

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(Civil)**

SLUHCV2014/0100

BETWEEN:

RAMBALLY BLOCKS LIMITED

Claimant

and

THE COMPTROLLER OF CUSTOMS AND EXCISE

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Vandyke Jude with Mr. Clarence Rambally for the Claimant

Mr. George Charlemagne with Mr. Kurt Thomas and Mr. George Kamali
Charlemagne of Counsel for the Defendant

2018: January 31;
2019: March 18.

JUDGMENT

- [1] **CENAC-PHULGENCE J:** On 4th February 2014, the claimant filed a notice of intention to file an application for leave to apply for judicial review pursuant to article 28(1) of the **Civil Code of Procedure**, followed by an application for leave to apply for judicial review on 11th April 2014. By order of the Court dated 30th April 2014, the claimant was granted leave to file the claim for judicial review, and so filed its fixed date claim form and affidavit in support on 2nd May 2014. The defendant filed an application to strike out the claimant's claim on 1st July 2014, which was refused by order of the court dated 18th August 2014. Prior to that order, on 11th July 2014, the claimant filed an amended fixed date claim form and affidavit in support. Then on 6th October 2016, the claimant filed a claim in detinue

against the defendant; however a notice of discontinuance in respect thereof was filed on 26th January 2017. On 9th May 2017, the claimant filed a further amended fixed date claim form and affidavit in support. The substantive hearing of the claim for judicial review was held on 31st January 2018.

Background

- [2] This case concerns four forty-foot containers landed at Port Castries in the name of the claimant on 26th August 2013, said to contain used block making machinery and parts (“the Containers”). The parties’ versions of the details of what occurred after landing of the Containers are relevant to the resolution of the matter and are therefore set out below.

The Claimant’s Factual Contentions

- [3] Mr. Rudolph Rambally (“Mr. Rambally”), the claimant’s representative, states in his affidavit that the claimant paid the sum of US\$30,000.00 for the contents of the Containers and shipped them from the USA to Saint Lucia at the cost of US\$26,283.00.
- [4] Mr. Rambally says that the claimant presented to the defendant (i) Invoice Number 20813 from Doles Brothers Ltd., dated 12th July 2013 and (ii) Bill of Lading No. 41140 issued by Xpress Freight Services in the said amounts evidencing the purchase and shipping transactions. Further, Mr. Rambally says the claimant submitted to the defendant a Single Administrative Document which reflected a payment for service charges in the amount of EC\$7,667.49; import duties of EC\$111.87; Value Added Tax of EC\$24,169.40; and an overtime container examination fee of EC\$900.00.
- [5] However, the claimant claims that the defendant neglected to examine and release the Containers.

- [6] Consequently, Mr. Rambally says that several meetings were held between himself, other representatives of the claimant, and the defendant's representatives, Mr. Edmund Charlery ("Mr. Charlery") and Mr. Grantley Promesse ("Mr. Promesse"), and correspondence exchanged. Mr. Rambally says that during the course of those meetings, the defendant requested that the claimant disclose and produce its bank records from January to September 2013 with which it complied.
- [7] Mr. Rambally says subsequently, on 10th September 2013, he was told by Mr. Promesse that he, Mr. Promesse, had discussions with the supplier of the imported items and had received information which contradicted the invoice in the sum of US\$30,000.00 presented by the claimant, and on that basis, a Notice of Seizure would be issued.
- [8] Mr. Rambally then says that Mr. Charlery and Mr. Promesse made an unannounced visit to the claimant's premises on 26th September 2013. They took photographs of the premises and requested a list of all the block plant parts, for which no explanation was given. Before leaving, Mr. Rambally alleges that Mr. Promesse said that he had the power to put a chain on the block plant and shut it down for five years. Mr. Promesse then handed Mr. Rambally an envelope represented to be the Notice of Seizure but which was in fact a letter from the Comptroller. The letter notified that the Comptroller had rejected the invoices presented because they did not conform to a number of requirements and requested the claimant to furnish the defendant with a commercial invoice for the consignment in the stipulated form by 9th October 2013, failing which the necessary action would be taken in accordance with the dictates of law.
- [9] Mr. Rambally says that he provided a revised invoice conforming to the requested information as well as an explanatory note under cover of letter from the claimant's Attorney dated 2nd October 2013. The letter explained that the claimant had a duty-free concession and therefore it made no sense that the claimant would

under-invoice the items in the containers; and that the daily demurrage and storage fees payable were causing unnecessary hardship to the claimant. The letter suggested that, in mitigation, the defendant release the containers to the premises of the claimant where they could be unloaded, photographed and an inventory undertaken by the defendant, on the claimant's undertaking not to use or interfere with the goods until cleared by Customs. Alternatively, the letter suggested that on the revised invoice containing the requested information, the containers be unconditionally released to the claimant. Mr. Rambally says the claimant received no response to this letter and that the defendant continued to neglect to inspect and release the containers, despite further letters from the claimant to the defendant on 15th October and 24th October 2013, to which it received no response.

