

**Return to an Address of the Honourable the House of Commons
dated 18 July 1996 for the Appendices to the Report of the Inquiry into the Export of
Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions laid before
The House on 15 February 1996***

Volume Four

Section J Other Prosecutions

Chapter 6 The Ordtec Prosecution and Appeal

Excerpt:

THE INVESTIGATION: 1990

J6.1 As I have previously described, on 2 May 1990, Mr McNaught, the Managing Director of Astra, alerted Mr Primrose of DESO to suspicions which Astra had about the true end-user of the booster pellets which they had been contracted to supply by Ordtec. *1 It will be recalled that the booster pellets formed part of the main fuse assembly line contract signed between Ordtec and SRC. *2 The immediate action taken on receipt of Mr McNaught's information was that the DTI revoked Ordtec's export licences 1A/5044/89 and 1A/5362/89. The information was also, not surprisingly, passed to Customs Investigation Division.

J6.2 According to Customs, the formal investigation into Ordtec did not begin until 16 July 1990. *3 It is clear, however, that prior to that date Customs ID had notified the Reading Local VAT office that they had an interest in Ordtec and were contemplating an investigation. *4 In June 1990 the VAT office advised Customs ID that, as a result of a pre-repayment query, a VAT control visit was to be made to Ordtec on 24 July 1990. Arrangements were made for an ID officer, Mr David Makin, to accompany the VAT officer on the visit. *5 In the course of the visit various files relating to Ordtec's exports were seized. Papers relating to the contract with SRC were also requested during the visit, and were sent to Customs by Mr Grecian shortly afterwards. *6

J6.3 Mrs Valerie Strachan, the Chairman of Customs Commissioners, was asked by the Inquiry to explain the role which Mr Makin was performing on the VAT visit. She said:
"As well as business relating specifically to [the] pre-repayment query, the LVO officer and the ID officer looked at other company records, including those relating to exports. Because exports are zero rated for VAT purposes the proportion of a trader's domestic and export business can significantly affect the trader's liability to VAT and this aspect of a trader's business is subject to normal scrutiny. Because the LVO officer was not entirely satisfied with what he saw, he obtained Ordtec's permission to take up records for further reconciliation at his office. During the course of the visit the ID officer took part in and assisted the LVO in the VAT business they conducted at Ordtec." *7

I have no doubt from the papers which I have seen that the visit to Ordtec was initially arranged because of the VAT pre-repayment query and not because of the interest being shown in the company by Customs ID. I accept, too, that Mr Makin when on the visit would have "taken part in and assisted the LVO officer in the VAT business they conducted at Ordtec." But I find the inference that Mr Makin's primary purpose in attending the visit was to investigate possible export control offences (in particular those relating to the SRC contract) to be overwhelming. It was because of Customs ID's interest in this area that Mr Makin, rather than another specialist VAT officer, attended the visit.

J6.4 Mrs Strachan was asked also whether she considered it appropriate for Customs to use its powers in respect of the assessment and gathering of VAT in order to obtain information about potential export control offences. She responded as follows:

“If an officer, in purported exercise of VAT powers to require information or production of documents, was only concerned in obtaining evidence relating to a non-VAT offence, I understand that he would not be acting in the exercise of his duty. There would in such circumstances be no valid exercise of statutory powers, nor would he be able to invoke common law powers the exercise of powers in such a way would be improper.” *8

In her oral evidence Mrs Strachan made it clear that in her view “the main purpose of a VAT officer’s visit *9 must be to exercise the statutory functions in relation to VAT.” *10 I agree.

