# AVERMENTS STILL REQUIRE CLOSE ATTENTION!

*Paul Gerber**

In *Chief Executive Officer of Customs v El Hajje* [2005] HCA 35 (3 August 2005), the High Court was asked to consider whether the ultimate fact in issue in an excise prosecution can properly be the subject matter of an averment provision.

In February 2000, a hired truck, driven by the respondent, was intercepted by police officers in Broadford, Victoria, who seized some 691 kilograms of what was referred to as 'cut tobacco' contained in a large number of plastic bags, each weighing approximately 500 grams. In a prosecution brought by the Chief Executive Officer of Customs ('Customs') in the Supreme Court of Victoria, the statement of claim averred that the respondent had in his possession, custody or control, 'manufactured or partly manufactured' excisable goods, namely a quantity of cut tobacco, which he knew he had no authority to store, and which he knew was subject to excise pursuant to s 117 of the *Excise Act 1901* (Cth) ('the Act'), which relevantly provided that '*no person other than a manufacturer shall, except by authority, have in that person's possession, custody or control, any manufactured excisable goods upon which Excise duty has not been paid'.*

At the trial, the only evidence before the Court consisted of the description given by customs officers of the tobacco found in the respondent's truck. The respondent (who was not legally represented) did not challenge any of the evidence. In the result, Customs submitted that in the absence of contradictory evidence, it had proved its case in reliance on the averments to the requisite legal standard of proof, relying on s 144 of the Act which relevantly provides that:

> (1) In any Excise prosecution the averment of the prosecutor or plaintiff contained in the information, complaint, declaration or claim shall be *prima facie* evidence of the matter averred.
>
> (2) This section shall apply to any matter so averred although:…
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> (3) the matter averred is a mixed question of law and fact but in that case the averment shall be prima facie evidence of the fact only

* LLB DJur. Solicitor

The respondent was duly convicted of an offence against s 117 of the Act, the cut tobacco was condemned as forfeit to the Crown, and the respondent ordered to pay the amounts of excise duty allegedly evaded.

On appeal to the Court of Appeal (2003) 180 FLR 224, Buchanan JA, who gave the reasons of that court (Phillips CJ and Batt JA concurring), allowed the appeal and set the convictions aside. His Honour concluded that the ultimate fact in issue cannot be averred: '*The averment stated no facts other than the ultimate fact in issue, the factum probandum*'. [82] After referring to *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47, in which Fullagar J stated [at 51]:

> '[*w*]*here the factum probandum involves a term used in a statute, the question whether the accepted facta probanda establish that factum probandum will generally … be a question of law*'.

Buchanan JA held that:

> It could hardly be said that every cut tobacco leaf constituted manufactured or partly manufactured tobacco. Tobacco leaf might be cut for purposes which have nothing to do with the manufacture into a product suitable for public consumption. I do not think that tobacco leaf cut to enable it to fit into bags so that it could be transported could properly be described as manufactured or partly manufactured tobacco. [76]

His Honour, after citing the recent decision of the High Court in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 which held that the appellant had to prove such a case beyond reasonable doubt, concluded that the defect in the evidentiary foundation provided at the trial was not cured by Customs' averments and by the legal effect given to them by s 144 of the Act.

Customs appealed the decision to the High Court. In the result, McHugh, Gummow, Hayne and Heydon JJ, in a joint judgment, allowed the appeal; Kirby J dissenting in part.

The joint judgment held that the Court of Appeal was in error in concluding that an ultimate fact in issue cannot be averred because tobacco leaf might be cut for purposes that have nothing to do with 'manufacture'. This, in turn, led that Court to conclude that the facts constituting manufacture not being averred, and no facts other than the ultimate facts being averred, that fact 'was not properly the subject matter of an averment'. (2003) 180 FLR 224 at 230 [21]

Two points must be made at once about this reasoning. First, the point at issue in *Hayes* was whether, an appeal being restricted by the relevant legislation to an appeal on a point of law, the appeal that had been instituted was competent: The distinction drawn by Fullagar J in that case was directed to *that* issue, not any question about the operation of averment provisions. Secondly, the fact that tobacco leaf *might* be cut for purposes other than manufacture into product suitable for consumption is beside the point. What was averred in this case was that the respondent had possession, custody or control of manufactured or partly manufactured goods of a kind described as 'cut tobacco': a term not found in the *Act*, or the *Excise Tariff Act 1921* (Cth). The relevant excisable goods were 'tobacco' as that term is defined in the Schedule to the *Tariff Act*: 'tobacco leaf subject to *any* process other than curing the leaf as stripped from the plant' (emphasis added). What are manufactured or partly manufactured goods must be understood in light of that definition. [24]

Either of the two points just identified may constitute a sufficient basis to conclude that the reasoning of the Court of Appeal was erroneous. [25]