- [10] Mr. Rambally says that on 4th October 2016, the claimant's Attorney wrote to the Comptroller confirming that on 26th September 2016, during the course of proceedings, representations were made for the first time that the Consignment had not been seized by the Comptroller and demanding release. He further says that on the same date the Comptroller belatedly responded and falsely claimed that the defendant's concerns regarding the invoices submitted had been relayed to the claimant on 21st November 2013 and that the claimant agreed to provide additional documentation. Mr. Rambally says that on 27th October 2016, the claimant's Attorney wrote to the Comptroller protesting the Comptroller's response contained in letter of 4th October 2016, requesting more information from the defendant and complaining again of significant port and demurrage charges. On 5th December 2016, the Comptroller wrote to the claimant acknowledging the claimant's concerns in its letter of 27th October 2016, however, failed to provide the specific information requested.

The Defendant's Factual Contentions

- [11] The defendant's version of the facts leading to this action are set out in the affidavits of Mr. Edmund Charlery, Senior Customs Officer and Mr. Grantley

Promesse, Senior Inspector in the Investigations Unit of the Customs and Excise Department, (together “the defendant’s representatives”) and is as follows.

- [12] The defendant’s representatives say that the declaration submitted by the claimant included two invoices from Dolese Brothers dated 12th July 2013, one of which contained no invoice number, buyer, weight, terms of payment or delivery, currency, signature, country of final destination, country of origin, marks or numbers, and the description of the goods did not allow for identification and recognition of the goods. The other invoice which was numbered 20813, contained no specific quantities for the goods listed, no weight, and the description of the goods did not allow for identification and recognition of some of the parts. The invoices therefore did not comply with the requirements of the law.
- [13] Mr. Charlery says that he attended a meeting on 28th August 2013 with the claimant’s broker in which he informed of the deficiencies in the invoices presented and requested proof of payment and other transaction documents. Mr. Charlery says that at a further meeting on 4th September 2013 between himself and the claimant’s representatives, he made further requests for information.
- [14] On 6th September 2013, (incorrectly stated in their affidavits to be 6th September 2016) the defendant’s representatives say that Mr. Rambally and his legal representative met with them and provided additional documents including a Bank of St. Lucia account statement for the period 14th May 2013 to 28th August 2013; a Bank of St. Lucia customer payment receipt for US\$30,000.00 made on 4th September 2013 payable to Mr. O’Bradovic for machines; and another Bank of St. Lucia customer payment receipt for US\$12,528.00 payable to Xpress Freight Services, a shipping company for shipment and containers; and a letter dated 4th September 2013 from the claimant’s legal representative, Mr. Clarence Rambally.
- [15] The defendant’s representatives further say that on 6th September 2013, the valuation unit of the defendant visited the website of Dolese Brothers, as well as

the website of Mr. O'Bradovic's company. On the latter, the valuation unit observed a concrete block plant label matching the description of the one in the claimant's declaration. As a result, Mr. Charlery contacted Mr. O'Bradovic via telephone who informed Mr. Charlery that: that block plant label had already been sold to a party in Saint Lucia, it was being offered at the price of US\$150,000.00; he was unable to give the final price for which it was sold; that the buyer had negotiated a lower price but that it was impossible that it had been the price of US\$30,000.00 due to the huge loss he would have incurred; that a 50% deposit had been paid prior to dismantling and loading; and that the cost of buying, dismantling, loading and shipping that block plant to Saint Lucia is about the cost of US\$200,000.00. Mr. Charlery says he continued communication with Mr. O'Bradovic, inquiring about purchasing an identical block plant and by email dated 19th January 2015 was informed by Mr. O'Bradovic that he could purchase same and have it dismantled and loaded for a total of US\$170,000.00. This cost included Mr. O'Bradovic's fees, dismantling and loading fees, and the cost of all invoiced equipment.