J6.5 In this particular case it seems to me clear that Mr Makin’s “main purpose” in attending Ordtec’s premises on 24 July 1990 was not the exercise of statutory VAT functions. That being so, his attendance on the visit constituted, in my opinion, an improper use of the statutory powers. There was a reasonable prospect that the documents/information obtained as a result of the VAT visit would, at an ensuing trial, have been deemed inadmissible under the provisions of section 78 of the Police and Criminal Evidence Act 1984 (PACE). *11 It appears that the possibility that the seized documents might be deemed inadmissible was considered at the time by the Customs Solicitor’s Office and by Counsel. On 30 October 1991 a meeting was held between Miss Bolt of the Solicitor’s Office and Mr Wiltshire and Mr Dubery of Customs ID. The note of the meeting records:

“Main concern is that VAT officer was used to pick up records. If these records are not ones which VAT officer would have picked up for VAT and it is admitted that VAT visit used as a ‘cover’, evidence from these records could be de-barred. ID and Sols do not consider this would seriously weaken our case” *12

The issue was also considered at a conference with Counsel on 16 December. The Customs note of the conference records:

“Discussed VAT/ID visit is there a misuse of powers - counsel sees no problem should not lose the evidence. Don’t need to raise it.” *13

J6.6 It is, in my view, desirable that VAT officers should be able to inform Customs ID officers about any information concerning potential export control offences which they incidentally discover during a VAT visit. On receipt of such information Customs ID can decide whether a further visit to the company concerned, using the powers conferred on them by section 77 of CEMA, is merited. But, Customs ID officers should not attend VAT visits, and thereby purport to exercise VAT enforcement powers, if their primary purpose is in fact to investigate export control offences. Such attendance constitutes, in my view, an abuse of power. There are various references in the papers which I have seen which suggest that the approach adopted in the Ordtec case was not unique. *14 Mr Wiltshire (Customs ID) has told the Inquiry that “It is unusual for Investigation Division officers to attend VAT visits but it does occasionally occur where it is suspected that intelligence of a suspected offence relating to an assigned matter for the Department may be found.” *15

J6.7 Mrs Strachan has commented on behalf of Customs on the foregoing paragraph. She has made it clear that her comments “are based upon the legal advice which [she has] been given.” *16 The comments include the following:

“It is submitted that the only relevant question in law is whether the questions asked on the visit and the records taken up at the visit were reasonably required for a VAT purpose. If the officer conducting the visit can justify what was done on VAT grounds

then it matters not in law that that officer or another accompanying officer had an additional non VAT interest in the visit. I do not believe that anything the Inquiry has seen suggests that what was taken up was not required for a VAT purpose....

The difficulty... is that the Inquiry has shifted the criterion for the legal exercise of power away from an objective look to see if the documents were reasonably required for the purposes for which the enabling power was granted by statute, namely for purposes of VAT control, to a subjective test involving incidental matters such as intelligence gathering, which could flow from the lawful exercise of that power, and has concluded that a predominant subsidiary purpose in the mind of one of two officers taints the otherwise lawful exercise of power by the other officer....

The Inquiry's approach to the interpretation of the exercise of VAT control powers will create a continuing uncertainty whenever such powers are exercised. In our submission the only sensible approach to the construction of the provisions is to see if what is done is done for the purpose for which the power has been granted. To import subsidiary subjective notions of additional incidental secondary or even primary other purposes, will make the exercise of such powers a task of uncertain validity and susceptible to frivolous challenge...."

I do not find at all persuasive this defence of what is apparently Customs' practice. First, no suggestion is made that the impropriety (if that is what it was) of Mr Makin's attendance on the VAT visit to Ordtec's offices tainted the lawful exercise of VAT powers by the LVO officer. The question, rather, is whether the circumstances of Mr Makin's attendance tainted the lawfulness of his own presence. Second, I do not accept that Mr Makin's intention to examine Ordtec's papers for indications of export control offences was his "predominant subsidiary purpose" (if there can be any such thing). It was his main purpose. To enter and search for this purpose was, in my view, a misuse of VAT powers. It seems to me beside the point that Mr Makin also assisted the VAT officer in some respects. Nor do I accept that the view I have expressed "will create a continuing uncertainty" when VAT powers of entry and search are exercised. All that Customs need do to avoid any such apprehended uncertainty is to refrain from sending ID officers along on VAT visits in order to investigate export control or other non-VAT offences.

