

# THE HIGH COURT

[2023] IEHC 269  
Record No. 2022/1994P

**BETWEEN**

**THE REVENUE COMMISSIONERS**

**PLAINTIFF**

**- AND -**

**KITCHEN KART LIMITED**

**DEFENDANT**

**Judgment of Mr. Justice O'Moore delivered the 19<sup>th</sup> day of May 2023**

1. This is an application by Revenue for the following order: -

“An order pursuant to Order 13 of the Rules of the Superior Courts granting the plaintiff an order pursuant to sections 19(4) and 20(2) of the Customs Act, 2015 providing for the forfeiture and condemnation of the goods, to wit 10,687.50 litres of Nitrous Oxide, as used pursuant to s. 34 of the Customs Act, 2015 on the 15<sup>th</sup> December, 2021 at Dublin Port the said goods being liable to forfeiture under section 17 of the Customs Act, 2015 and section 3(2) of the Criminal Justice (Psychoactive Substances) Act, 2010.”

Other adjectival orders are also sought.

2. The application is grounded on the affidavit of Jennifer McCann, solicitor with Revenue. She gives evidence to the effect that on the 15<sup>th</sup> December, 2021 an officer of

Customs and Excise (Ms. Brenda Lunney) examined a container at Dublin Port. The container was found to include 10,687.50 litres of Nitrous Oxide; there were 11,250 canisters of .95 litres each. The consignor was ZB International Trading BV, a company based in the Netherlands. The consignee was the Defendant to these proceedings, Kitchen Kart Limited.

3. Ms. McCann goes on to say that Ms. Lunney detained the goods pursuant to the provisions of the Customs Act, 2015 because she had reasonable grounds to suspect that the goods were being imported or had been imported in contravention of a prohibition or restriction on their importation. Following further examination, the goods were seized by Officer Lunney as being goods liable to forfeiture under s. 17 of the Customs Act, 2015 and s. 3(2) of the Criminal Justice (Psychoactive Substances) Act, 2010.

4. The activities of Officer Lunney took place because, on the evidence of Ms. McCann, Nitrous Oxide is a psychoactive substance within the meaning of the 2010 Act. Accordingly, a person who imports or exports a psychoactive substance knowing or being reckless as to that substance as being acquired or supplied for human consumption is guilty of an offence.

5. Given the status of Nitrous Oxide, Officer Lunney felt entitled to seize the goods and to notify the Defendant of such seizure. This was done by Notice of Seizure dated the 17<sup>th</sup> December, 2021.

6. In response, the Defendant (through its solicitors) lodge a Notice of Claim pursuant to s. 19 of the Customs Act, 2015 contesting the seizure and forfeiture. Ultimately, however, that Notice of Claim was withdrawn by the Defendant's solicitors, in these terms:

“My client has consented on the terms proposed as follows. They have instructed me to withdraw the Notice of Claim dated the 17<sup>th</sup> January 2022 and to forfeit [the goods] as seized under Notice of Seizure dated the 17<sup>th</sup> December 2021.

As agreed within these terms, no appearance in court will be entered in response to any action taken, by you, on behalf of your client.

Further, within these terms, your client will not seek a cost order for any court action your client may wish to take in relation to this matter.”

Three days after this letter, on the 13<sup>th</sup> June, 2022, these proceedings were initiated by Plenary Summons served on the Defendant company.

7. On the 24<sup>th</sup> October, 2022 Ms. McCann wrote to the Defendant directly at its registered office agreeing to extend the time for the entry of an appearance to these proceedings but saying that, if this did not happen, judgment in default of appearance would be sought.

8. Ultimately, no appearance was filed on behalf of the Defendant. The current motion was issued, initially returnable for the 13<sup>th</sup> February, 2022 but ultimately heard on the 9<sup>th</sup> March, 2023. A solicitor attended on behalf of the Defendant, to indicate that the reliefs being sought by Revenue on the motion were not disputed.

