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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY PALMER AGENCIES LIMITED FOR JUDICIAL REVIEW

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Richard Coghlin KC & Robert McCausland (instructed by McIldowies) for the Applicant
Tony McGleenan KC & Gordon Anthony (instructed by Belfast City Council, Legal Services) for the Respondent

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HUMPHREYS J

Introduction

[1] The applicant company describes itself as an importer and distributor of 'Hallowe'en and party products' throughout the United Kingdom, Ireland and further afield.

[2] Its application for judicial review raises significant points of substance and procedure in relation to the importation of goods of this nature into Northern Ireland in the post-Brexit environment. In particular, the applicant seeks to impugn the decision by the respondent, Belfast City Council, to classify goods imported as 'toys' within the meaning of the Toys (Safety) Regulations 2011 ('the 2011 Regulations') and also the consequential decision to detain the goods pursuant to the powers contained in the Market Surveillance (Northern Ireland) Regulations 2021 ('the 2021 Regulations').

Background

[3] In May 2021 part of a consignment of goods imported by the applicant from the USA was subject to a customs hold, and the respondent later determined that the products failed to meet the standards of the 2011 Regulations. An August 2021 consignment was subject to a similar partial customs hold.

[4] However, it is the actions taken in relation to the consignment imported by the applicant in October 2021 (number 515-00319P) which are the subject of these judicial review proceedings. This relates to Hallowe'en products emanating from a USA-based company named Fun World.

[5] On 22 October 2021 Leona Kelly, Senior Environmental Health Officer of the respondent, emailed the applicant's freight agent a 'Market Surveillance Temporary Suspension Notice' stating:

> "Belfast City Council as the Market Surveillance Authority has 72 hours within which a decision will be made as to whether the products can be released from their temporary suspension."

[6] On 29 November 2021 the respondent explained that it was notified by the Office for Product Safety and Standards ('OPSS'), part of the Department for Business, Energy and Industrial Strategy, of the consignment and had thereafter carried out an examination in its capacity as the market surveillance authority. A number of items had been removed and sent for testing.

[7] On 3 February 2022, following the receipt of a pre-action protocol letter, the respondent made the following points:

(i) It had acted lawfully at all material times;

(ii) The hold was placed on products not by it but by OPSS and/or by HMRC acting in conjunction with OPSS;

(iii) The goods being held were 'toys' and were not compliant with the provisions of the 2011 Regulations read in accordance with the relevant guidance.

[8] In an email dated 11 February 2022, Ms Kelly confirmed that all test results had been received and some of the goods could be released. In respect of the remainder, she stated:

> "The goods detailed in the attached document FA HOLD will remain subject to a customs hold as they are not compliant with the requirements of toy safety regulations and will therefore not be released into free circulation"

[9] The goods the subject of the hold were identified as follows:

(i) 25th Anniversary Movie Mask

(ii) DBD Mask Viper Face Style Only

(iii) Fade In/Out LU Cyclops Child (medium)

(iv) USA Flag Ghost Face Mask

(v) DBD Scorched Ghost Face Mask

(vi) Deluxe Ghost Face

(vii) Scary Movie Mask

(viii) Fade In/Out LU Cyclops Child (large)

(ix) Michael Myers Knife

(x) Walking Staff

(xi) Bloody Surgical Saw

(xii) Scary Ghost Face Mask

(xiii) Anubis Mask Adult

[10] The applicant says that the respondent has fallen into error in classifying these goods as toys and acted unlawfully in subjecting the goods to permanent detention. In this judgment I propose to consider these aspects of the judicial review challenge separately.

(1) The Toys (Safety) Regulations 2011

[11] The 2011 Regulations implemented EU Directive 2009/48/EC on the Safety of Toys. Regulation 4 of the 2011 Regulations provides that toys are:

> "products designed or intended (whether or not exclusively) for use in play by children under 14 years of age."

[12] Guidance Document no. 4, produced by the European Commission, relates to the application of Directive 2009/48/EC and is entitled "Grey Zone Problem : Is a specific product covered by Directive 2009/48/EC or not?" The nature of this type of guidance is to provide non-binding guidelines to Member States on whether or not a particular product is classified as a toy.

[13] It recognises that the matter of classification will often turn on the meaning of the phrase "for use in play." The Guidance states:

> "Virtually everything has play value for a child, but this does not make every object fall into the definition of a toy…the play value has to be introduced in an intended way by the manufacturer."

