RODDA CASTLE &
INTERNATIONAL TRADE CONSULTANTS

SUITE 11A
LEVEL 1, ANDREWS HOUSE
185 MILITARY ROAD
NEUTRAL BAY NSW 2089
AUSTRALIA

PO BOX 305
NEUTRAL BAY NSW 2089

TELEPHONE (61 2) 8969 6422
FACSIMILE (61 2) 8969 6522

PRINCIPAL IAN RODDA
0414 690 469
IanRodda@roddacastle.com

ASSOCIATES NINA BULLARD
0408 412 788
NinaBullard@roddacastle.com

VICTORIA JAY
0419 626 362
VictoriaJay@roddacastle.com

www.roddacastle.com

OUR REF:

8 May 2003

The Hon. Bronwyn Bishop MP
Federal Member for Mackellar
657 Pittwater Road
DEE WHY NSW 2099

Dear Bronwyn,

Averments Inquiry - Peter Tomson and Australian Customs Service

To facilitate your examination of all of the matters raised in Peter Tomson's submission, I have enclosed herewith a copy of the transcript of evidence for the entire trial.

As requested, I have also attached to this note the section of the transcript dealing with the magistrate's comments regarding the significance to the prosecution case of the averments used to initiate the proceedings. The section I am referring to is pages 4 to 6 of the transcript dated 20 April 1994. These are attached and reproduced as pages A-9 to A-11 of Attachment A.

In making the observations set out in his comments, the magistrate reviewed the evidence led by the prosecution. The averments formed part of that evidence. To understand the magistrate's comments in context therefore, it is helpful to refer to the prosecution's own summary of its evidence, and to note that the magistrate's comments were made in response to a submission from the defence at the close of the prosecution case that the charges should be dismissed for lack of evidence. This is explained in detail below.

Categories of Evidence

The prosecution's summary of its evidence commences in the final paragraph at the foot of page 3 of the transcript dated 26 July 1993 and concludes in the middle of page 5 of the transcript of the same date (see pages B-1 to B-3 of Attachment B). The five categories of evidence are as follows -

(i) documents presented to the ACS by the defendants Tomson and Keomalavong

(ii) documents obtained overseas by ACS officers

(iii) expert evidence relating to the cost of manufacture of the goods which were the subject of the charges (men's and women's clothing)

(iv) the fact that the defendants travelled overseas to purchase the goods personally

(v) the fact that the amount of money sent out of Australia by Peter Tomson over a period of about 2 years exceeded the value of goods imported during the same period.

The averments sworn by the ACS to initiate the proceedings were also in evidence, as noted later in the magistrate's comments.

Before summarising the defence position in relation to the evidence, it is important to note on Attachment B-1 (page 3 of the transcript dated 20 July 1993) that the prosecution attempted from the outset of the trial to mislead the court as to the true nature of the proceedings. I refer in particular to the statement -

> "In each case the ***price value*** disclosed on those invoices which were produced to Australian Customs were said to be done on an FOB basis, on a Free On Board basis and in each case it is the prosecution's case that the figures disclosed were false, they were substantially less than the ***true value*** of the goods" (lines 37 to 42)(my emphasis).

The expressions "price value" and "true value" are unknown in customs law and are meaningless. I believe the prosecution used these expressions however in an attempt to mislead the court into accepting that an owner of goods has a legal obligation to declare in a customs entry that the *customs value* of the goods is not necessarily the price actually paid or payable but is some other amount that will be acceptable to the ACS.

The proposition is utter nonsense. The obligation imposed on the owner is to declare the amount paid or payable for the goods, which is precisely what Peter Tomson did in every case. It is the ACS which bears the legal duty to determine *customs value*. Without more (such as evidence of deliberate fraud), an owner of goods does not and cannot commit an offence if he correctly declares in the customs entry the amount actually paid or payable for the goods.

<u>The Defence Position in Relation to the Prosecution Evidence</u>

The position of the defence in relation to the five categories of evidence may be summarised as follows -

(i) the information contained in the documents presented to the ACS by the defendants was true and correct in every material respect. Most of the documents in this category were annexures to affidavits previously sworn by both defendants for the purposes of proceedings in June 1988 in the Federal Court. The prosecution claimed (through the averments) that information in these documents was false, but led no evidence during the trial to support that claim. The defence position also was that there was nothing in any of this material that supported the prosecution case.

(ii) although neither defendant had seen any of the overseas documents before the trial, both assured me that, since they knew they had done nothing wrong, it was not possible that there would be anything in the documents that would support the prosecution case. The overseas documents were therefore admitted into evidence without objection from the defence on the basis of those assurances. As events showed, the assurances were correct. **The prosecution led no evidence at all in relation to any of these documents, none of which were put to prosecution witnesses.**

(iii) the defence objected to the expert evidence regarding cost of manufacture of the goods, on the grounds that it was not relevant to any issue before the court.

(iv) the defendants had never denied that they had travelled overseas to purchase the seized goods in direct negotiations with the sellers. In fact, both stated that they had done so in clear and unambiguous terms in the affidavits referred to above.

(v) Mr Tomson never at any time sought to deny that the total sum of money sent out of Australia in the two years prior to the seizure of his goods exceeded the value of what he imported. The ACS never asked him what was done with the money. The prosecution led no evidence of any kind during the trial to suggest that those money transfers had a fraudulent underlying purpose.

Submission of No Case to Answer

The prosecution closed its case on 18 April 1994. The defence then made a number of submissions on various matters, commencing with a submission on the fact that four charges were laid against the defendants in respect of each import transaction to which the proceedings related (there being five transactions and therefore twenty charges laid). The defence argued that the various charges in respect of each transaction constituted duplicity (transcript

18 April 1994, page 54). Further submissions followed in relation to the validity of numerous averments (Attachment A-1 - transcript 18 April 1994, page 57, lines 27 to 39). On the same day, the defence foreshadowed that it would be making submissions in relation to the Cameron Trading matter (Keomalavong), arguing that all charges should be dismissed (Attachments A-1 and A-2 - transcript 18 April 1994, page 57 line 46 to page 58, line 4).

