of proceedings brought by the owners of goods which had been seized. In particular, the defendant was protected from liability in damages or costs if there had been probable cause for the seizure: see the Act 3 and 4 Will IV c 53, section 102, which is a predecessor of section 144(2) of the 1979 Act.

28. The only statutory reference to the "detention" of goods at that time was made in a different context. The Act 3 and 4 Will IV c 52 required importers of goods to deliver a bill of entry of the goods, containing specified information about them. Goods which were not properly described in the bill were forfeited: section 20. Where the duty payable depended on the value of the goods, that also had to be stated. Section 22 provided that "if upon examination it shall appear to the officers of the customs that such goods are not valued according to the true value thereof, it shall be lawful for such officers to detain and secure such goods, and … to take such goods for the use of the Crown", the importer being paid compensation based upon

his own valuation. Section 133 distinguished between goods being "seized as forfeited, or detained as under-valued". Then as now, the legislation conferred extensive powers upon customs officers, including a plethora of powers of entry, search and examination.

29. The 1833 legislation was in force at the time of the case of *Jacobsohn v Blake and Compton* (1844) 6 Man & G 919; 13 LJ CP 89, which is one of the few reported decisions in this area of the law, and the only one which contains a detailed consideration of the relevant principles. The case was brought by the owner of a consignment of cutlery against two customs officers. The officers had examined the goods when they were landed in order to determine the duty payable (the precise statutory power under which they did so is not stated in the report: there are a number of possibilities), and had then decided to detain them, because of a suspicion that they contravened a statutory prohibition on the importation of cutlery of foreign manufacture bearing the names of British manufacturers resident in the United Kingdom, and were therefore liable to forfeiture. The officers refused to release the goods until the matter had been considered by the Commissioners. After a period of about five months, the Commissioners agreed to release the goods on payment of the duty, and the goods were duly released. An action for damages was then brought, on the basis that the detention had been unlawful. There was no express statutory basis for the detention of the goods, since they were not detained as under-valued.

30. The jury was directed to return a verdict for the defendants, and that direction was upheld by the Court of Common Pleas. Tindal CJ is reported at pp 925-926 of Manning and Granger's report as stating:

> "[T]he defendants merely took possession of the goods, in the execution of their duty as custom-house officers, for the purpose of examination. When the goods were examined certain marks were found upon them, which induced the defendants to think they were prohibited; and they said they must detain them; and then, on a subsequent application on the part of the plaintiff for the delivery of the goods, the answer was that they were detained and would be prosecuted as seizures. It appears, therefore, that the defendants originally detained the goods under a real and honest doubt that they were subject to forfeiture: whether that doubt was well grounded, is not now the question. … There has been no abuse of authority on their part. The goods remained, during the whole time of the examination, in the same custody in which they were, in the first instance, legally detained."

The latter part of that passage is reported slightly differently in the Law Journal report at p 90:

> "There has been no abuse of the process which the defendants had to execute, and things remain in the same position during the whole time the goods were under examination."

The implication, in both reports of the judgment, is that the process of examination was not completed until the necessary enquiries had been carried out. His Lordship left open the question whether an action might have been brought if the goods had been detained for an unreasonable time.

31. The other judgments similarly emphasized that the officers had been acting within their authority. Coltman J stated at p 926:

> "The defendants were custom-house officers acting under an authority given them by law. It was their duty to examine the goods in question, in order to ascertain to what duty they were liable, or whether or not they were subject to forfeiture. If the goods had been afterwards detained by them for a time more than reasonable for the examination, that might have been an abuse of their authority so as to render them liable in another form of action. But it appears to me there is no ground for saying they did more than detain the goods for a reasonable time, in order that the question as to the liability of the goods to forfeiture might be submitted to the proper authorities."

(In relation to the second sentence in that passage, Coltman J is reported in the Law Journal report as saying that the officers were acting under an authority given them by law to examine the goods to see whether they were liable to duty, and that "I think they had also a right to examine them, to see whether they were liable to forfeiture or not").