[14] Every parent will be familiar with children finding more entertainment from the cardboard box than its contents. This does not mean that the box is itself a toy since the 'play value' was not designed into the product or introduced in an intentional way by the manufacturer.

[15] The Guidance also notes that a statement of intended use by a manufacturer is to be taken into account, but "reasonably foreseeable use" will prevail over such a declaration.

[16] Guidance Note no. 17 emanates from the same source and is concerned with the application of the Directive to "carnival costumes (disguise costumes, fancy dress)." It states:

> "Carnival costumes are products used to disguise and most children also use them to play the corresponding character (eg cowboy, policeman, princess and witch). If they are products designed or intended, whether or not exclusively, for use in play by children under 14 years of age they should be classified as toys - of course only if they are of a size which is suitable for children under 14 years. Carnival costumes for adults are no [sic] toys in the sense of the TSD. Most children, especially children in the kindergarten and elementary school, do use the costumes really in play: they are not only dressed as a cowboy or a princess – at this time they are a cowboy or a princess."

[17] It is clear therefore, in light of the guidance, that fancy dress costumes for adults are not toys. The question of size is also referenced. If an item is not sized in a way which is suitable for a child under 14 years, then it cannot be a toy since it cannot have been designed or intended for someone of that age.

The Respondent's Consideration

[18] The evidence filed on behalf of the respondent on this issue stresses that it must form an evaluative judgement when determining whether particular goods fall within the meaning of the 2011 Regulations. At times, it will be obvious when an item is a toy and it then falls to the respondent's officers to check for compliance with the 2011 Regulations in terms of CE [Conformité Européenne] marking, labelling and safety requirements in accordance with EN-71, the relevant EU safety standard.

[19] In other cases, the position may be less clear and the provisions of Guidance Document no 4 come into play. In order to assist in this process, the respondent may engage the services of Glasgow Scientific Services ('GSS'), an accredited testing service. Its opinions are not definitive but, on the evidence of Ms Kelly provide:

> "an independent means of testing goods to help BCC determine whether the goods in question ought to be regarded as toys"

[20] Assistance was sought from GSS in relation to the three 2021 consignments. In relation to the third consignment, Ms Kelly and two colleagues carried out a physical examination on 27 October 2021. As a result, a decision was made to submit a sample of each of nine products to GSS for testing and analysis. A similar exercise carried out on 2 November 2021 in respect of a second container resulted in a further nine samples being sent to GSS. A total of 18 product types therefore remained under hold whilst another 31 product types from the consignment were released.

[21] The test reports were received from GSS in December 2021 and January 2022. Five of the products were found either to not be toys or to be compliant with the relevant standards. Thirteen product types were, according to the evidence, "deemed to be toys and did not comply with the requirements of toy safety legislation and EN-71."

[22] The results were adopted by the respondent in full and the applicant's freight agent informed by the email dated 11 February 2022.

The Testing Results

[23] In respect of the items which were held following the 11 February 2022 email, the test results from GSS in relation to masks state as follows:

> "The packaging was marked 'Adult Carnival Item'. The EC Guidance Document 7 on disguise costumes states carnival costumes are products used to disguise and most children also use them to play the corresponding character. If they are products designed or intended, whether or not exclusively, for use in play by children under 14 years of age they should be classified as toys if they are of a size which is suitable for children under 14 years. Carnival costumes are not toys in the sense of TSD.
>
> CEN [*Comité Européen de Normalisation*] Report 14379 lists costumes, designs and masks (intended to imitate) as toys for children below and above 36 months, depending on the size. The age determination guidelines of the CPSC

> [*Consumer Product Safety Commission, the relevant USA agency*] lists information on dress-up materials and gives examples of costumes regarded as toys for children as of 12 months old. If the manufacturer labels the product as not being toys (as intended by 'Adult Carnival Item') he has to be able to support this claim. It is of [sic] analyst's opinion this is a toy as defined in the Toys (Safety) Regulations 2011 (also see pretend and role play accessories, CSPC guidance) and it must therefore comply with all the appropriate requirements of the Regulations. As of CSPC Age determination guidelines, dress up materials of this type are not appropriate for children under 3, however masks with play value are considered as toys and subject to the requirements of the EN71-1 and TSD.
>
> Toys made available on the market shall bear the CE or UKCA [*United Kingdom Conformity Assessment*] marking. There was no CE or UKCA marking on this product."

[24] This identical wording was used by the GSS analyst in respect of items (i), (ii), (iv), (v), (xii) and (xiii).