The abovementioned submissions were made on 19 April 1994. Page 3 of the transcript for that day refers to the fact of addresses by counsel, but does not record the submissions themselves (Attachment A-5).

The submissions are however referred to in the transcript for 20 April 1994. The magistrate commenced his findings, firstly, by summarising the defence argument in relation to the averments (Attachment A-6 - transcript page 1, lines 21 to 48). He sets out his findings in relation to each of the averments challenged, finding that some were averments of fact (Attachment A-7 - transcript page 2, lines 15 to 43) and hence valid. He also found that the use of the word "false" was a nullity in some averments but not in others. He said the averments in the latter group "**are averments of fact and will be considered prima facie evidence of the fact averred to**" (Attachment A-7 - transcript page 2, lines 45 to 55)(my emphasis). He found that the averments sworn in relation to the offences alleged under sec. 234(1)(a) [evasion of duty] "are averments of law and are precluded as (sic) being proper averments ..." (Attachment A-8 - transcript page 3, lines 1 to 15). In addition, he found that the use of the word "false" in the averments sworn in relation to the offences alleged under secs. 234(1)(d) and (e) are averments of fact (Attachment A-8 - transcript page 3, lines 17 to 37).

The magistrate then delivered his findings in relation to use of the word "duty" in the various averments. He found that those averments were invalid (Attachments A-8 and A-9 - transcript page 3, lines 39 to 56 and page 4, lines 1 to 9).

The magistrate then turned to the defence submission that the prosecution had not shown that there was a case to be answered in relation to the Cameron Trading shipment, noting the defence submission that it is not an offence to undervalue goods (meaning of course that it is not an offence for a person to purchase goods for a price lower than their nominal cost of production). He acknowledges the validity of that argument by commencing "**It may well be the case it is not an offence to undervalue goods**..." (my emphasis) (Attachment A-9 - transcript page 4, lines 14 to 20).

He then continues by stating "**however the prosecution allege that false entries were made on the invoices and entries for the home consumption by the insertion on those documents of lower prices per unit of clothing**

and lower total prices for each type or style of clothing than the prices which were actually paid for the goods in the country of export, and that each defendant did so with the intent of evading the appropriate duty. And it is further alleged by the prosecution that the goods were imported into Australia by each of the defendants with the intent to defraud the revenue" (my emphasis)(Attachment A-9 - transcript page 4, lines 20 to 29).

The magistrate then goes on to consider, in turn, each item of evidence tendered in respect of the Cameron Trading transaction. He refers to the documents presented to the ACS by the defendants, i.e., documents falling within category (i) of the prosecution's summary of evidence (Attachment A-9 - transcript page 4, lines 31 to 39), and to documents obtained overseas, i.e., documents falling within category (ii) of the prosecution's summary of evidence (Attachment A-9 - transcript page 4, lines 39 to 51). I make some observations in relation to this issue below.

The magistrate then states that there is evidence that the defendant personally inspected the goods before he purchased them overseas. He also notes the opinion of the expert witness "as to the valuation in his view of the of the items which were seized" (Attachment A-9 - transcript page 4, lines 53 to 56).

The magistrate then goes on to state "The averments contained or attached to the informations state that the price paid for the goods in relation to each so called or in relation to the shipment ... was in excess of the amount shown on the relevant invoices and the entries for home consumption" (Attachment A-10 - transcript page 5, lines 9 to 13).

The magistrate then concludes "**The court, in determining whether a prima facie case has been established in respect of each information, is required to take the prosecution evidence at its highest and disregard any evidence which may be favourable to the defendant ... On the documentary evidence which I have summarised and the evidence of Mr [Prelea], there is evidence to indicate that the defendant paid a price in excess of that of** (sic) **price for the clothing in the country of export in excess to that amount shown on the documents which I have been referred, that is the invoices and the entry for home consumption"** (my emphasis)(Attachment A-10 - transcript page 5, lines 43 to 53).

It is important to note the context in which this finding was delivered. As noted above, the defendants did not object to any of the evidence falling in category (i), because it was their case that all of the documents in that category were true and correct in every material respect. These documents did not become evidence of the guilt of the accused merely because they had been tendered. In fact, apart from the averments, there was not the slightest shred of evidence led

by the prosecution to suggest that these documents were false in any respect whatsoever.

In relation to the category (ii) evidence, the prosecutor said in his opening address -

> "It is the prosecution case in relation to this second category of evidence that these documents which include export licences in Hong Kong, export declarations disclose higher **values** for the goods than those disclosed on the invoices produced to the Australian Customs ..." (my emphasis)(Attachment B-2 - transcript 26 July 1993, page 4, lines 22 to 26)
>
> and
>
> "Mr Grausam was the officer who conducted the various inquiries in Australia. Documents were obtained in Australia and then he travelled overseas and was one of the authorised persons who obtained documents in Thailand and Hong Kong and he has made long statements ... In fact, Mr Grausam's evidence is very much a matter of sourcing documents and explaining where they came from" (Attachment B-6 - transcript 26 July 1993, page 8, lines 29 to 42).

In relation to the first extract above, please note that the prosecution case is that the overseas documents disclose higher **values** (a proposition subsequently shown to be false in any event). The prosecution did not lead any evidence to suggest that those documents disclosed that the **price paid** by the defendant was anything other than the amount shown in the documents produced to the ACS. This statement is a good example of the deceitful and misleading manner in which the prosecution used the terms "value" and "price" during the trial to suggest that those terms are interchangeable (there are numerous other examples). Any competent customs officer trained in the principles of customs valuation knows that this is nonsense. "Price" and "value" are entirely different concepts in customs valuation legislation, as examination of the Customs Act itself plainly indicates.

In relation to the second extract above, please note that the prosecution in fact led no evidence at all in relation to the category (ii) documents, nor were any of Mr Grausam's "long statements" tendered in evidence. This was one of the main reasons the defence submitted that there was no case to answer.