- [16] The defendant's representatives say that a further meeting was held on 10th September 2013 with the claimant's representatives. At this meeting, Mr. Promesse says he disclosed the information received by the valuation unit from Mr. O'Bradovic up to that time, which was not refuted by the claimant and to which Mr. Clarence Rambally responded by questioning how the valuation unit would present that evidence in a court.
- [17] The defendant's representatives say that on 25th September 2013, they visited the claimant's premises for the purpose of examining a concrete mixer and delivering a letter from the Comptroller, dated 25th September 2013. The said letter from the Comptroller notified the claimant that the Comptroller did not accept the documents presented as commercial invoices, informed of the requirements under the legislation and requested that the Comptroller be furnished with commercial invoices for the Consignment in the form set out in section 36(2) and schedule 3 of

the **Customs Regulations**,¹ ('the Regulations') as well as all other necessary documents relevant to the transaction.

- [18] The defendant's representatives deny that Mr. Promesse ever said that he had the power to put a chain on the block plant and shut it down for five years, or that either of them informed the claimant that the items had been seized. The defendant's representatives state that a Notice of Seizure was never issued or served on the claimant.
- [19] The defendant's representatives state that the Comptroller received a letter from the claimant's legal representative, Mr. Vandyke Jude dated 2nd October 2013 but which failed to address the concerns raised in the Comptroller's letter of 25th September 2013. They say that the letter made no attempt to address the issues that existed with the invoice without a number, dated 12th July 2013; and that Invoice # 20813 was replaced with another version void of even more information and which contradicted the initial Invoice # 20813. There was also enclosed a letter from Mr. O'Bradovic which stated that Mr. Rambally undertook the responsibility of loading the containers, which confirmed that the loading and packing cost was not included in the declared value of US\$30,000.00.
- [20] The defendant's representatives also state, in their respective affidavits, that Form 61 attached to the claimant's declaration could not be accepted for a number of reasons. The first was that the term of delivery was incorrectly stated as "Free on Board which indicates that the seller has assumed all costs up to the point where the goods have passed over the ship's rail in the country of export and would include charges such as loading and packing, dismantling, storage, inland freight, and brokerage in the country of export. However, the defendant's representatives state that the Bill of Lading No. 41140 illustrated that the inland freight was paid as a separate cost and was not included in the invoice value of US\$30,000.00. Also, Invoice No 20813 contained the term "All Equipment As Is/Where Is", which

¹ Cap. 15.05, Revised Laws of Saint Lucia, 2013.

means that the seller fulfils his obligation when he has made the goods available at his premises to the buyer, and therefore also indicated that the value of US\$30,000.00 stated on the invoice did not represent the “Free On Board” value of the block plant. Further, in letter dated 1st October 2013 from Terry O’Bradovic to the claimant, enclosed under cover of letter dated 2nd October 2013 from the claimant’s legal representative, Terry O’Bradovic stated that he did not charge Rambally Blocks for loading as Mr. Rambally undertook this responsibility on his own. The other reasons for rejecting Form 61 were: the claimant failed to respond to question 8(b) concerning whether the price was subject to some consideration or condition for which a value cannot be determined with respect to the goods being valued; and the claimant having assumed responsibility for packing and shipping of the consignment, incorrectly answered no when asked whether these costs were incurred by it.

[21] Mr. Promesse says that at a meeting on 22nd October 2013 between the claimant’s and the defendant’s representatives, he informed the claimant’s representatives of the concerns arising from the new invoice submitted by the claimant and that it did not comply with section 36(2) of the **Customs Regulations**.

[22] The defendant’s representatives say that on 21st November 2013, the claimant’s representatives attended a meeting, in which Mr Promesse presented all the concerns about the declaration. The claimant’s accountant took a written account of the concerns and promised they would be addressed. At the meeting Mr. Rambally said he did not pay a 50% deposit; that US\$30,000.00 is the full amount paid in spite of what the invoice stated and that he and his son-in-law dismantled and loaded the block plant into the containers using equipment provided free of charge by the requisitioner/seller. The defendant’s representatives say that when they asked Mr. Rambally who was responsible for the demurrage fees, given that it took in excess of five months for the containers to be shipped, Mr. Rambally provided no response; however, the accountant stated that inland freight was paid

by Mr. O'Bradovic. Mr. Promesse requested from them the Customer payment receipt for the US\$30,000.00 made towards the block plant by the claimant; proof of payment of the entire freight amount declared on the Bill of Lading and a response to all the concerns raised about the Consignment during the meeting.