32. Cresswell J's judgment at pp 927-928 was to the same effect:

> "The goods were taken by the plaintiff's agent to the proper place for the examination of them by the defendants in the regular discharge of their duty as custom-house officers. Upon their examination, all that the defendants did was, to detain them, till it could be ascertained whether or not they were liable to forfeiture. … Here, there was no act of trespass, either actually, or impliedly from any subsequent abuse of authority."

33. In the present appeals, it was argued on behalf of Eastenders and First Stop that the ratio of the *Jacobsohn* case was confined to the situation where imported

goods had been taken to a customs warehouse: the officers were entitled to decline to allow the goods to leave the warehouse until the appropriate duty had been paid. So understood, it was argued, the case had no application to cases such as the present appeals, where goods which were inside the country might be liable to forfeiture. The argument that the plaintiff could not insist upon the delivery of imported goods from a customs warehouse, so long as the duty remained unpaid, was indeed one of the arguments advanced on behalf of the officers at the trial of the case, but it does not appear to have been argued on appeal, and only the judgment of Erskine J at p 927 adverts to the point:

> "The goods were landed and taken possession of by the defendants in the discharge of their duty, for the purpose of their being examined. Upon their being partially examined there appeared to be sufficient ground for the defendants to doubt whether they were authorised to receive the duty upon them. All that the defendants did was merely to decline to receive the duty upon them. The subsequent declaration made by them was not a declaration that what they had done amounted to a seizure, but merely a statement that, the matter being under the consideration of the commissioners, the goods could not be given up to the plaintiff."

Erskine J's reference to the goods being "partially examined", prior to the making of enquiries of the Commissioners, is consistent with the approach adopted in the other judgments. In any event, in the light of the other judgments, the ratio of the decision cannot be said to have been based on the non-payment of duty on imported goods.

34. In a related submission, it was argued on behalf of Eastenders and First Stop that the decision in *Jacobsohn* was based on a technical aspect of the law of trespass: since the officers had lawful possession of the goods initially for the purpose of examination, their subsequent detention of the goods did not involve any transfer of possession, and therefore could not amount to trespass. This argument also was advanced on behalf of the officers at the trial of the case, but it was not accepted. The court recognised that possession which was initially lawful might be rendered unlawful by an abuse of the authority under which possession had been taken, following the *Six Carpenters' Case* (1610) 8 Co Rep 146. Hence the emphasis laid in the judgments upon the absence of any abuse of authority: as Cresswell J said, there was no trespass, "either actually, or impliedly from any subsequent abuse of authority".

35. As is clear from the passages in the judgments which we have cited, the majority of the court accepted that the detention of the goods was lawful because there had been no abuse of authority on the part of the officers; and there had been

no such abuse because their authority to examine the goods in order to determine the duty payable, or (by implication) whether the goods were liable to forfeiture, carried with it, by necessary implication, an authority to detain the goods for such time as was reasonably necessary in order to make that determination. Where the determination required the making of enquiries, going beyond an inspection of the goods themselves, it was lawful to detain the goods for such time as was reasonably necessary to make those enquiries.

36. The practical importance, and good sense, of the approach adopted in the *Jacobsohn* case to the scope of an examination of goods can be illustrated both by the facts of that case and by the facts of the present appeals. In that case, as we have explained, the statutory prohibition was on the importation of cutlery of foreign manufacture bearing the names or marks of British manufacturers resident in the United Kingdom. Some of the cutlery in question was impressed with the words "Watson, Barbican, Norton Folgate", and some with the words "Daniel Lutter, extra-patent silver steel". A visual examination alone could not enable the officers to know where the cutlery had been manufactured, or whether Watson and Lutter were British manufacturers resident in the United Kingdom. In the present appeals, as counsel for Eastenders submitted, the question whether beer or wine is liable to forfeiture as not duty-paid will not be resolved by gazing at the goods, for whatever length of time. It will only be resolved by examining the paper trail back to the point of duty payment.