The majority judgment pointed out that there had been a good deal of debate about the reach of averments, noting that in *Baxter v Ah Way* (1909) 10 CLR 212, the issue before the High Court was whether averments reversed the burden of proof. Could a matter of mixed fact and law be averred? What significance was to be attached to an averment if evidence was led on the subject-matter of the averment? The majority noted that in *Baxter*, Higgins J '… acknowledged that the averment provisions in the *Customs Acts* of the Commonwealth were *meant to throw the* [*evidentiary*] *burden of proof on the defendant … of disproving the charge'*, concluding that such a shift was '*apparently subversive of the first principle of justice*', albeit justifying such 'subversion' by reference to what his Honour declared was '*necessary in consequence of the peculiar difficulty of such a cases'*.[64]

The majority judgment concluded that these questions were addressed in a new form of averment provision, introduced in s 17 of the *Excise Act 1918* (Cth) and again in s 35 of the *Customs Act 1923* (Cth), noting that the averment provisions introduced were substantially identical to the form of s 144 set out above. The joint judgment concluded that:

First, as is apparent, from the text of s 144, an averment is prima facie evidence of the matter or matters averred; it does not alter the burden of the final burden of proof. Secondly, an averment which was not confined to an allegation of fact, but alleged a matter of mixed fact and law, still had work to do – as 'prima facie evidence of the fact only' (s 144 (2)(b)). Thirdly, the new form of averment provision made plain that if evidence was led about a matter averred, the averment provisions of the Act still applied and the evidence given by witnesses in

support or rebuttal of that matter was to be considered on its merits, the credibility and probative value of the evidence being neither increased nor

diminished by reason of s 144. Fourthly, the intent of the defendant could not be averred. [33].

Section 144 speaks of 'the matter' (or 'the matters') averred. The averment must be 'contained in the information, complaint, declaration or claim'. It is therefore for the drafter of the process by which the Excise prosecution is commenced to frame the averment, and the *Act* is otherwise silent about how that is to be done. In particular, there is no textual footing in the *Act* for drawing some distinction between the ultimate fact in issue and other facts or evidence. [35]

Reference to cases like *Hayes* does not support or require the conclusion that material facts or the ultimate fact or facts in issue cannot be averred. The distinction which Fullagar J made in *Hayes* was between the proposition to be established and the material evidencing the proposition. [38]

The majority judgment concluded that:

In the present case, para 4 of the Amended Statement of claim alleged (and it was averred) that the respondent had in his possession, custody or control 'manufactured or partly manufactured goods'. The allegation that the goods were 'excisable' goods was an allegation of legal conclusion. And if the allegation that the goods were 'manufactured or partially manufactured goods' was to be understood as no more than an allegation that the goods met the statutory description in s 117 of the Act, that too would be an allegation of law. But read in this context, this part of par 4 of the pleading is to be understood as making allegations of mixed fact and law: that the tobacco had been subjected to one or more manufacturing processes and, for that reason, fell within the reach of s 117. The former is an allegation of fact; the latter may be an allegation of law. Section 144(2)(b) then provided that, to the extent that the allegation averred was one of fact, the allegation was prima facie evidence of that fact. [40]

In partial dissent, Kirby J was the sole member of the Court to ask himself the constitutional question:

Must s 144 of the Act be read, for constitutional reasons so as to avoid averments in federal jurisdiction that amount to averments of matters of law; or matters of mixed law and fact involving the 'application of a legal standard'? [58] … [t]hat so long as s 144(2)(b) of the Act is a valid law of the Commonwealth, it permitted the primary judge to conclude, as he did, that the cut tobacco was 'manufactured … goods, namely … of cut tobacco' (*El Hajje* [2002] VSC 286 at [12]). Although reaching that conclusion involved the application of a legal standard, it did so in a

manner permitted by s 144(2)(b) of the *Act*. The only way that the respondent could have overcome that conclusion was by challenging the validity of that law. This he failed to do, and in this Court declined to do. [94]

The above brief citation does less than justice to his Honour's thoughtful analysis of the constitutional question. However, since the majority did not deal with this argument, it is not dealt with here, although it will no doubt be analysed in its constitutional context elsewhere.

The ultimate outcome can hardly be viewed with enthusiasm. As foreshadowed in *Labrador Liquor* (supra), the facts relied on by Customs was claimed to involve a *criminal* offence. The elements of the offence had therefore to be established *beyond reasonable doubt,* an evidentiary requirement overlooked by the prosecution, the respondent, the primary judge as well as the Court of Appeal. When the case reached the High Court, the majority judgment noted that:

The averments of fact were prima facie evidence of the facts averred, but it remained a matter for the primary judge, and the Court of Appeal on appeal, to say, on the whole of the material that was adduced at trial, whether the facts averred were established to the requisite degree of proof. Because the Court of Appeal in this case reached the conclusion it did about the facts of the averments, that Court did not consider whether the necessary facts were established to the requisite degree and the respondent's contentions in that Court, that the primary judge erred in finding the material in the respondent's possession … was manufactured or partly manufactured goods, remained undetermined. It will be necessary to remit the matter to the Court of Appeal for it to consider the matter. [40]

It is a nice question when the matter is being reconsidered by the Court of Appeal in light of the High Court's ruling, will that Court find it necessary to refer the matter back to the Supreme Court, with an order for a new trial? In which case the averment will need some attention. Whatever the outcome, the moral of this case is that strict pleading, generally thought to be a relic of our legal history, is alive and well.