[25] Very similar wording was used for items (ix) and (xi) with the addition of:

> "The packaging was marked 'Adult Carnival Item. This is not a toy and not intended for use by children.' 'Costume accessory. Recommended for ages 8 and up.'
>
> Warnings on toys shall not be misleading or incorrect. A warning on a toy or on its packaging does not release the manufacturer or his authorised representative from the obligation to meet the requirement."

[26] In relation to item (x), references to the EU Guidance, the CEN Report and CSPC guidance were excluded, the analyst simply said:

> "The packaging was marked 'Adult Carnival Item. This is not a toy and not intended for use by children.' And '15+.'
>
> Warnings on toys shall not be misleading or incorrect. A warning on a toy or on its packaging does not release the manufacturer or his authorised representative from the obligation to meet the requirement.

> Toys made available on the market shall bear the CE or UKCA marking. There was no CE or UKCA marking on the product."

[27] In respect of certain other items, namely (vi) and (vii) the analyst reasoned as follows:

> "This item may fall under Toys (Safety) Regulations 2011 or General Product Safety Regulations 2005. The item is being described as an 'Adult Carnival Item', however it is of analyst's opinion this is a toy, as defined under the Toys (Safety) Regulations 2011, as it is of size and design to be intended, whether or not exclusively, for use in play by children under 14 years of age. It must therefore comply with the all the appropriate requirements of the Regulations. Status should be sought and determined, however, the Court of Justice of the European Union is the only body which can give a definitive interpretation of the scope of the Directive. The product does not comply with the requirements of the Toy Safety Directive and relevant European standard EN71-1 in respect of the absence of the CE/UKCA mark."

[28] Items (iii) and (viii), which are identical items in different sizes, had particular findings in relation to the presence of hazardous cords and flammability, which entails an assumption that these items were toys within the meaning of the 2011 Regulations.

The Evidence of Alan Ross

[29] The applicant instructed an expert witness, Alan Ross, a Chartered Textile Technologist, to prepare a report dated 14 November 2022 for the purposes of these proceedings. He has been involved with the testing of toys and conformity assessment since 2010.

[30] He attended at the respondent's premises where a random sample was taken of each item within the October 2021 consignment and subjected to examination. His particular instruction was to consider whether or not such items should be considered to be designed or intended for use by children under the age of 14 years.

[31] He identified that items (ix) and (xi) carried conflicting age-related information, saying both that they are not intended for use by children and that they are suitable for age 8 upwards.

[32] Items (iii) and (viii) were noted to be child costumes which carried a warning for choking hazards for children under three years and were labelled with the CE conformity mark.

[33] The remaining items were all labelled as not being intended for use by children, as being adult carnival costumes and recommended for age 15 and upwards.

[34] Based on his examination, Mr Ross arrived at the following conclusions:

(i) The products all related to 'horror' themes associated with adult related films or video games;

(ii) The two items with conflicting age statements should properly be considered as toys within the meaning of the 2011 Regulations and therefore would require the appropriate CE or UKCA conformity marking;

(iii) Alternatively, the labelling could be amended to reflect an adult only intended consumer audience;

(iv) The two child costumes did carry the appropriate conformity marking;

(v) The various face masks were too large for child use and are clearly and unambiguously labelled as being for adult use;

(vi) A product which relates to an adult film, marked for adult use and sized for adults should not be regarded as a toy within the meaning of the 2011 Regulations since play value for children is not designed or intended;

(vii) The 2011 Regulations allow for remedial action to be taken by an importer to bring items into conformity prior to them being released onto the market.

[35] In his evidence, Mr Palmer of the applicant company has stated that it will undertake remedial action if the two products are released by removing the reference to adult use only, accepting the items are properly identified as toys and affixing the relevant CE marking.

[36] In a series of recent cases, including *Re McAleenon's Application* [2022] NIQB 39 and *Re Weir's Application* [2023] NIQB 4, I have been critical of the use of expert evidence in judicial review proceedings. In this case, however, I am satisfied that the evidence of Mr Ross is admissible on a technical question, namely the process and guidance to be followed in making a determination under the 2011 Regulations.

The Grounds for Judicial Review

[37] The applicant contends that the decision to classify nine of the items as toys was wrong in law since they were intended for use by adults and sized accordingly. Reliance is placed on the European Commission Guidance Note no 17 in relation to the issue of sizing and it is argued that the respondent misdirected itself by not applying the 2011 Regulations, as informed by the Guidance, to these goods.