In relation to the expert evidence regarding cost of manufacture (misleadingly called "valuation" evidence by the prosecution), the defence sought exclusion of this evidence on the grounds that such evidence was irrelevant to the issue before the court, namely, what was the amount paid for the goods by the

defendants? (This is the submission referred to by the magistrate in Attachment A-9 - transcript 20 April 1994, page 4, lines 9 to 12). Although the magistrate did not exclude that evidence, his final decision on 27 June 1995 indicates that, in the end, he did correctly attribute little, if any, weight to it (Attachment C - transcript 27 June 1995, page 10).

The effect of the magistrate's ruling may therefore be summarised as follows -

(a) there was nothing in the category (i) evidence that suggested wrongdoing of any kind on the part of the defendants

(b) no evidence at all was led by the prosecution in respect of the category (ii) evidence

(c) the "valuation" evidence was irrelevant to the issue before the court

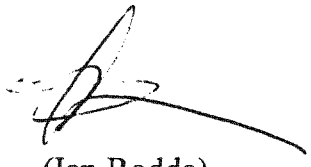
(d) the defendants did nothing wrong in purchasing the goods themselves

(e) the prosecution led no evidence at all in relation to Mr Tomson's overseas fund transfers.

The irresistible conclusion to be drawn from all of the above is that the only evidence that led the magistrate to decide that he should hear a defence to the charges was the averments themselves.

There never was any evidence of wrongdoing on the part of Peter Tomson and, but for the capacity of the ACS to abuse the averment power, he would never have been charged.

Yours sincerely



(Ian Rodda)

the reasonable possibility he'll suffer greater punishment than would be warranted if he were convicted of only one' and then he quotes Baron and the Queen, and Barron and the Attorney General. 'It would be for the Judge in each case to discern whether a decision to grant a stay or produce such prejudice as to require also the discharge of the jury'.

Now in Justice Hunt's view 'the Judge in the present case should require the crown to amend the second account by making it an alternative. And in the event of the crown's refusal to do so, he should have stayed the indictment so far as the second count was concerned, there would however be no prejudice in this case and declind the Judge's refusal', it points out it's discretionary.

And it goes on to talk about Periera and says 'I do however point out the Commonwealth prosecution authorities, that further disregard of the continued disapproval by the courts of this practice, will be interpreted as a deliberate and intransigent refusal by them to act fairly, with a consequence that Judges will more readily grant stays when sought upon proper grounds.' And Justice Enderby and Allen agreed. I hand this to your Honour.

DOCUMENT HANDED TO HIS WORSHIP AND REFERERNCES INDICATED

PARNELL: I might just briefly put a couple of other matters your Worship. In the event I will also be putting to your Worship that a large number of these averments being averments of law ought to be dealt with in accordance with s 255, which only allows the acceptance of averments of fact. But a large number of these are averments of law, they'll be readily seen and I'd rely upon the authority of Goodrich Bond(?) which is a decision of the Supreme Court of the Australian Capital Territory. It's reported in 46 ACT reports at p 13. It's a decision of Mr Justice Gallup(?) of the 10 December 1982. There are a number of other decisions referred to in that case. These are matters which have been - this question of averment has been subject to a number of decision over the years.

LAKATOS: If it shortens matters your Worship there is the concession that we can't make averments as to law, it's quite clear in s 255 so it doesn't need to take your Worship to those authorities.

PARNELL: And the matter there will be a submission in relation to the matter of Keomalavong tomorrow based upon - it's a case in which the prosecution pitched its case on valuations only, and the submission will be based upon a comparison of three documents. The information which alleges 37 cartons, the application for the export documents which speak of 40 cartons, and about 420 items, and the facts that only 36 cartons were received, some of them pillaged. We don't know how much pillaging there was, and that only 325 items were received. It will be submitted that whatever view your Worship might take of

the valuation evidence, and the submission eventually will be its irrelevant anyhow, this particular evidence. The prosecution just can't succeed against Mr Keomalavong and those informations ought all to be dismissed, if your Worship pleases.

BENCH: Yes I'll hear you further ..(not transcribable).. tomorrow.

ADJOURNED TO 19 APRIL 1994

oOo

ADJ. 30/11/95

408/94 Z4487 JMH-B2

LOCAL COURT
DOWNING CENTRE

MAGISTRATE: W P CONNORS

19 April 1994

AUSTRALIAN CUSTOMS SERVICE v PETER TOMSON
AND KONGKEO KEOMALAVONG

CHARGES - Entry false in a material particular
Smuggle goods and ORS

Mr Lakatos for the informant
Mr Parnell for and with the defendant

DISCUSSION RE DOCUMENTS

MATTER INTERPOSED UNRELATED MATTER

Charge case 131 in relation to the defendant Tomson, the Commonwealth Director of Public Prosecution offers no further evidence, and I'm of the view that there's insufficient evidence to satisfy the test outlined under S 41 ss (2), and the defendant is discharged.

Application for costs made on behalf of the defendant is adjourned to this Court on 2 June 1994.

Charge case 132 is the allegation under S 25 (1), of the Drug Misuse and Trafficking Act, relating to an allegation of 10 kilograms. That matter is adjourned to this Court for further hearing on 19 September 1994.

Charge case 133 is the allegation under Drug Misuse and Trafficking Act, the State Director of Public Prosecution offers no further evidence, and I am of the view that there is insufficient evidence to satisfy the test under S 41 ss 2, and the defendant is discharged from the inquiry.

Application for costs made on behalf of the defendant is adjourned to this Court for hearing on 2 June 1994.

QUESTION OF BAIL

PARNELL: Your Worship, the State DPP aren't prepared to make any concessions in relation to the matters that I have raised.

I will speak with Mr Arfaros in relation to the matter, he being the person with the conduct of the case, with a view to having the matter listed in the near future, in respect of those remaining reporting conditions.