J6.8 On 2 August 1990 Customs ID visited Ordtec again and interviewed three executives of the company, Paul Grecian, John Grecian and Bryan Mason. *17 On this occasion the purpose of Customs ID's visit (to investigate a potential export control offence) was made clear. In interview all three of the Ordtec executives said that Ordtec had never exported anything to Iraq, that the only item exported to Jordan was a gauge valve assembly line which did not require an export licence and that the fuse assembly line covered by the contract with SRC had never been built. *18 On 29 August 1990, Mr Pat Blackshaw, the Assistant Chief Investigation Officer, wrote to Mr David Hope (FCO/MED) outlining the case against the three Ordtec executives and seeking "comments" on the proposal to interview them with a "view to proving an offence under the Export of Goods (Control) Order 1987, contrary to S.68(2) Customs and Excise Management Act 1979." *19 The FCO advised Customs that "they saw no reason why [Customs] should not continue with the investigation." *20 On 2 October 1990, Paul Grecian, John Grecian and Bryan Mason were arrested and charged with an offence under section 68(2) of CEMA, 1979. The brief circumstances of the case specified in the "Notice of Arrest" form were as follows:

"Export of assembly line for artillery fuse M739A1 to Iraq without required export licence. Goods diverted to Iraq from Jordan in December 1989 having been misdescribed at export from UK." *21

On 4 and 5 October 1990 Ordtec's premises were searched, with the consent of the defendants, and a large number of documents were seized.

J6.9 On 30 October 1990 Colin Phillips, a director of EC Transport (the shipping agents employed by Ordtec) *22 was interviewed under caution. Mr Phillips admitted in interview that he had "discovered that there possibly was some Iraqi connection" to the fuse assembly line contract but said that he had proceeded with the shipment because he had "panicked and thought that the best way to get it out of EC Transport's hands was not to make too many waves."*23 Mr Phillips was not charged at this stage.

J6.10 On 1 February 1991 Mr Stephen Kramer was instructed to conduct the prosecution. *24 He was asked, among other things, to consider whether there was sufficient evidence to charge Mr Phillips and/or Mr William Stuart Blackledge *25 with section 68(2) offences. Mr Kramer advised that, in his view, there was sufficient evidence to justify section 68(2) charges against both Mr Phillips and Mr Blackledge. *26 He advised, also, that each of the five defendants should, in addition to the section 68(2) charge, be charged with conspiracy to evade the export prohibitions imposed by the EGCOs. On 24 February 1991 Mr Blackledge was arrested and charged with an offence under section 68(2). On 4 March 1991, Mr Phillips was summonsed to appear at Reading Magistrates Court. At a hearing on 12 March 1991 two additional charges were added against each of the defendants. The charges were for conspiracy to export the assembly line and the components/sub-assemblies in breach of the EGCO. They were added in accordance with Mr Kramer's 22 February 1991 Advice. On 7 May 1991 all five defendants were committed for trial at Reading Crown Court under the provisions of section 6(2) of the Magistrates Court Act 1980.

J6.11 At the time of the committal, each of the five defendants was charged with the following three offences:

- (1) that "on divers days between the 1st day of January 1988 and the 2nd day of October 1990 [they] conspired together and with others knowingly to be concerned in the exportation of certain goods, namely an assembly line for the artillery fuse designated M739A with intent to evade the prohibition on exportation thereof imposed by the Export of Goods (Control) Order 1987", contrary to section 1(1) of the Criminal Law Act 1977;
- (2) that "on divers days between the 1st day of January 1988 and the 2nd day of October 1990 [they] conspired together and with others knowingly to be concerned in the exportation of certain goods namely sets of sub-assemblies and sets of components for the fuse designated M739A with intent to evade the prohibition on exportation thereof imposed by the Export of Goods (Control) Orders 1987 and 1989", contrary to section 1(1) of the Criminal Law Act 1977;
- (3) that "between the 1st day of January 1988 and the 2nd day of October 1990 [they] were knowingly concerned in the exportation of certain goods namely an assembly line for the artillery fuse designated M739A1 with intent to evade the prohibition on exportation thereof imposed by the Export of Goods (Control) Order 1987", contrary to section 68(2) of the Customs and Excise Management Act 1979. *27

Counts 1 and 3 were based on the illegal exportation of the fuse assembly line. *28 Count 2 was based on the proposed illegal exportation of the sub-assemblies and components for the fuse. *29