[23] The defendant's representatives say that the Comptroller received the claimant's letter of 27th October 2016, which made no request for information but made inflammatory and frivolous accusations about officers of the office of the Comptroller. They say that the Comptroller responded by letter dated 5th December 2016.

[24] The defendant's representatives state that the defendant's investigation was not dilatory but that it was the claimant who chose not to act. The claimant was obligated to submit a perfect entry to the Comptroller which it did not. The defendant's representatives said the Valuation Unit had several meetings with the claimant's representatives and made all the necessary requests for information but was provided with responses which failed to address adequately the issues identified by the Comptroller with respect to the Consignment and its value. Further that where the claimant is unable to submit an entry for the goods in the form and manner and containing such particulars as the Comptroller may direct for lack of documents or information, the claimant may make and present a signed declaration, being a Bill of Sight informing of same. Had such a declaration been made, the claimant would have been permitted to have the goods examined, and where the particulars were found acceptable to the Comptroller, the claimant would have been allowed to pay the applicable duties. The defendant's representatives say that there was no failure on the part of the Comptroller to act within the ambits of the law, but due to the deficiencies and discrepancies in the documentation provided by the claimant, the Consignment could not be properly entered.

Relief Sought

[25] The claimant, in its further amended fixed date claim form filed 9th May 2017 requested the following relief:

- i. An order of mandamus requiring the defendant to inspect and release the containers;
- ii. A declaration that the matters complained of were contrary to the literal interpretation of the **Customs (Management) Act**,² (“the Act”) sections 136, 82, 113, and 116;
- iii. A declaration that the defendant has come to a conclusion so unreasonable that a reasonable Customs and Excise Department could never have come to it, and/or it has taken into account matters it ought not to have taken into account, or conversely refused to take into account or neglected to take into account matters which it ought to have taken into account under the Act;
- iv. A declaration that the matters complained of were so unfair as to amount to an abuse of power on the part of the defendant;
- v. A declaration that the actions of the defendant were arbitrary, oppressive, and unconstitutional in that they were contrary to sections 6 and 7 of the **St. Lucia Constitution Order**³ (“the Constitution”);
- vi. Costs.

Relief was also sought in the prayer for relief contained in the supporting affidavit to the amended fixed date claim of special damages for port and demurrage charges and loss of use and income; interest on special damages, general damages and interest thereon; and aggravated and exemplary damages.

The Claimant’s Legal Contentions

[26] The claimant contends that the central issue, which is not addressed by the defendant in its pleadings, is its refusal to inspect the consignment, to make clear whether the goods were seized or detained, or to make clear whether the invoices

² Cap. 15.05 of the Revised Laws of Saint Lucia 2013.

³ Cap 1.01 of the Revised Laws of St. Lucia 2006.

submitted were rejected because they did not represent the transactional value of the consignment. The claimant says that the affidavit evidence of the defendant would suggest that the defendant is impotent to fix or take alternative measures to correct the claimant's inability to produce a satisfactory invoice; and that unless and until the claimant provided the defendant with unspecified information, the defendant could simply abdicate all further responsibility to process and clear the Consignment.

[27] The claimant contends that the defendant is armed with a vast array of investigative powers under the Act; in particular section 102 allows the defendant to request information from an importer to facilitate such investigation. However, in the four years of the defendant's investigation, there has been no letter from the defendant requesting information pursuant to section 102 of the Act.

[28] In relation to re-assessing the value of the goods, the defendant had a duty to consider and assess an alternative value for the goods in accordance with Schedule 2, section 3(1) of the Act and the Customs Manual of Valuation, which provide a hierarchy of valuation methods to be followed. The Comptroller failed to set out the reasons the transaction value was rejected, and without any, or any proper cause refused to inspect the Consignment which would allow him to ascertain whether there was any proper basis for rejecting the transaction value.

[29] The claimant says that it was not until September 2016 that the defendant for the first time claimed that the Consignment was not in fact seized. The claimant says this is a tacit admission that the defendant detained the Consignment for over four years, detention for that length of time being prima facie unlawful and amounts to constructive seizure. The claimant says this is particularly so as the defendant has not communicated the basis of the detention or considerations for release. Further, even where goods are seized, the defendant has an obligation to consider conditional release under section 130(5) and (6), particularly where such a request was made by the claimant in its letter of 2nd October 2013.