BENCH: Charge case 132, bail is to continue.

80311-29384

Yes the first matter I have to determine whether there was a situation of duplicity, placing the defendants in double jeopardy.

Then I'll hear your further submissions gentlemen, you wish to raise further matters, is that the situation Mr Parnell?

PARNELL: No I've nothing further to raise on that point your Worship.

BENCH: During the hearing of the matter on the last occasion the Court raised the question of duplicity in relation to offences laid under S 234 ss 1A, and S 233 ss 1A of the Customs Act. Principally because both offences appear to arise from the same factual circumstances.

The Court has considered the matter with the assistance of written submissions made on behalf of the informant, and verbal submissions made on behalf of the defendant. And the Court has been referred to a number of cases, but principally Vogel & Son Pty Ltd v Anderson (1966) 120 CLR 157 and R v Mai and Tran, a decision of the Court of Criminal Appeal on 6 April 1992.

Having read the appropriate sections carefully, and considered the judgment of the Court in Vogel & Son Pty Ltd v Anderson, I am not of the view that there is any duplicity. And therefore each defendant is not subjected to double jeopardy in relation to those two matters, that is the allegations framed under S 233 ss 1A, and S 234 ss 1A.

And accordingly I do not propose to place the prosecution to any election as to which matter it is proceeding. And all matters remain before the Court.

COUNSEL ADDRESSED

BENCH: Well as I've indicated I'm not inviting the prosecutor to make an election, but I'll hear you Mr Lakatos, on the request for a permanent stay.

COUNSEL ADDRESSED

BENCH: The Court made a determination in regards to the question of duplicity. Application is now made on behalf of each of the defendants for a permanent stay of proceedings on the basis that it's to charge each defendant with five matters involving each shipment is an abuse of process.

I am of the view that each information before the Court represents a separate and distinct series of pieces of conduct, all of which breach the provisions of the Customs Act, more particularly, S 233 and S 234.

And for that reason I believe the decision in R v Mai and Tran

can be distinguished from the matters now before the Court. And I do not propose to grant a permanent stay in relation to any of the informations now before the Court.

As I have said earlier, five informations rising from each shipment substantially arise from the same factual circumstances. If each or both of the defendants were to be convicted, certain considerations would be taken into account by the Court at that time in relation to penalty.

COUNSEL ADDRESSED

SHORT ADJOURNMENT

COUNSEL ADDRESSED

LUNCHEON ADJOURNMENT

COUNSEL ADDRESSED

BENCH: Yes I'll consider the submissions overnight gentlemen.

ALL MATTERS ARE ADJOURNED TO THIS COURT FOR FURTHER HEARING ON 20 APRIL 1994 AT 10 A.M..

oOo

ADJ. 20/1/94

A-6

413/94 Z4487 DD-C2

LOCAL COURT
DOWNING CENTRE

MAGISTRATE: MR CONNORS

20 April 1994

AUSTRALIAN CUSTOMS SERVICE v PETER TOMSON
and KONGKEO KEOMALAVONG

CHARGES - Entry False in a Material Particular;
Smuggle Goods; and Others

PART HEARD

Mr Lakatos for the informant
Mr Parnell for and with both defendants

BENCH: Yes, I'll deal firstly with the argument relating to averments, gentlemen, and there was a matter of a submission relating to the defendant Keomalavong, and invite any further submissions in regard to the other defendant in that regard. The prosecution has closed its case against each defendant, and Mr Parnell on behalf of each defendant has raised the issue of the averments outlined in each information before the court, and supports and submits that the court must disregard certain words in those averments as they are averments of law and not of fact.

He refers specifically to the averments contained in the information laid against the defendant Keomalavong for the alleged offence of smuggling goods laid under Section 233 sub-section 1A namely to paragraph 5 and a word "arrange", paragraph 6 and a word "caused", paragraph 7 the word "engaged", paragraph 8 the word "caused", paragraph 9 the word "false", paragraph 10 the word "false", paragraph 11 the word "false", paragraph 12 the word "engaged", paragraph 13 the word "engaged", paragraph 16 the word "duty" and paragraph 17 the word "duty".

Mr Parnell indicates that the same issue is raised in regard to all the informations before the court, that is the sixteen informations laid against the defendant now known as Peter Tomson and the four informations laid against the defendant Keomalavong, where those words are used in the same or similar context in the averments.

Section 255 of the Customs Act sub-section 1 states that, "In any customs prosecution the averment of the prosecution or plaintiff contained in the information, complaint, declaration or claim shall be prima facie evidence of the matter or matters averred".

Sub-section 2 states, "This section shall apply to any matter so averred, although evidence in support or rebuttal of the matter averred or any other matter is given by witnesses", or (b) "the matter averred is a mixed question of law and fact but in that case the averments shall be prima facie evidence of the fact only".

Sub-section 4 states, "The foregoing provisions of this section shall not apply to an averment of the intent of the defendant". And another matter outlined in b2 of the sub-section, "Should an averment refer to a matter of law it is a nullity and the prosecution is unable to rely upon it as prima facie evidence of a fact".

Mr Lakatos submits the words, "arranged", "caused" and "engaged" are merely conclusions of fact based on the evidence rather and conclusions of law. I am of that view the averments contained in the twenty informations before the court which contain the words "arranged", "caused" and "engaged" are averments of the fact, and the matters which contain such references are prima facie evidence of the facts to which they relate.

The averments containing of the words "false" and "duty" require closer examination. Dealing firstly with the word "false" it is necessary to determine the requisite elements of each alleged offence pursuant to Section 233 sub-section 1A, Section 234 sub-section 1A, Section 234 sub-section 1D and Section 234 sub-section 1E. Clearly the offence created by Section 233 sub-section 1E is one of mens rea and I refer to the definition of smuggling contained in Section 4 sub-section 1 of the Act, "And the prosecution is at the end of the day required to prove beyond reasonable doubt that the defendants had the ..(not transcribable).. intent to defraud the revenue".