J6.12 Ordtec, unlike Matrix Churchill, did not hold a licence for the export of the equipment to Iraq. The only licences obtained by Ordtec were in respect of the export of the fuse

assembly line and associated components to Jordan. A licence to export to country A does not escape a prohibition on export to countries other than country A. In any event, the licence to export to Jordan which Ordtec had obtained had not been proffered to Customs when the fuse assembly line had been exported. Accordingly, the gravamen of the conduct of the defendants in the Ordtec case was that they had exported licensable equipment (the fuse assembly line) and proposed to export other licensable equipment (the sub-assemblies and components) to Iraq without a licence for that export. In these circumstances, it was, in my opinion, prima facie appropriate for the defendants to be charged with a section 68(2) offence in respect of the fuse assembly line and with charges for conspiracy to commit section 68(2) offences in respect both of the fuse assembly line and of the sub-assemblies and components. *30 It is important to bear in mind, first, that the charges were not confined to the illegal exportation of the fuse assembly line components which had been exported before the end of November 1989. The charges covered also the proposed export to Iraq of the sets of sub-assemblies and components, which in the event never were exported to Iraq and of the remaining parts of the fuse assembly line for which the export licence had been revalidated in January 1990 *31; and, secondly, that the period covered by the alleged conspiracy extended, according to the charges, to 2 October 1990. That was the date on which the first arrests had taken place. *32 The alleged conspiracy could not, in fact, have continued beyond the date in June 1990 when, following the revocation of the export licences, the sub-assemblies and components were returned to Rexon in the United States. *33

J6.13 On 24 September 1991 a Case Summary, prepared by Mr Kramer, was sent to the solicitors acting for each of the defendants. *34 There are two aspects of the Case Summary which merit particular attention:

J6.14 First, in dealing with the licensability of the fuse assembly line, the Case Summary stated that “the goods in question in this case were specially designed for military use the exportation of the assembly line was controlled by Article 2(i) of the Orders and heading ML18 of the classifications in Group 1.” *35 The Case Summary went on to outline the various sub-contracts signed by Ordtec for the supply of the components required for the fuse assembly line. The conclusion was then stated that:

“Accordingly there can be no doubt that the components which comprised the assembly line were specially designed or modified and assembled to form that assembly line, which had the sole function of assembling and testing M739A1 fuse.” *36

It is clear from the statements taken from two of the executives of the main sub-contractor engaged by Ordtec *37, that some of the components for the assembly line were indeed “specially designed”. But, it is equally clear that a number of the components were standard, off-the-shelf items. An example of the statements given in this regard is as follows:

“The assembly and test equipment for the PD M739A1 fuse designed by Lanscot consisted of specially designed components in conjunction with commercially available ‘off-the-shelf’ items, eg, electric motors, stroboscopes, etc ...” *38

Mr Mason, one of the defendants, said in the course of an interview with Customs ID officers that, when Ordtec’s export licence was revoked, some of the components were sold at a car boot sale. *39 This, if true, would strongly suggest that the components in question were dual or multi-use items and not “specially designed”, single-use, ML18 items. Mr Kramer, junior Counsel for the prosecution, has, however, told the Inquiry that “had the case proceeded to a contested trial, this assertion would have been tested and - it is submitted - disproved.” *40

J6.15 If the “package” construction of ML18, evolved in discussions between Mr Fletcher (MOD) and Mr Wiltshire (Customs ID) in the context of the Matrix Churchill case *41, is

correct, there can be no doubt but that the fuse assembly line was, as a whole, “specially designed” for ML18 purposes. The two executives of the sub-contractor from whom statements were taken by Customs ID said in their statements:

“The assembly line we designed was specially designed for the sole purpose of assembling the M7379A1 fuse from component parts into completed fuse assemblies.”