37. As we have explained, the power of detention which was held to exist in *Jacobsohn* was not expressly conferred by the customs and excise legislation, but arose by necessary implication from the officers' statutory power to examine goods for the purpose of determining the duty payable or whether they were liable to forfeiture. It was not conditional upon the goods' being liable to forfeiture: as Tindal CJ observed, whether the officers' suspicions were well grounded was not the question. It was sufficient, in order for the power of detention to be lawfully exercised, that the officers should have, in the words of Tindal CJ, a real and honest doubt that the goods were liable to forfeiture. The protection from liability in damages or costs which was conferred on customs officers where goods had been mistakenly seized as liable to forfeiture had nothing to do with such detention, and did not feature in the case: since the detention of the cutlery was impliedly authorised by statute, it could not constitute a tort.

38. The approach adopted in the case of *Jacobsohn* is consistent with the approach to a statutory power of examination which was taken more recently in the case of *R v Secretary of State for the Home Department, Ex p Labiche* [1991] Imm AR 263, a decision of the Court of Appeal concerned with immigration. The immigration legislation gave immigration officers the power to examine any person entering the United Kingdom, and required that a person examined by an immigration officer should be given notice, granting or refusing leave to enter the

United Kingdom, not later than 12 hours after the conclusion of his examination. The appellant had been given a notice refusing leave more than 12 hours after being interviewed by an immigration officer, and argued that the notice was out of time. The Court of Appeal disagreed. Fox LJ, with whom Butler-Sloss LJ and Sir Roualeyn Cumming-Bruce agreed, said at p 268 that the examination "cannot terminate until (a) necessary inquiries by the immigration officer or the Secretary of State have been completed and (b) the immigration officer has received the directions of the Secretary of State". The approach adopted to the concept of examination in this context was the same, *mutatis mutandis*, as that adopted in *Jacobsohn.*

39. It is also relevant to note the earlier customs case of *Irving v Wilson* (1791) 4 Durn & E 485. That action was brought in the Court of King's Bench for the recovery of money had and received by customs officers. The officers had stopped a cart containing goods which required a permit, without which they were liable to forfeiture. The carrier did not have a permit, but told the officers that the goods formed part of a larger consignment, and that a permit for the entire consignment was with the remainder of the consignment, some miles behind. The officers waited some time, but the remainder of the consignment did not appear. The officers then seized the goods. When the remainder of the consignment eventually arrived, and the permit was produced, those goods also were seized. The officers then refused to restore the goods until a payment had been made by the owner. He succeeded in his action for the recovery of the payment. The significance of the case in the present context arises not from that decision, but from some of the observations made. Ashurst J noted at p 486 that "the goods were not liable to seizure", but also stated at pp 486-487 that "the defendants acted right in stopping the goods at first; but when the permit came up, there was no pretence to detain them". The implication appears to be that it was lawful to detain the goods while there were reasonable grounds for suspecting that they might be liable to forfeiture. Lord Kenyon CJ similarly distinguished at p 486 between the initial detention and the subsequent seizure, stating that "whatever ground of probability there was for stopping the first cart, yet after the matter was cleared up, there was no pretence for making a seizure".

40. Returning to the history of the legislation, following the 1833 consolidation a further consolidation took place in 1845, when generally similar provision was made by the Act 8 and 9 Vict c 86 and the Act 8 and 9 Vict c 87.

41. The next consolidation, in the Customs Consolidation Act 1853, amalgamated in a single Act the provisions formerly contained in separate statutes dealing with the regulation of customs and the prevention of smuggling. It also amalgamated, in section 223, the previously separate provisions in respect of the seizure of goods liable to forfeiture, on the one hand, and the detention of suspected offenders, on the other hand. The consequence was that a reference to detention appeared for the first time in a provision dealing with the seizure of goods.

42. Generally similar provisions were contained in the next consolidation statute, namely the Customs Consolidation Act 1876. Section 202 again dealt in a single provision with the seizure of goods liable to forfeiture and the detention of persons. The provisions dealing with legal proceedings were drafted, as previously, on the basis that claims would be brought by the owners of goods which had been seized as liable to forfeiture; and section 267, protecting officers from liability, applied only where the goods had been seized.