[38] In order to ascertain the standard of review applicable to a decision of this nature, it is necessary to consider whether the determination is properly analysed as one of law or of fact. The learned editors of De Smith's Judicial Review (8th Edition) comment:

> "Perplexing problems may, however, arise in analysing the nature of the process by which a public authority determines whether a factual situation falls within or without the limits of standard prescribed by a statute or other legal instrument" [11-038]

[39] On the one hand, the meaning of an ordinary word is a question of fact whilst, on the other, the construction of a statutory provision is a matter of law. Sometimes courts have resorted to the concept of a 'mixed question of law and fact' when a distinction is drawn between questions of primary fact, such as whether an item is possessed of certain characteristics, and those of law which relate to the inferences or conclusions to be drawn from the facts.

[40] The distinction is important in that traditional public law principles imply a reticence on the part of a court exercising supervisory jurisdiction to intervene in relation to questions of fact determined by public authorities. This is particularly so where Parliament has vested the role of gathering and assessing evidence to a specialist body – see *Jones v First Tier Tribunal* [2013] UKSC 19. By extension of this principle, it may be that where Parliament has established a specialist appellate tribunal to consider questions of law, that a more generous approach is adopted to what constitutes an issue of law in a given area. Thus, it can be observed, matters of policy and expediency enter into the determination of the distinction between fact and law – see the speech of Lord Hoffman in *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44 and the extra-judicial comments of Lord Carnwath in *Tribunal Justice, A New Start* [2009] PL 48.

[41] When one considers the key underlying question – "was the product designed or intended for use in play by children under 14?" – it becomes apparent that this is a question of primary fact. Arriving at the answer will require the decision maker to identify and consider the relevant evidence and apply, at least in doubtful cases, a degree of evaluative judgement. That exercise of judgement will result in a conclusion of law, namely whether or not a particular product is a 'toy'.

[42] For reasons which will become apparent in the second part of this judgment, in light of the remedies established in domestic law, the distinction between fact and law on this issue ought to carry little significance.

[43] However, for the purposes of this judicial review challenge, there are three alternative bases to analyse the alleged error by the respondent:

(i) As an error of law within the traditional territory of judicial review;

(ii) As a factual decision which is itself susceptible to review. It is well-established that such decisions can be impugned on the ground of perversity or where it is unsupported by evidence or infected by mistake of material fact. In *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 the Court of Appeal considered the latter category to represent a freestanding ground of review. Carnwath LJ summarised the law as follows:

> "First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

(iii) As a decision which can be impugned on the basis of failure to take into account material considerations.

[44] The respondent in this case accepted the findings made by GSS in relation to Regulation 4 of the 2011 Regulations. In the case of nine of the items found by the GSS officer to be 'toys', there does not appear to be any factual basis for this conclusion. Having correctly identified the legal test, the individual leaps to the conclusion that they fall into the statutory definition. In the analysis provided, there is no reference to:

(i) The products are based on films which are intended for viewing by adults only;

(ii) They are labelled for use by adults only;

(iii) They are sized for adults and not for children;

(iv) The absence of any evidence to indicate that the manufacturer designed the items or intended them for use by children under 14.

[45] All these pieces of evidence point inexorably in the direction of a finding that the products in question are not toys. To have concluded otherwise is to have made an error of established fact which played a material part in the decision making process and, ultimately, the legal conclusion. This has caused evident unfairness to the applicant.

[46] In the alternative analysis, the respondent has failed to take any or adequate account of Guidance Note no. 17 in reaching these conclusions in relation to the nine product types. In particular, no account has been taken of the express statement that carnival costumes should only be classified as toys "if they are of a size which is suitable for children under 14." This omission constitutes a fundamental flaw in the decision making process.

[47] The respondent has therefore acted unlawfully in classifying items (i), (ii), (iv), (v), (vi), (vii), (x), (xii) and (xiii) as toys within the meaning of the 2011 Regulations.

(2) The Detention of the Goods

[48] A wholly separate and discrete point arises in relation to the powers enjoyed by the respondent under relevant European and domestic law and its decision to permanently detain the items.

The Legislative Framework

[49] The 2021 Regulations were enacted in exercise of the power conferred by section 8C(1) of the European Union (Withdrawal) Act 2018 as being in relation to the implementation of the Ireland/Northern Ireland Protocol and came into force on 16 July 2021.