Mr Fletcher also provided a statement, dated 26 September 1990, for the purposes of the Ordtec prosecution. In the statement Mr Fletcher said that he had considered the witness statements of the sub-contractors’ executives and continued:

“The statements refer to an assembly line specially designed for the production of the M739A1 artillery fuse. I can say that such an assembly line which is specially designed production equipment for an item which falls to be caught under ML3/ML4 of Group 1, Part II of the Export of Goods (Control) Order as amended (1987), would fall to be caught under heading ML18 of Group 1, Part II of the [EGCO].” *42

The statement does not espouse the package theory in terms, but the witness statements to which Mr Fletcher referred make it clear that a number of the components of the fuse assembly line were standard, off-the-shelf items. Ordtec exported the various components of the fuse assembly line as separate, unassembled, items; assembly of the components so as to constitute a fuse assembly line was to take place on site in Iraq. At the point of export, therefore, the standard, off-the-shelf items remained exactly that. They could have been used for a number of different purposes on arrival in Iraq although the intention clearly was that they would form part of the fuse assembly line.

J6.16 Nonetheless, the proposition that the components of the fuse assembly line were, as a whole, licensable under ML18 was, if the “package” construction of ML18 was correct, plainly justifiable. It should, moreover, be noted that, by a letter to Customs dated 1 November 1991, John Budd & Co, Mr Blackledge’s solicitors, admitted “that the goods being the subject matter of the allegations are of special design within the meaning under the Export of Goods (Control) Order” and said that “the Crown will not be required to prove this issue in so far as the Defendant Mr Blackledge is concerned.” *43 None of the other defendants made similar admissions, save to the extent that their eventual guilty pleas might be so regarded. In addition to the “package” construction of ML18 under which the whole assembly line would become licensable, a number of individual components of the assembly line were, on any footing, ‘specially designed’ and thus licensable. In this regard the Case Summary referred to “the drawings based on which sub- contractors made the parts specially for the assembly line” and expressed the justifiable conclusion that components “made to those specifications were specially designed to form an assembly and test facility for the M739A1 type fuse and could not reasonably fulfill any other function.” *44

J6.17 The second aspect of the Case Summary which merits attention is that it provides considerable detail about the export licence applications made by Ordtec. *45 This seems slightly surprising in view of the fact that the export licences which were granted were not, in the event, used. The parts of the fuse assembly line and associated equipment exported on 28 November 1989 were exported as being non-licensable and were described in the Administration Document provided to Customs at Sheerness Docks as “Machine Tools.” *46 The parts of the assembly line exported in October 1989, too, had been exported as being non- licensable equipment. The explanation for the emphasis placed by the prosecution on the licence applications and the licences appears to have been the position of Mr Blackledge. In his written statement to the Inquiry, Mr Andrew Collins QC (as he then was) *47 said:

“... Blackledge’s position was different to that of the others in that the evidence of his involvement in the smuggling by means of the false documentation was less strong: he was admittedly involved in the obtaining of the licence by deception. But the conspiracy throughout was to breach the prohibition on exportation of the assembly line. The means to be used to achieve that object may have changed (assuming that the use of the false documentation was an afterthought).” *48

In oral evidence Mr Collins said that Ordtec’s intention throughout was to “get these particular goods to Iraq in breach of the prohibition”. He continued “The way they started to do it was to obtain a false licence, pretending that they were to go to Jordan. Then for whatever reason - and I do not think we ever discovered why - they changed their minds and sent it [as a gauge] valve assembly line.” *49 The ELAs were relevant, Mr Collins said, because they illustrated the first approach adopted by Ordtec to attempt to breach the prohibition.

J6.18 In December 1991 Mr Collins had been appointed Leading Counsel for the prosecution, taking over from Mr Michael Kalisher QC who had been appointed Leading Counsel in July 1991. Mr Kalisher had indicated that because of his other work commitments he would be unavailable for the trial. Mr Collins was of the view that Count 3 on the Indictment (the section 68(2) charge) *50 was unnecessary. The Indictment was therefore amended and the charge removed. *51 The remaining two charges, it will be recalled, each alleged conspiracy between 1 January 1988 and 2 October 1990 to be knowingly concerned in the illegal exportation of goods.