43. The final consolidation prior to the 1979 Act was effected by the Customs and Excise Act 1952. Like the earlier legislation, the 1952 Act conferred on customs officers extensive powers of investigation. The Act reverted to the separate treatment of the detention of persons, in section 274, and the seizure of goods, in section 275. Section 275(1) however retained the reference to detention which had appeared in section 223 of the 1853 Act and section 202 of the 1876 Act, and provided in subsection (1) that "any thing liable to forfeiture under the customs or excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard". That provision is almost identical to section 139(1) of the 1979 Act. The 1952 Act also extended the scope of the protection from liability given to customs officers, by providing in section 280(2) that there should be no civil or criminal liability on account of the seizure or detention of any thing liable to forfeiture if the court were satisfied that there were reasonable grounds for seizing or detaining that thing. That provision is almost identical to section 144(2) of the 1979 Act.

44. The effect of section 275(1) of the 1952 Act was to create an express statutory power to detain goods which were liable to forfeiture. Such a power is clearly distinct from the power to detain as part of the process of examination, and has a different purpose and different legal consequences. It was and is available only where goods are liable to forfeiture, whereas the power of detention discussed in the case of *Jacobsohn* is available where there are reasonable grounds for suspecting that goods are so liable. The power of detention conferred by section 275(1) of the 1952 Act, and now contained in section 139(1) of the 1979 Act, is an alternative to the seizure of the goods in question, but differs from seizure in that it is temporary in nature and does not trigger the commencement of proceedings for the condemnation of the goods. As Elias LJ suggested in the *Eastenders* case, there could be circumstances in which goods were considered to be liable to forfeiture but in which the Commissioners might not wish to embark at once upon a procedure leading to the condemnation of the goods, for example where the breach of the law was capable of correction. Detention under section 139(1), unlike detention for the purpose of investigation, would require, and would attract, the protection afforded by section 144(2).

45. The important question for present purposes is whether, when Parliament created the power to detain goods liable to forfeiture, it by implication abolished the

power of detention which had previously been held to arise by necessary implication from statutory powers of examination. In our view no such implication follows, for several reasons.

> (1) Temporally, the powers are distinct: the process of examination precedes the reaching of a conclusion whether goods are liable to forfeiture. In terms of purpose, the powers are equally distinct. The purpose for which the power to detain, as an incident of examination, may be exercised is to enable the officers to retain control over the goods temporarily until they have arrived at a conclusion as to the duty payable or as to whether the goods are liable to forfeiture. The purpose for which goods may be detained after such a conclusion has been reached is plainly different, and would appear to be as Elias LJ suggested. There is therefore no necessary implication that the enactment of a power to detain goods liable to forfeiture entailed the abrogation of the existing power to detain as part of the process of examination.
>
> (2) It is difficult to conceive why Parliament should have conferred upon the Commissioners and their officers a wider range of intrusive investigatory powers than any other public body, but should at the same time have chosen to deprive them of a means of preventing goods from being disposed of until they have completed their examination and decided whether the goods should be seized. Why depart from an approach long approved by the courts? Why, moreover, should Parliament have conferred on the Commissioners more extensive powers to detain persons (in section 138 of the 1979 Act) than to detain goods?
>
> (3) The 1952 Act was a consolidation Act with amendments. There is nothing in the report of the Committee reporting on the Bill (Report of the Committee on the Draft Customs and Excise Bill (1951), Cmd 8453), or in the notes on clauses prepared by Parliamentary counsel, included as an appendix to the report, to indicate that Parliament intended the 1952 Act to have the effect of restricting the existing powers of detention possessed by customs officers.

46. We turn now to consider the present appeals in the light of these general observations.

The Eastenders case

47. In the *Eastenders* case, there is no dispute that the officers were entitled to inspect the goods in question in accordance with section 118C(2) of the 1979 Act,

and to require the production of documents under section 118B. It is also not in dispute that, as Sales J found, the officers had reasonable grounds to suspect that duty had not been paid on the goods. The officers were unable to fulfil the object of the inspection, by determining whether the appropriate duties had been paid, without making further enquiries into the provenance of the goods. They detained the goods while those enquiries were made. It is not in dispute that the period during which the goods were detained did not exceed a reasonable period of time.