- [30] The claimant claims that the defendant's failure to abide by the hierarchy for valuation of the goods was arbitrary, oppressive, high-handed, illegal, unjust and unconstitutional, and in breach of the provisions of the Act. It also amounts to an unlawful taking of property in violation of sections 6 and 7 of the Constitution, entitling the claimant to damages including aggravated and exemplary damages. Further it amounts to a denial by the State of the claimant's right to enjoyment of property, not to be deprived thereof except by due process of law.
- [31] The claimant contends that, the Comptroller failed to supervise the actions of his agents and to investigate the claimant's allegations of misconduct against the defendant's officials, which has caused unnecessary loss to the claimant. The claimant says that these failures were deliberate and caused the claimant to suffer substantial delay, loss, expense and damage in that the claimant was accumulating significant port and demurrage charges.
- [32] On the issue of damages, the claimant says that the total cost of the consignment is US\$68,407.77, and that its unlawful detention from 2nd September 2013 to present has deprived the claimant the use of this sum of money. The claimant submits that in the circumstances, it would be just and proper to award the claimant interest at the judgment rate of 6% compounded over the period of the detention. As the claimant has been denied the ability to use the imported machinery and parts as a result of the detention, the claimant also says it would be proper for the court to award compensation for loss of use. Further, the defendant's deliberate misconduct has caused the claimant to incur in excess of EC\$1,700,000.00 in port and demurrage charges for which the claimant is indebted to the shippers and SLASPA, which is recoverable damage arising from the unlawful detention. The claimant also submits that the behaviour of the defendant has been so outrageous that the Court ought to award a further sum by way of aggravated or exemplary damages to emphasize to the defendant that such maladministration must not be allowed and that it ought to exercise its powers responsibly and not vindictively. The claimant also submits that the

detention of the consignment for over four and a half years is a breach of the claimant's constitutional right not to be deprived of its property for which the Court ought to exercise its discretion to award the claimant compensation as part of the redress for breach of its constitutional rights.

- [33] On the issue of costs, the claimant submits that costs should be assessed under Appendix B column 1 paragraph 8 of the **Civil Procedure Rules 2000** as the Court should properly value the claim to include the port and demurrage charges that have accumulated in excess of EC\$1,700,000.00.

The Defendant's Legal Contentions:

- [34] The defendant claims that the claimant was at all material times obligated to provide the defendant with a Declaration that represented the true value of the consignment and all information pertaining thereto, pursuant to section 26(1) of the Act. The defendant says that upon investigation, the claimant's declaration was found to be defective. The defendant further claims that by letter dated 25th September 2013, the defendant informed the claimant of its decision to reject its declaration regarding the value of the Consignment and the grounds for rejection.
- [35] The defendant contends that it has not seized, nor informed the claimant that the consignment has been seized for breach of the Act, as their investigations did not prove any breach of the Act.
- [36] The defendant says that it has not acted in any unreasonable or procedurally improper manner, as the circumstances known to the defendant at the material time and the reasons given by the defendant provide a logical basis for their actions. The defendant's agents were guided by the Act which sets out the basis for establishing the assessment and seizure of goods.
- [37] There has also been no procedural impropriety as the claimant's declaration was rejected based on the investigative exercise coupled with a consideration of the

factors that determine how goods are valued. The claimant was informed of the rejection and the obligation to provide the necessary information in compliance with the Act. The defendant had several meetings with the claimant's representatives, in which the claimant had the opportunity to be heard in relation to the issues raised by the defendant and the claimant committed to provide the requisite information but failed to do so. Save and except section 27 of the Act which provides for an Entry by Bill of Sight, there are no other provisions obligating the defendant to examine the claimant's goods for assessment purposes. Under section 27, the defendant's obligation to revalue is introduced only after the importer declares that it is impossible to establish a value for preparation of a perfect entry, in accordance with the procedure set out in subsection 3 of Schedule 2 of the Act. The claimant provided no evidence to indicate that this alternative had been employed by it for the purpose of assessment and collection of appropriate duties. Therefore there was no procedural unfairness or breach of the principles of natural justice.

[38] The defendant states that there has been no breach of section 6 of the Constitution which vests a person with the right not to be deprived of his property, which right is limited and not absolute. The defendant says that the claimant's goods have not been seized or acquired by the Crown as the process to deem the goods forfeited was never initiated and the claimant was never given notice to which he is entitled to object. In any event, the defendant says that the limitation in section 6(6) of the Constitution would be relevant to this case.