[50] The 2021 Regulations exist alongside the EU Regulation 2019/1020 on market surveillance and compliance of products ('the MSC Regulation'), which remains directly applicable in Northern Ireland. It was designed to ensure a high level of protection of the public in relation to goods moving freely within the single market.

[51] Article 11 of the MSC Regulation requires 'market surveillance authorities' to ensure the taking of appropriate corrective action by economic operators in relation to compliance and, in default, the taking of appropriate measures by the relevant authority. By Article 25(1), Member States are obliged to designate an authority to be in charge of the control of products entering the EU market.

[52] An authority designated under Article 25(1) is obliged, by Article 26, to suspend the release of a product for free circulation if, inter alia, is not correctly labelled or marked or if there is cause to believe it does not comply with relevant EU law or presents a serious risk to health or safety. Any such suspension must be notified immediately to the market surveillance authority. Equally, by Article 26(3),

if the market surveillance authority has reasonable grounds to believe the product is non-compliant or presents a serious risk, then it must request the designated authority to suspend its release.

[53] Article 27 states that a product subject to such a temporary suspension must be released if the market surveillance authority has not, within four working days, requested the designated authority to maintain the suspension.

[54] Article 28 governs the position when a conclusion has been arrived at by the market surveillance authority that a product presents a serious risk or is non-compliant with EU law. In such circumstances, it is obliged to take measures prohibiting the placing of the product on the market and to require the designated authority not to release it for free circulation.

[55] Article 14 sets out the powers which must be conferred on market surveillance authorities in order that compliance with EU-wide harmonisation legislation be achieved.

[56] Article 16 is concerned with the measures which may be taken by such authorities to ensure corrective action is taken in relation to non-compliant products. It states:

> "1. Market surveillance authorities shall take appropriate measures if a product subject to Union harmonisation legislation, when used in accordance with its intended purpose or under conditions which can be reasonably foreseen and when properly installed and maintained:
>
> (a) is liable to compromise the health or safety of users; or
>
> (b) does not conform to applicable Union harmonisation legislation.
>
> 2. Where market surveillance authorities make findings referred to in point (a) or (b) of paragraph 1, they shall without delay require the relevant economic operator to take appropriate and proportionate corrective action to bring the non-compliance to an end or to eliminate the risk within a period they specify.
>
> 3. For the purposes of paragraph 2, the corrective action required to be taken by the economic operator may include, inter alia:

(a) bringing the product into compliance, including by rectifying formal non-compliance as defined by the applicable Union harmonisation legislation, or by ensuring that the product no longer presents a risk;

(b) preventing the product from being made available on the market;

(c) withdrawing or recalling the product immediately and alerting the public to the risk presented;

(d) destroying the product or otherwise rendering it inoperable;

(e) affixing to the product suitable, clearly worded, easily comprehensible warnings of the risks that it might present, in the language or languages determined by the Member State in which the product is made available on the market;

(f) setting prior conditions for making the product concerned available on the market;

(g) alerting the end users at risk immediately and in an appropriate form, including by publication of special warnings in the language or languages determined by the Member State in which the product is made available on the market."

[57] In the event that an economic operator fails to take the required corrective action, then market surveillance authority must take steps to ensure the product is withdrawn or recalled or prohibited from being made available on the market – Article 16(5).

[58] By Article 18, any measure, decision or order taken or made by the market surveillance authority must:

(i) State the exact grounds on which it is based;

(ii) Be communicated without delay to the economic operator; and

(iii) Inform the economic operator of all remedies available in national law.

[59] Article 18(3) states that not less than ten working days before the decision or measure being taken, the economic operator must be given the opportunity to be heard unless that is not possible by reasons of urgency or other public interest

ground. In the event that the opportunity to be heard is not given prior to the decision or measure being taken, it should be afforded as soon as possible thereafter, and the measure or decision reviewed promptly by the market surveillance authority.

[60] The respondent is the market surveillance authority for its council area pursuant to Regulation 4 and 6 of the 2021 Regulations and section 27 of the Consumer Protection Act 1987 ('the 1987 Act'). Its powers extend to the issue of safety compliance of toys under the 2011 Regulations.

[61] The powers vested in the market surveillance authority exist for the purpose of the enforcement of the MSC Regulation – see Regulation 5 of the 2021 Regulations.