Mr Lakatos submits there is no averment made in the informations laid pursuant to Section 233 1A as to an intent to defraud. That is indeed the case, however the court will be asked by the prosecution to an infer and intent to defraud in the case of each defendant on the basis of the alleged falsity of the documents referred to as the invoices and the entries for home consumption.

I've already read out the provisions of sub-section 4 of Section 255 which states, "Foregoing provisions of this Section shall not apply to an averment of the intent of the defendant". I'm of the view that the word "false" in respect of the averments contained in the informations laid pursuant to Section 233 sub-section 1A is an averment of law and is, in each instance it is used, a nullity. I refer of course to the word "false". The remainder of the averments in which the word "false" - contained in the paragraph in which the word "false" appears are averments of fact and will be considered to be prima facie evidence of the fact averred to.

In relation to the offences created under Section 234 sub-section 1A, the prosecution is required to prove beyond reasonable doubt that each defendant intentionally evaded payment of the appropriate duty, although it is not required to establish such intentional conduct was for the purpose of defrauding the revenue. I refer to Wilson v Chambers. Therefore I believe the offence is one of mens rea and the court would be required to consider any alleged falsity of the documents referred to, to establish the intention of each defendant to evade the payment of the appropriate duty. And in that context therefore I am of the view that the use of the word "false" in the averments contained were attached to the informations laid pursuant to Section 234 (1A) are averments of law and are precluded as being proper averments pursuant to Section 255 sub-section 4.

The use of the word "false" in the averments contained in the informations laid pursuant to the provisions of Section 234 (1D) as it then was, and Section 234 (1E) is a different matter. And in that regard I refer to the case of Davidson v Watson 28ALJ.63.1954. In that case it was stated that false in Section 234 sub-section D means contrary to fact and further it was stated, "It was not contended that under Section 234 sub-section D the knowledge or belief of the appellant is material, for clearly if the entry is objectively false in a particular the offence is committed and guilty knowledge or belief forms no ingredient of the offence".

Clearly from that decision in Davidson and Watson the offence created under Section 234 sub-section 1D and by extension the offence created under Section 234 (1E) are offences in which the prosecution is not required to establish mens rea on the part of the defendants. Therefore I am of the view that the word "false" as it appears in the averments contained in the informations laid pursuant to Section 234 sub-section 1D and Section 234 sub-section 1E are averments of the fact rather than averments of law.

I now refer to the use of the word "duty" and the monetary amounts in the averments attached to the four informations laid against the defendant Keomalavong. The four informations laid against the defendant now known as Tomson, known as case or shipment number two, and finally the four informations laid against the defendant Tomson known as case or shipment number four. The court has been referred to the case of Brambles Pty Limited and Lenham at 55ALR.113. In that case, the prosecution averred that the defendant stated that on an entry for home consumption the duty rate was free, whereas the duty rate applicable was in fact forty-one per cent. It was held that the reference to the applicable duty rate as forty-one per cent was a question or averment of law.

Mr Lakatos submits this case may be distinguished, this present case now before this court may be distinguished from Brambles v Lenham as the averment relates only to the correct FOB value of the goods rather than the correct duty payable.

The court cannot accept that submission, the averments nominated for duty payable on the relevant goods, and nominated the shortfall in the duty paid. To calculate those amounts it would be necessary to determine that the goods were classified within the schedules of the Customs Tariff Act. I am of the view that this court is bound by the decision in Brambles v Lenham and accordingly I hold with some reservation the averments which I have just outlined are averments of law and therefore must be disregarded. I might add, I reject the submission made by Mr Parnell in regard to Sections 156 and 157 of the Customs Act for the reasons I have outlined earlier in the proceedings.

Having dealt with that matter, I shall now deal with the submission made on behalf of the defendant Keomalavong. Mr Parnell submits that it's not an offence to undervalue goods and makes a submission that the prosecution has not made out a prima facie case against that defendant in respect of the four informations before the court. It may well be the case it is not an offence to undervalue goods however the prosecution allege that false entries were made on the invoices and entries for the home consumption by the insertion on those documents of lower prices per unit of clothing and lower total prices for each type or style of clothing than the prices which were actually paid for the goods in the country of export, and that each defendant did so with the intent of evading the appropriate duty. And it is further alleged by the prosecution that the goods were imported into Australia by each of the defendants with the intent to defraud the revenue.

In respect of case number five, there is an invoice before the court indicating that the total cost of the goods was $HK104,070 which were contained in the sum of 37 cartons imported into Australia. The packing list also refers to 37 cartons, as does an airways bill.

The court has before it entry for home consumption at documents indicating that the total declared value was $A17,961.68 and that the duty paid was $A8,173.78. There were also documents before the court, namely export declaration form 2A, document identified in exhibit 5 as L5S. That document, the FOB value of goods is nominated at $HK126,620 for 37 cartons of similarly or the same items outlined in invoice identified document L5D.

There's also a document of an export licence form, four before the court. Those documents refer to 40 cartons, however the FOB value of the documents totals $HK126,620, the same amount as shown on the export declaration form 2A. That value is higher than the nominated value on the invoice which was $HK104,070.

There is evidence before the court that the defendant personally inspected the goods before he purchased them overseas, and there is the evidence of Mr Prelea as to the valuation in his view of the items which were seized by the

Customs Department. Mr Prelea gave his evidence in United States dollars. The invoices in relation to shipment number 5 against the defendant I'm now dealing with is in Hong Kong dollars. However, there is evidence as to the exchange rate applicable at the time for Hong Kong to Australian dollars, and there is also evidence of exchange rates from Australian dollars to US dollars at the appropriate time.

The averments contained or attached to the informations state that the price paid for the goods in relation to each so called or in relation to the shipment number 5 was in excess of the amount shown on the relevant invoices and the entries for home consumption.

As I've indicated there is evidence of a contrary nature as to the amount of cartons, but the prosecution as I've indicated rely on the statements made in the invoices and entry for home consumption as to the value of the goods, that is the FOB or transaction price which the defendants say they paid for the goods, or that the defendant says he paid for the goods.