9. That is important as the affidavit of Ms. McCann gives evidence which is clearly of a hearsay nature, relating as it does to the actions of Officer Lunney, and indeed, the suspicions of Officer Lunney as to the illegality of the importation of the relevant goods. Not only that, Ms. McCann gives evidence about the finding of Officer Lunney (to the

effect that the Defendant's business address was available for purchase on the internet) and the nature of the Defendant's business (namely that the activities of the Defendant were not consistent with those of a catering company - notwithstanding the Defendant's name - and that the Defendant had registered itself with Revenue as "engaging the trade of selling lighting for cars"). The importance of this evidence is significant. For example, it was accepted by counsel for Revenue that Nitrous Oxide has legitimate uses (notably for catering purposes) and that its importation can be lawful in certain circumstances, given its potential lawful use. However, the evidence of Ms. McCann to the effect that the Defendant is not carrying out catering or similar activities but rather has registered a completely different business purpose with Revenue would suggest that it was not importing the Nitrous Oxide for any proper purpose.

**10.** Had any of this evidence been challenged, and had the solicitors for the Defendant not agreed in correspondence to withdraw its Notice of Claim and not to oppose any action taken by Revenue, the contentions of Ms. McCann would have been much more closely scrutinised. However, in circumstances where the Defendant has taken the attitude it has adopted, and in particular in circumstances where a conscious decision (with the benefit of legal advice) was made not to resist any court application made by Revenue, it is possible to take the evidence of Ms. McCann at face value.

**11.** Just as there was no contest to the evidence put forward by Revenue on this application, equally there was no legal submission of any sort made to contradict or contest the submissions made by counsel for Revenue at the hearing of the motion.

**12.** I accept the submissions of counsel for Revenue to the following effect: -

- (1) Nitrous Oxide is a “psychoactive substance” within the meaning of the Criminal Justice (Psychoactive Substances) Act, 2010.
- (2) It is an offence pursuant to s. 3(2) of the 2010 Act to import a psychoactive substance knowing or being reckless as to whether that substance was being acquired or supplied for human consumption.
- (3) In this case, the importation of the consignment of Nitrous Oxide was contrary to the provisions of s. 14(1)(c) and (d) of the Customs Act, 2015, and therefore constituted an offence.
- (4) The relevant officer had reasonable grounds to suspect that these goods were being imported in contravention of the law, and the officer had the entitlement to detain the goods for the purpose of examination, enquiries or investigations.
- (5) The goods were liable to forfeiture, by reason of the breach of the provisions of s. 14 of the 2015 Act.  
  
As the goods were so liable to forfeiture, it was open to the officer to seize them pursuant to s. 34(1) of the 2015 Act.
- (6) Notice of seizure was given in accordance with s. 18(1) of the 2015 Act.
- (7) The Notice of Claim (subsequently withdrawn) was made by the Defendant in accordance with s. 19 of the 2015 Act. Once that was done, s. 19(4) of the 2015 Act applied. That provides: -

“Where a notice of claim has been given, the Commissioner shall subject to *section 35(1) and (2)*, take court proceedings under *section 20* for the condemnation of thing concerned.”

**13.** Section 35(1) provides for the return or restoration of anything seized under the Customs Act. Section 35(2) provides for the return of seized goods to the claimant (on the making of an appropriate payment) or the sale or destruction of the goods seized if those goods “in the opinion of the Commissioners, [are] of a perishable or hazardous nature ...”

**14.** As none of the possibilities contemplated in s. 35(1) or (2) of the 2015 Act applied in these circumstances, Revenue have taken court proceedings for the purpose of condemnation of the goods concerned. It may seem peculiar that there is a positive obligation on Revenue to take such proceedings on the service of a Notice of Claim even when the Notice of Claim is withdrawn before the proceedings begin. However, Revenue have taken the understandable view that bringing these proceedings is appropriate notwithstanding the withdrawal on the 10<sup>th</sup> June, 2022 of the Notice of Claim delivered on behalf of the Defendant in January of that year.

**15.** I will therefore grant Revenue judgment in default of appearance against Kitchen Cart Limited. I will also, on the basis of the evidence before me, direct that the goods seized were, at the time of the seizure liable to forfeiture and, accordingly, pursuant to s. 20(2) of the 2015 Act I will make an order that the goods the subject matter of these proceedings are to be condemned as forfeited.

**16.** In the event that there is anything outstanding on foot of this judgment then I will grant the parties liberty to apply.