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Practice Statement makes perfect: The Supreme Court affirms *Buchanan v Babco*

Stewart Buckingham KC and Ben Gardner

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In a leapfrog appeal, ***JTI Polska Sp Z o.o. and Ors v Jakubowski & Ors*** [2023] UKSC 19, the Supreme Court was invited to overturn the majority decision of the House of Lords in ***Buchanan v Babco*** [1978] AC 141. The Court in that case held that excise duty was recoverable in addition to the value of the goods under Article 23.4 of the CMR Convention, which governs the international carriage of goods by road.

Lord Hamblen, giving the leading judgment, held that the interpretation of Article 23.4 in ***Buchanan*** was at least tenable and, as such, there was no basis under the 1996 Practice Statement to overturn that decision. In so doing, the Judge gave short shrift to an earlier suggestion by the Court of Appeal that ***Buchanan*** should be confined to its facts: that suggestion *'should not have been made and should not be followed".*

The Court's decision provides important clarification for the proper interpretation of the CMR Convention, but also helpful guidance for the proper approach to the 1966 Practice Statement and the *travaux preparatoires* to international conventions.

The decision

It has been clear since 1977 in the UK that senders of cigarettes and alcohol have been entitled to recover their excise duty liability to HMRC as *'other charges"* under Article 23.4 of the CMR, in addition to the market value of the cigarettes ex duty. This followed from the 3:2 majority decision of the House of Lords in ***Buchanan***, adopting the broad interpretation of Article 23.4 adopted by the French Court rather than the narrow interpretation adopted by the Dutch Court.

The appellants accepted at trial that they were liable for excise duty in respect of the respondents' cigarettes stolen during international road carriage pursuant to the CMR, following ***Buchanan***. However, HHJ Pelling KC granted a leapfrog certificate to appeal directly to the Supreme Court to challenge Buchanan. Central to the appellants' challenge was the sustained academic criticism of ***Buchanan*** and the direction by the Court of Appeal in ***Sandeman Coprimar SA v Transitos y Transportes Integrales SL*** [2003] QB 1270 that ***Buchanan*** should not be *'applied any more widely by the courts of this country than respect for the doctrine of precedent requires".*

The Court began by considering the proper interpretation to international conventions such as the CMR, outlined in ***Buchanan*** and other decisions. The Court clarified that the use of *travaux preparatoires* is not, as is sometimes thought, limited to 'bull's eye' material which demonstrates a definite legislative intent. That well-known test, applied recently by the Court of Appeal in ***The Giant Ace*** [2023] EWCA Civ 569, is appropriate to <u>determine</u> the meaning of a treaty provision. However, when seeking <u>confirmation</u> of an interpretation indicated by the wording of the clause, a more liberal and unconstrained approach to the *travaux* is appropriate. In the present context, the *travaux* provided little guidance because they did not reveal the common intention or understanding of the parties to the CMR (as opposed to various advisory and lobby groups). This approach to *travaux* leaves over for future discussion the dividing line between the tests for determining the meaning of an international convention and for confirming the meaning of such a convention.

Drawing little assistance from the *travaux*, the Court considered whether the broad interpretation was a tenable construction of Article 23.4 of the CMR. It was not enough for the appellants to argue that Buchanan was wrong because, as Lord Hamblen noted at para. 42, *'it will always be necessary to do more than to persuade the present panel of Justices that the prior decision is wrong".* The Court considered that the threshold test was that the previous decision was *'untenable"*, whereas the majority in ***Buchanan*** adopted a tenable construction evident from the respondents' arguments and also the Supreme Court decisions in Denmark, Belgium, Lithuania and Czechia adopting the broad construction.

The Court had little time for the academic criticism of ***Buchanan***, which appeared to be overstated and to have no real world impact. The Court was also unimpressed by the ***Sandeman*** critique of Buchanan, which Professor Clarke described as casting a *'Scotch Mist"* over Article 23.4 by inviting lower courts to interpret ***Buchanan*** narrowly. The Supreme Court said that this invitation *'should not have been made"* and it was a reason to disapprove ***Sandeman*** (at least insofar as it cast doubt on ***Buchanan***), rather than ***Buchanan*** itself.

Implications

For CMR practitioners, the decision of the Supreme Court will resolve a long-debated question about whether ***Sandeman*** justifies a challenge to ***Buchanan***. The answer is no: excise duty is recoverable under Article 23.4, in addition to the market value of the cigarettes under Article 23.1 as limited by Article 23.3. The UK remains a 'broad interpretation' jurisdiction, broadly favourable to cargo interests who carry excisable goods.

The decision is also significant more generally in three respects:

1. Lord Hamblen made clear that, although only publicly available *travaux* which reveal the legislative intent of the signatories will be admissible, it is unnecessary to point to a 'bull's eye' if the *travaux* are confirmatory rather than definitive. The line between confirming a particular interpretation and defining that interpretation will not always be easy to draw. However, it is important to remember that this judgment joins a long list of commercial decisions in which the *travaux* have not impacted on the Court's judgment.
2. Decisions in which the Supreme Court will decide that its previous decisions are untenable will be few and far between. It is difficult to envisage a (modern) judgment which is susceptible to challenge on the basis that it is obviously wrong, especially if foreign judges have adopted the same approach. A material change in circumstances will be a more fruitful line of challenge to a Supreme Court / House of Lords judgment.
3. The Court's rebuke of the Court of Appeal in ***Sandeman*** reasserts the orthodox position that it is not for appellate judges to challenge Supreme Court / House of Lords judgments. Court of Appeal judges who disagree with higher court decisions are limited to granting permission to appeal on objectionable decisions and should not attempt to restrict the application of higher court precedent.

Stewart Buckingham KC and Ben Gardner acted for the Respondents, instructed by Christopher Chatfield and Sara Askew of Kennedys and John Kimbell KC and Maya Chilaeva acted for the Appellants, instructed by Ben Griffin, Darren Kenny, and Stephanie Sandford-Smith at DWF.

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Stewart Buckingham KC

"Unflappable and as knowledgeable as he is practical, he inspires confidence, and for good reason - he is the calmest of hands on the tiller." (Legal 500, 2023)

Stewart Buckingham is a commercial barrister, specialising in commercial law, mainly focussing on commercial litigation and international arbitration. He has extensive trial, interlocutory and arbitration experience, and also undertakes advisory work and drafting.

> view Stewart's full profile

stewart.buckingham@quadrantchambers.com

Ben Gardner

"Excellent on his feet, very quick thinking and calm, gets stuck in with the documents, has a feel for tactics and how an arbitrator will view something." (Legal 500, 2023)

Ben has a busy commercial practice, focusing on international arbitration, energy, shipping and commodities. He is the only barrister recognised by both Chambers & Partners and Legal 500 as a leading junior across each of these fields.

> view Ben's full profile

ben.gardner@quadrantchambers.com