Endnotes:

*1 - see paragraph E10.50 *supra*

*2 - see paragraph E10.4 *supra*

*3 - see the chronology and supporting documents on the Ordtec investigation submitted to the Inquiry by Customs: CE/70.1

*4 - see the written statement of Mrs Valerie Strachan, the Chairman of Customs Commissioners, dated 10 June 1994, paragraph 2(b)

*5 - CE/70.1.6

*6 - CE/70.1.8 at 9

*7 - see Mrs Strachan’s written statement dated 10 June 1994, paragraph 2(b)

*8 - see her written statement dated 3 May 1994, paragraphs A.9.3 and A.9.4

*9 - ie, an officer attending a VAT visit

*10 - see the transcript, Day 86, 10 May 1994, p. 42

*11 - It is likely that the defence would have made an application to exclude the seized documents from evidence. John Grecian had expressed his annoyance about the use of VAT powers by Customs ID at his first interview: see Mr Dubery’s Interim Report dated 9 October 1990 (CE/70.1.29)

*12 - CE/70.1.165

*13 - CE/70.1.171

*14 - see, for example, the minute from Mr Duncan (FCO/SEND) dated 4 April 1990 (DTI/295.2.20623) which states: “I realise that the above is somewhat sketchy, but I believe it would bear further investigation. Perhaps as a first step the VAT inspectors could establish whether the company has any formal links with Iraq ...”

*15 - see Mr Wiltshire’s written statement dated 31 March 1994, paragraph L.2.2

*16 - Written comments dated 7 December 1995

*17 - The respective roles in Ordtec of the two Mr Grecians and Mr Mason are described in paragraph E10.1 *supra*

- *18 - CE/70.1.11
- *19 - CE/70.1.17
- *20 - CE/70.1.20; Sir Brian Unwin, the then Chairman of Customs, having been informed of the FCO's views on the prosecution, commented: "The political circumstances of this case have obviously been very delicate but I hope the FCO do not think they have any veto over our operational decisions. It is clearly right to allow time for consultation with them but the decisions remain ours."
- *21 - CE/70.1.22
- *22 - see paragraph E10.6 *supra*
- *23 - see the record of Mr Phillips' interview: CE/70.1.34 at p. 44
- *24 - CE/70.1.56
- *25 - Mr Blackledge, it will be recalled, was the SRC project engineer who had negotiated the fuse assembly line contract with Ordtec: see paragraph E10.3 *supra*
- *26 - see the Advice dated 22 February 1991: CE/70.1.58 at 61 and 63
- *27 - CE/814
- *28 - see paragraphs E10.19 to E10.21 *supra*
- *29 - see paragraphs E10.5(b) and (c), E10.7 and E10.22 *supra*
- *30 - see also paragraphs C3.58 to C3.65 and G18.31 to G18.35 *supra*
- *31 - see paragraph E10.21 *supra*
- *32 - see paragraph J6.8 *supra*
- *33 - see paragraph E10.22 *supra*
- *34 - CE/70.1.101
- *35 - CE/70.1.101 at 106
- *36 - CE/70.1.101 at 125
- *37 - see paragraph E10.5(a) *supra*
- *38 - CE/835
- *39 - see the record of the interview with Mr Mason summarised in the Case Summary: CE/70.1.101 at 146
- *40 - Written comments submitted on 11 December 1995
- *41 - see paragraphs G3.19 to G3.23, G18.13 to G18.26 and H1.8 to H1.9 *supra*
- *42 - CE/70.1.19
- *43 - The letter was submitted to the Inquiry as an Annex to Mr Kramer's written comments dated 11 December 1995
- *44 - CE/70.1.101 at pp. 125 to 126
- *45 - CE/70.1.101 at pp.116 to 119
- *46 - see paragraph E10.20 *supra*
- *47 - Mr Collins was appointed Leading Counsel for the prosecution in the Ordtec case in December 1991. He became Sir Andrew Collins on his appointment to the High Court Bench in 1994
- *48 - see his written statement dated 21 October 1993, p. 2
- *49 - see the transcript of Mr Collins' oral evidence, 2 February 1994, p. 11
- *50 - see paragraph J6.11 *supra*
- *51 - see Mr Collins' written statement dated 21 October 1993, p. 1

* The Full report is available from The Stationery Office Ltd., PO Box 276, London, SW8 5DT.