



13 July 2016

PRESS SUMMARY

Amoena (UK) Limited (Appellant) v Commissioners for Her Majesty’s Revenue and Customs (Respondent) [2016] UKSC 41
On appeal from [2015] EWCA Civ 25

JUSTICES: Lady Hale (Deputy President), Lord Sumption, Lord Reed, Lord Carnwath, Lord Hodge

BACKGROUND TO THE APPEAL

The appeal concerns the appropriate customs classification of a mastectomy bra marketed under the name “Carmen” and imported by the Appellant. The bra is designed to be worn with an artificial breast form by women who have undergone surgical removal of one or both breasts. The issue is whether the bra should be classified under the ‘Combined nomenclature of the European Union’ (“CN”) classification system as a brassière, thereby attracting duty at 6.5%, or as an “orthopaedic appliance”, “artificial part of the body”, or “other appliance... worn... to compensate for a defect or disability”, in which case there is no duty payable. The First-tier Tribunal held that it should be classified as a brassiere, attracting duty. The Upper Tribunal reversed the decision. The Court of Appeal upheld the First-tier Tribunal’s decision.

JUDGMENT

The Supreme Court unanimously allows Amoena (UK) Limited’s appeal. Lord Carnwath gives the judgment of the court, with which the other Justices agree.

REASONS FOR THE JUDGMENT

The factual findings of the First-tier Tribunal concerning the design features of the Carmen bra are not in dispute [3]. The issue is whether the bra falls under heading 9021 of chapter 90 of the CN classification system, which takes effect under EU Regulation 2658/87 [7]. As the Court of Justice of the European Union (“CJEU”) held in the *Uroplasty* case (C-514/04), the intended use of the product may constitute an objective criterion in relation to tariff classification if it is inherent in the product and is capable of assessment on the basis of the products objective characteristics [10].

The Court of Appeal concluded with respect to “orthopaedic appliances” that the reference in explanatory note 6 to appliances “supporting or holding parts of the body following an illness, operation or injury” does not encompass appliances supporting *artificial* body parts such as an artificial breast form. Lord Carnwath observes, without ruling decisively on the issue, that the Court of Appeal’s conclusion is consistent with the ordinary understanding of orthopaedics and the Advocate General’s opinion in the *Uroplasty* case [22-24].

Under the sub-heading “appliance to compensate for a defect or disability”, Lord Carnwath agrees with the Court of Appeal that it is the *breast form* which compensates for the defect or disability, and the bra is worn solely to keep it in place [26-28].

The final sub-heading considered is “artificial parts of the body”. The issue is whether, under note 2(b), the bra is a “part” or “accessory” and “suitable for use solely or principally with” the breast form, and so should be “classified with” it [29]. This point was answered in favour of the Appellant by the Upper Tribunal [31] but reversed by the Court of Appeal, based on its interpretation of three CJEU cases, *Turbon 1* (C-276/00), *Turbon 2* (C-250/05), and *Unomedical* (C-152/10) [33-36]. The two *Turbon* cases, which dealt with ink-cartridges for printers, are of little direct help on account of having such different facts, but they provide guidance on the meaning of “parts and accessories”, which was treated as authoritative in *Unomedical* [38]. There are difficulties in the reasoning of the CJEU in defining “accessories”, and in the Advocate General’s suggestion in *Turbon 2* that “additional functionality” is required. A better answer is that the second test identified in *Turbon 1*, whether the item performs “a particular service relative to the main function”, should be narrowly construed as referring to a service directly connected with the mechanisms or processes by which that function is performed [41].

Unomedical, which concerned urine drainage bags, is of more direct relevance to the interpretation of heading 9021. What mattered to the CJEU in that case was that the bags played no direct part in the actual processes of either the catheter or the dialyser [42]. However, the reasoning of the CJEU in these three cases is difficult to translate to an artificial breast form, whose function does not depend on any mechanical or other active process [43].

In agreement with the Court of Appeal, Lord Carnwath does not consider the bra to be a “part” either of the breast form on its own, or of a “whole” consisting of the breast form and bra together, as it is marketed as an entirely separate product [44]. However, on a natural reading of the guidance, the bra is an “accessory” because it enables the breast form to perform its function, by holding it in place, and thus performs “a particular service relative to (its) main function” [45].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.uk/decided-cases/index.html