In respect of the allegation laid under Section 234 sub-section 1A, the elements of the case are outlined in Brambles case. The court has before it a document entitled 'Brief Headed Case number 5' with certain amounts endorsed on that document. However, that is not part of the evidence before the court. There is evidence from Mr Simpson in pages 9 and 10 of the transcript of 27 July 1993 relating to the entries for home consumption, that the goods imported were subject to classification and that duty is payable for those goods imported at certain rates and nominates certain rates. There's fifty per cent, forty per cent, twenty per cent, sixty per cent, one hundred and thirty-seven per cent and forty-five per cent.

Therefore notwithstanding my determination in regard to the word "duty" and the amounts nominated in the averments as being averments of law, I believe that there is evidence to a prima facie degree that the goods imported were subject to classification and incurred a duty at variable rates depending on their style or classification.

The court, in determining whether a prima facie case has been established in respect of each information, is required to take the prosecution evidence at its highest and disregard any evidence which may be favourable to the defendant.

On the documentary evidence which I have summarised and the evidence of Mr ~~Treloar~~ Prelea, there is evidence to indicate that the defendant paid a price in excess of that of price for the clothing in the country of export in excess to that amount shown on the documents which I have been referred, that is the invoices and the entry for home consumption. And accordingly, there is evidence capable of leading to conviction, that the statements on those invoices and entry for home consumption were false entries, and that the defendant did produce an

untrue statement to the Customs Department. And from the same evidence, I believe it may be properly inferred for the purposes of determining whether a prima facie case has been established, that the defendant did so to defraud the revenue in relation to the shipment, and at the same time intentionally evaded payment of the appropriate duty. And I find that a prima facie case has been established in respect of the four informations before the court.

Yes, are there any submissions made in regard to the defendant Tomson, Mr Parnell?

PARNELL: No, no submissions, your Worship. A document has been handed to me a couple of minutes ago, your Worship, which will require consideration.

LAKATOS: Perhaps, whilst that's being done, your Worship, I make an application at this stage, and I appreciate it may be objected to, that in relation to your Worship's determination of the averments alleging falsity in respect of 233 (1A) and 234 (1A), that an amendment made to that word, so that in lieu of "false" to describe invoices or entries, there be amended and inserted the word "incorrect"? I say that because otherwise the averments which are identified - your Worship's identified as being, I think, averments 9, 10, 11 have no meaning. The said entry for home consumption I'm reading 9 and the entry for warehouse were blank in a particular. And as I apprehended the basis of your Worship's ruling is that the use of the word "falsity" in relation to charges which involve a mental element of which it's conceded both smuggling and evading of payment do, or some blameworthy conduct as the cases say. The use of the word "false" connotes a degree of mental element which it's impermissible to aver, according to Section 255 (4), I believe it is. So that I seek that alteration be permitted at this stage in relation to each of those entries pursuant to the averments of 233 (1A) and 234 (1A).

BENCH: Yes, is there anything further?

LAKATOS: I ought to say one further thing, your Worship, and really I'm not asking for the advice of the court, but the submission is this. If averments 16 and 17 relating to the duty were simply to state that duty was payable, and duty was short paid, without reference to sums, I apprehend on what your Worship said, that even such a statement would be covered by your Worship's ruling, that they would be averments of law.

BENCH: Yes.

LAKATOS: So that no averments asserting duty of any type could be an averment of fact. Subject to my learned friend's attitude to the document that I've handed him, I may seek a five minute adjournment to seek some instructions as to what flows from your Worship's ruling as to the duty averments?

Thong Son Imports again the importer. Supplier Wine Lux Enterprise Company this time from Taiwan and the entry number at the bottom 1152K. In relation to declared true values one nine five six and other figures as your Worship sees across the page. The true value the prosecution alleging being not less than seven nine four one seventy-two.

Case 4 against Mr Tomson, date of the alleged offence 24 September 1987. Importer Thong Son Imports and Exports. The supplier New Cole Cutter Store Limited. Country of origin Thailand. The entry number as disclosed. The declared value and the true value. In this case the prosecution alleges that the true value was not less than eight four five two forty-three.

Case 5, the case against Mr Keomalavon. The date of the alleged offence 28 March 1988. The importer Lan Ren of which Mr Keomalavon is a director. The supplier Cameron Trading Company. The country of origin Hong Kong. The entry number as shown at the bottom. The declared value seventeen nine sixty one, sixty-five. These are all in Australian dollars these dollar figures your Worship. The true value alleged to be twenty one thousand eight hundred and fifty three sixty-four and the duty figures as alleged appearing across the page.

The prosecution case in each matter could be put broadly in this way your Worship. Mr Tomson in relation to the four shipments that relate to him and Mr Keomalavon relating to the one shipment that is the subject of his charge, travelled overseas and purchased items of clothing, women and childrens and mens clothing mainly men and womens clothing in Thailand, Hong Kong or Taiwan, predominately Hong Kong and Thailand.

The items were paid for in those countries. Thereafter documents were prepared which included invoices which were produced to Australian Customs in due course. In each case the price value disclosed on those invoices which were produced to Australian Customs were said to be done on an FOB basis, on a Free On Board basis and in each case it is the prosecution's case that the figures disclosed were false, they were substantially less than the true value of the goods.

The prosecution case is that in the case of Mr Tomson and his four shipments and the case of Mr Keomalavon and his one shipment that the documents were effectively prepared by the overseas suppliers the figures being inserted which were false figures, but this was done to the knowledge of Mr Tomson and Mr Keomalavon and that as a result in each case there has been each of the offences alleged committed.