[62] Schedule 1 of the 2021 Regulations sets out the investigatory powers of the respondent including, at paragraph 13, the power to seize and detain products. This power is exercisable in circumstances where an officer of the respondent reasonably suspects products may disclose non-compliance. Paragraph 13(8) limits the time for detention of products detained under this power to:

(a) A period of no more than 3 months; or

(b) Such longer period as may be reasonably required for a purpose for which they were seized.

[63] Paragraph 25 of Schedule 1 provides for a right of appeal against any exercise of the power in paragraph 13 to the magistrates' court.

[64] Schedule 2 of the 2021 Regulations incorporates the enforcement powers under the 1987 Act into the market surveillance regime. These include the power to serve a Prohibition Notice, prohibiting a person from supplying, or offering to supply, any relevant goods which are considered to be non-compliant. The power exercisable by a customs official under section 31 of the 1987 Act to detain goods for a period of up to two working days to facilitate the exercise of enforcement powers by the market surveillance authority is also incorporated.

[65] Schedule 4 of the 2021 Regulations gives a market surveillance authority the power to issue a variety of notices, namely:

(i) Compliance Notice, where there are reasonable grounds to believe there is non-compliance and which requires the economic operator to end the non-compliance within a set period;

(ii) Withdrawal Notice, where there are reasonable grounds to believe there is non-compliance and which prohibits the economic operator from making the product available;

(iii) Recall Notice, where there are reasonable grounds to believe there is non-compliance and which requires the goods to be dismantled and disposed of or returned from end users.

[66] In any event, whether on foot of the exercise of the powers under the 1987 Act or in the case of the service of a notice pursuant to Schedule 4, an economic operator has a right, under paragraph 4 of Schedule 4, to seek an order setting aside or varying any such notice from the appropriate court, such application being made within 21 days of the date of service of the relevant notice.

[67] In *R v Liverpool City Council ex p. Baby Products Association* [2000] 2 LGLR 689, the council published a press release declaring that certain baby walkers did not meet the relevant standards, a decision challenged in the judicial review application. Lord Bingham LCJ held that this was ultra vires the council since the provisions of the 1987 Act and the General Product Safety Regulations:

> "…constituted a carefully crafted code…to promote the very important objective of protecting the public against unsafe consumer products and…to give fair protection to the business interests of manufacturers and suppliers"

[68] In such circumstances, it was impermissible to seek to achieve an effect which ought only to be exercised through the statutory code in light of the important rights and protections enacted by Parliament. There is no scope to add to the suite of powers enjoyed by the relevant authorities on an ad hoc basis.

[69] The applicant in this case points to the absence of any power enjoyed by the respondent to detain allegedly non-compliant goods permanently and without any right of redress being afforded to the applicant.

[70] Ultimately, and for good reason, the respondent has not attempted to argue that any such power exists either expressly or by implication within the detailed statutory code. At all times, the respondent has acted ultra vires in relation to the goods in question. I have reached this conclusion for the following reasons:

(i) On 3 February 2022 the respondent asserted that it had not placed a 'hold' on the goods, but this had been done by OPSS and/or HMRC;

(ii) In the email dated 11 February 2022 Ms Kelly states that the goods in question would remain 'subject to a customs hold';

(iii) The legal basis for the detention of the goods was not articulated by the respondent either at the time of initial seizure or on foot of the decision to permanently detain;

(iv) The respondent has made the case repeatedly in sworn evidence that it has complied with its legal obligations when this is manifestly not the case, and the opportunity has not been taken to correct this error;

(v) It is evident in the instant case that the respondent has made a determination that the goods in question are non-compliant with the 2011 Regulations and therefore they are not being detained on foot of the investigatory power. If, at one stage, they were so detained, it is evident that there was no opportunity provided to the applicant to be heard nor was it informed of its remedies in national law;

(vi) Pursuant to Article 28 of the MSC Regulation, if the market surveillance authority reaches a conclusion that a product is non-compliant or presents a serious risk, it must then take measures to prevent the product being released onto the market. The types of measures which may be used are set out at Article 16 and these are subject to the procedural rights in Article 18;

(vii) The measures available as a matter of domestic law are set out in Schedule 4 to the 2021 Regulations and are subject to appeal;

(viii) The decision by the respondent to detain the products sine die without the taking of an appropriate measure, without the right to be heard and without affording an appeal right was clearly in breach of the MSC Regulation and was without any legal authority.

Conclusion

[71] I therefore quash the decision of the respondent to subject all the goods in the October consignment to detention. I will hear the parties on any consequential relief and on the issue of costs.