48. In the present appeal, counsel for the Commissioners submitted that section 118C(2) of the 1979 Act authorised the detention of the goods until the statutory inspection had been completed, and further submitted, in the light of the *Jacobsohn* case, that there was, and had always been, a power to detain goods pending determination of whether or not they were liable to forfeiture. It was however their primary contention that the inspection of the goods came to an end when the goods had been visually examined, and that their subsequent detention must therefore be justified under section 139(1). For the reasons we have explained at paras 35-37, we consider that that approach is based upon an unduly narrow understanding of what may be involved in an inspection in such circumstances.

49. As we have explained at para 23, we consider that the majority of the Court of Appeal were correct in their construction of section 139(1). They were therefore correct to hold that, since the goods were not in fact liable to forfeiture, their detention did not fall within the scope of section 139(1). It does not however follow that the officers had no power to detain the goods for the purpose of investigating their duty status. Since the officers were carrying out a lawful inspection of the goods for the purpose of determining whether the appropriate duties had been paid, and had reasonable grounds to suspect that duty had not been paid, they were in our view entitled by virtue of section 118C(2) to detain the goods for a reasonable period in order to complete the enquiries necessary to make their determination.

The First Stop Case

50. In the *First Stop* case, there is no dispute that the officers were entitled to examine the goods in question in accordance with section 112 of the 1979 Act, and to require the production of documents under section 112A. The officers were unable to fulfil the object of the examination, by determining whether the appropriate duties had been paid, without making further enquiries into the provenance of the goods. They detained the goods while those enquiries were made. They appear to have had reasonable grounds for suspicion that duty had not been paid, and the contrary has not been argued. It has not been argued that the period during which the goods were detained exceeded a reasonable period of time.

51. As in the *Eastenders* appeal, it was submitted on behalf of the Commissioners that the power of examination conferred by section 112 permitted the Commissioners to detain the goods for the purpose of their examination, and that there was a power to detain the goods pending determination of whether or not they were liable to forfeiture. These were again, however, conceived to be distinct powers, on the assumption that the examination of the goods came to an end when they had been visually inspected. It was therefore the Commissioners' primary contention that the power to detain the goods after that point must have some other source, section 139(1) being the only candidate. As in the *Eastenders* appeal, we consider however that the examination was not completed until the necessary enquiries had been made, and that the power of examination impliedly included an ancillary power of detention for a reasonable time while those enquiries were made.

52. Counsel for First Stop submitted that this approach to the case was not open to the Commissioners, since they had expressly referred to section 139(1) as the legal basis of the detention of the goods: see para 8 above. We are unable to accept that submission. The lawfulness of the detention of the goods depends upon whether the Commissioners possessed the power to detain them, not on whether they accurately identified the statutory source of that power. The reasons given to First Stop for the detention of the goods ("pending further enquiries into their duty status"), although certainly not expansive, were sufficient to enable them to exercise their rights, as indeed they did.

Costs

53. As we have explained, section 144(2) of the 1979 Act confers a protection against liability in damages or costs. It applies "where any proceedings … are brought against the Commissioners, a law officer of the Crown or any person authorised by or under the [1979 Act] 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".

54. In the circumstances of the *Eastenders* and *First Stop* cases, judgment should not have been given for the claimants: on a proper understanding, the detention of their goods had been lawful, and their applications for judicial review should therefore have been dismissed. Section 144(2) was therefore not applicable. The court should have exercised its ordinary discretion in relation to the costs of the proceedings. It is unnecessary to decide whether, in any event, section 144(2) applies where goods are detained otherwise than under section 139(1).

55. It follows that the points that were raised by First Stop (and which Eastenders also sought to raise) in relation to the compatibility of section 144(2) with

Convention rights do not arise. It also follows, however, that the decisions on costs in both cases were made on a mistaken basis. No court has been addressed on the issue of costs in these cases on the basis that the court possessed its ordinary discretion. In the circumstances, it is appropriate that the decisions on costs should be set aside and the matter re-considered by this court on the proper basis.

Disposition

56. For these reasons, we would allow the Commissioners' appeal in the *Eastenders* case, and dismiss the first of the appeals brought by First Stop. The appeal in relation to costs should be allowed. The decision of the Court of Appeal in relation to costs in the *Eastenders* case should also be set aside. The parties should be invited to make submissions on the issue of costs in this court and the courts below.