The evidence in support of the prosecution case generally speaking falls within a number of categories. There are firstly the documents produced to the Australian Customs. Documents which included and entry for home consumption prepared by a customs agent on the instructions of on the one

hand Mr Tomson and on the other hand Mr Keomalavon, and those entries for home consumption were accompanied by the offending invoices with the allegedly false figures disclosed. And there will be evidence from the customs agents who acted for both Mr Tomson and Mr Keomalavon that in each case it was Mr Tomson and Mr Keomalavon who provided instructions to them in relation to the preparation of documents for the purpose of importation into Australia.

The second category of evidence is documents which were obtained in Hong Kong and Thailand by customs officers who were authorised persons for the purposes of the New South Wales Evidence Act. I will take your Worship in due course to the relevant positions, but the New South Wales Attorney General appointed two customs officers as authorised persons and that has the effect that where documents are obtained by them overseas and those documents the prosecution will submit may be admitted as business records under the Evidence Act and that certain evidence as to what those officers were told may be admitted on an information and belief basis.

It is the prosecution case in relation to this second category of evidence that these documents which include export licences in Hong Kong, export declarations disclose higher values for the goods than those disclosed on the invoices produced to the Australian Customs. It will be the prosecution's case that whatever the motivation may be for suppliers overseas to assist importers such as Mr Tomson and Mr Keomalavon by providing to them invoices with falsely low figures, that there are requirements for correct information to be included in overseas documents lodged with their authorities for the purpose of export declarations and licences and the like and there is material in those documents which supports the prosecution case that the figures disclosed in the invoices produced to Australian Customs were false.

The next category of evidence is the third category, is valuation evidence. In relation to each of the five shipments the items of clothing in question were taken into the custody of Customs and they have remained in the custody of Customs since. It is therefore possible to examine the garments which are the subject of the invoices. Compare them with the FOB figures shown on the false invoices, allegedly false invoices produced to Customs and determine whether those figures are true or not.

Expert evidence will be led from a witness with very substantial experience in the clothing industry in Australia and very substantial experience of purchasing goods in the three countries in question. That in each case the FOB value attributed to these clothing items on the false invoices are clearly far too low, even allowing for a conservative FOB valuation.

When one looks at the garments one looks at the materials of which they are made, the degree of workmanship that the values

attributed to these garments in the invoices produced to Australian Customs are far, far too low and are so low that they could not accord with the true position.

Now that witness has examined some two hundred garments which are said to be representative samples. They themselves fill four or five racks and will eventually be brought into Court. There is, if there is any issue as to whether these are representative samples then all the garments which were seized remain within the custody of the department and may be examined if that was considered necessary. There are however a very, very large number and the prosecution case will be that the representative samples examined by that witness which will be brought into Court, the witness will give evidence of the nature of his examination and the reasons for his conclusions based upon his substantial experience in the market place will be that the figures disclosed on the produced invoices are false.

There will be certain evidence - the fourth category of evidence is evidence that Mr Valasak and Mr Keomalavon were the persons who dealt with the overseas suppliers solely on their own behalf with respect to these five shipments.

There is also a fifth category of evidence that monies were sent overseas, quite substantial amounts by Mr Tomson which in the prosecution case included monies used to purchase the goods in question.

The prosecution case put simply is the two defendants travelled overseas, purchased the goods. It seems two sets of documents were prepared. The false set and the set which were closer to the truth. The false one came to Australia. The ones disclosing what was in effect the true position, were used overseas and the goods which were brought to Australia whether by reference to the overseas documentary evidence or by reference to the valuation evidence were clearly at such a low figure as to be false.

It is the prosecution case that the circumstances where the two defendants were the persons who obtained them overseas, provided the instructions to the Customs Agents here, that this a case where insofaras the smuggling charge is concerned, the relevant intent can be found and insofarsas the evasion charge is concerned, the more limited form or mental element may be found. The other two offences are under section 234(1)(d) and (e), are strict liability offences and no mental element at all need be found. It is submitted that at the end of the day the Court will conclude that the relevant state of mind should be found in each case.

That in general terms is the prosecution case your Worship. There are some amendments which are sought to be made to the averments, they are not substantial. The way in which it has been sought to be done is by preparing an amendment of an information with the alteration being underlined so your

Worship can quickly see what is the suggested amendment to the averments.

I don't know if your Worship has had an opportunity to hear a matter such as this before and is familiar with the averment provisions of the Customs Act itself. It is section 255 of the Act and it permits in a customs prosecution of this type the prosecutor to aver matters which are prima facie evidence of the matters averred. Your Worship sees the balance of the section there.

In relation to amendment. Section 251 of the Act ..(not transcribable).. the amendment power. This section is proved and I can take your Worship to authority in the Supreme Court if need be. There is a broad power to allow amendments subject to the question of prejudice that it was suggested that occurred.

Now if I could hand up to your Worship the copies of the amended informations. Copies have been provided to my friend. They relate only to what have been described as cases 1, 3 and 4. There are no amendments to case 2 or case 5.

In relation to case 1, the top information is that which alleges smuggling and then underneath that is the information that alleges evasion of duty. Underneath that is the section 234(1)(d) information that alleges making a false entry. And 234(1)(e) which alleges producing a statement which contains an untrue particular.

In each case I think it is the same amendment that has been made. There was a typographical error in paragraph 4 which may have already been amended on a prior occasion. If your Worship looks at paragraph 4 of the top averment, of the information, the 233(1)(a) matter. As originally typed it said that the entry disclosed the price as being two three six two eighty-three Australian dollars, that was an error. It has been corrected to two four six two eighty-three. Your Worship sees in paragraph five, the correct figure is disclosed.

BENCH: Yes.

JOHNSTON: So that was merely a typographical error. The other averments which were originally in the information referred to both the figure of two four six two eighty-three which appeared on the Australian invoice at entry. And then in paragraph six, the figure of US dollars, one five nine three, which appears on the steady export declaration, that is the document produced to the Thai Customs.

The additional averments then in relation to this first case are seven and eight, that the price paid for the goods was not less than the addition of Australian dollars two four six two eighty-three and US one five nine three.

It will be the prosecution case in relation to this first shipment that one finds the true figure by looking at an addition or certainly a figure of not less than the addition of those two figures.

Averment eight, that the only importation the defendant had from Steady Exports was that referred to in this particular entry.

They are the amendments, the averments in relation to that first case. It is the same all the way through the other informations in this category. I don't know if your Worship's papers have been put in such a way that the various shipments have been grouped. It may be that that could be of assistance to your Worship and it could be done at the bar table by my Instructing Solicitor. It may be that those who prepared the list may not have averred them to the groupings, which would be understandable.

BENCH: Well just try and get them into groups now Mr Johnson.

JOHNSTON: Yes, that can be easily done by my Instructing Solicitor your Worship. So they are the proposed amendments to case 1 your Worship.

As to case 3, which is the case against Mr Tomson and the Wine Lux shipment from Taiwan. The amendments here and the wording of the information itself is just a misdescription of the goods as they appeared there. Three hundred and sixty-eight sets of ladies skirts and ninety pieces of ladies dresses. As the information was originally, it said three eighty-eight and seventy respectively. It is now corrected to be three sixty-eight and ninety.

Then paragraph 11, the original averment I think stopped after the word amount in the third line and then has now been included namely a sum of not less than eight seven five eight fifty-two and the same in twelve. So it is now alleging the specific figure and that is the amendment which is made to each of the informations in relation to Tomson's charges arising from the Wine Lux shipment from Taiwan.

In case 4 your Worship, the information alleging that Mr Tomson committed certain offences arising from the shipment from the New Calcutta Store in Thailand. Now the amendment here is in paragraph 12. The only importation the defendant had with the New Calcutta Store was that referred to in the particular entry and that is the amendment that appears in each of the informations relating to that shipment.

BENCH: Do you wish to say anything in regard to those amendments Mr Parnell?

PARNELL: No, I have seen these your Worship and that will form part of an application which I will shortly make to your

Worship for a short adjournment in consideration of these matters at this stage.

BENCH: Do you have any objection to me amending the averments now?

PARNELL: No, not at this stage your Worship.

BENCH: Yes, amendments to case 1, 3 and 4 are granted as sought.

JOHNSTON: That your Worship was as far as I wished to go in an opening. The mechanics as to how the hearing is to proceed from here is a matter that posed something of a quandary to the prosecution as of Friday we didn't know whether anyone was going to appear and it was a possibility of a hearing with the defendants in person through an interpreter.

We prepared the bundles of documents and they have now been provided to Mr Parnell. I could commence to call the first witness who would be a witness who would provide some general evidence about the way in which the Custom system operates in the preparation of documents including the entry payment consumption. It is more evidence of assistance nature, but it will be designed to assist your Worship in understanding the system before moving to the first witness dealing with questions of fact, who would be Mr Grausam.

Mr Grausam was the officer who conducted the various inquiries in Australia. Documents were obtained in Australia and then he travelled overseas and was one of the authorised persons who obtained documents in Thailand and Hong Kong and he has made long statements.

Again the prospect of how to deal with the hearing with potentially unrepresented defendants, what I hope to do is to provide those statements to the defendants and that can be done to Mr Parnell with the view to seeing whether those statements could be tendered. It may be that there is very little in dispute. In fact, Mr Grausam's evidence is very much a matter of sourcing documents and explaining where they came from. There is conversation with the defendants, but I couldn't say at the end of the day there is any conversation that contains any admissions as such and I am happy to make those statements available to Mr Parnell. If we had known that they were in the case on Friday we would have sought to have taken the matter down the track but we didn't know until this morning.

It is the type of matter your Worship where perhaps there might be some advantage in there being some short opportunity for there to be discussion between the parties because if documents can go before your Worship in some orderly fashion, it may avoid the necessity for lengthy oral evidence that could see the hearing quite protracted.

them about the goods that I've found and then if they are interested I ask them to come and have a look.

She gave evidence that production overruns existed in the market, as did marginal costing. Ms Chon Wanarat's evidence in that regard was corroborated by Mr Balzary's evidence on 31 January 1995. The price of an item of clothing depended on Ms Chon Wanarat's evidence, whether the items was out of fashion, was produced as an overrun, the quantity purchased and the demand for the items. She specifically outlined her brief in respect of the defendant Tomson and I refer to the transcript of 30 January 1995 and page 10.

In response to a question Ms Chon Wanarat responded, and I quote:

My duty was to take Peter to see the goods that he wanted to buy. The goods that he wanted to buy are what very low priced and the goods that are out of stock is not in fashion at the moment. After that he would negotiate for the price of the goods himself. I was the only person who just took him there to see.

I refer also to page 5 of the transcript of 31 January 1995 in relation to Ms Chon Wanarat's evidence. She stated there the prices on the invoices were the real price and she also stated that in general she bought from the factory at the end of the stocks.

I am of the view that there is an appreciable difference in Mr Prelea's buying brief and Ms Chon Wanarats. Mr Prelea was to purchase fashion or fashionable items at the cheapest price whereas Ms Chon Wanarats from the defendants was merely to purchase inexpensive items irrespective of whether they were considered fashionable items or not. Therefore, I am of the view that Mr Prelea and ms Chon Wanarat did not operate in the same market place. Mr Prelea I believe did not fully understand or appreciate the market in which Ms Chon Wanarat operated, the existence of such market being corroborated by Mr Balzary's evidence and by exhibit 21.

Mr Prelea certainly had expertise in the Asian market but I do not believe his expertise or experience was relevant to the market in which the defendants operated. Both the defendants gave evidence. I do not propose to outline their evidence relating to the importations of the clothes, except to say that neither defendant gave precise evidence as to the actual importations the subject of the charges. However, having said that, nothing was raised in their evidence which established, or tended to establish, the details on the invoices were false.

The credibility of each of the defendants was not impugned to a degree which would enable the court to properly reject their evidence. The previous good character of the defendant Keomalavong has been considered in making that determination. Therefore, the valuation evidence led by the prosecution, when