[39] The defendant argues that the claimant is only entitled to damages where it can show that the tort of breach of statutory duty has been committed, but that the mere breach of a statutory duty is insufficient to prove same. The defendant further contends that where it is alleged that a statutory duty has been breached, the claimant must prove that the duty breached was intended to confer a private law claim to damages. The defendant says that section 26(1) of the Act is not specific to the claimant and there is no specific duty owed to the claimant to

examine the goods without the appropriate declaration to the Comptroller. In the circumstances, it would have been appropriate for the claimant to seek redress through a common law action in detinue.

[40] On this issue of damages, the defendant says that while the Court has the discretion to award damages for breach of a constitutional right, it is not automatic where violation of a constitutional right has occurred. In some cases a declaration may be sufficient to vindicate the right breached. The defendant says that apart from general damages, the claimant must plead and prove any other claim to damages. The defendant says the court must be satisfied as to the damage and the amount. However, the defendant says the claim for special damages as set out in the claimant's pleadings is speculative and unsubstantiated, in particular the sum claimed to have been incurred for port and demurrage charges. In relation to the claim for loss of use, the defendant says this is akin to special damages and the loss and the quantum must also be proved. In relation to the shipment and chargeable duties, the defendant argues that these costs cannot be associated with any loss arising from the alleged breach. Further, the defendant says that the case does not disclose any grounds for an award of exemplary damages in that the defendant's behaviour has not been particularly deliberate or outrageous; nor does it disclose grounds for aggravated damages, in that the defendant has not acted in a highhanded or insulting manner in the exercise of its statutory duty, which duty was not specific to the claimant.

[41] On the issue of costs the defendant urges the court to consider CPR 56.13(4)-(6) as well as 65.11(5) and (6).

Issues

[42] The issues for determination are:

- i. Whether there has been a seizure, actual or constructive, of the claimant's Consignment by the defendant?

- ii. Whether there has been a detention of the claimant's Consignment by the defendant and if so whether the period of detention is unreasonable?
- iii. Whether there is a statutory duty on the defendant to inspect and re-value the claimant's consignment and whether the defendant has breached such duty?
- iv. Whether the defendant acted (i) unreasonably, (ii) in a procedurally improper manner, and/or (iii) breached the principles of natural justice?
- v. Whether the defendant has breached the claimant's constitutional right guaranteed by section 6 of the Constitution not to be deprived of his property?
- vi. Whether the claimant suffered loss or damage as a result of the defendant's actions so as to be entitled to damages, aggravated damages and/or exemplary damages and the quantum thereof?

Analysis

Issues (i), (ii) and (iv)

[43] Issues (i), (ii) and (iv) will be addressed together for convenience. The failure of Customs to invoke any of the procedures available to it under the Act to have the claimant's Consignment assessed and released, condemned as forfeited, or otherwise administratively settled for some four and a half years is what has prompted this claim for judicial review. The claimant says that the defendant's inaction over this period is *ultra vires* the Act, irrational, unreasonable, procedurally improper, failed to take into account relevant considerations, and therefore breached the principles of natural justice, and is unconstitutional.

[44] The evidence from both sides is that on the landing of the Consignment, the claimant submitted a declaration to Customs in respect thereof. Customs found various issues with the declaration and invoices attached, and by a series of meetings between them, informed and discussed its concerns with the claimant. The claimant attempted to address Customs' concerns, however, Customs still found the declaration and invoices unacceptable. The claimant has since been

requesting further information with a view to settlement of the matter, including assessment of the value and upon payment of the relevant duty, release of its Consignment.

- [45] Belle J in the case of **China Town v The Comptroller of Customs and Excise**⁴ made certain observations of the Act. He noted that the Act contains the necessary provisions to enable the control of goods into and export of goods from Saint Lucia. It confers powers on the Customs Department and the Comptroller of Customs, which are enforced by way of court action for debt for duty owed, penalties for breaches of the law including fines, imprisonment, and forfeiture or condemnation and sale of goods imported in breach of the legislation. The legislation provides for appeals against decisions of the Comptroller of Customs or his officers to the High Court and Court of Appeal. The legislation also provides the Comptroller the power to make compromises, which do not include the use of coercive measures that are not provided in the legislation. Even though the Comptroller and his officers are entitled to exercise discretion, it must not be exercised arbitrarily, but used reasonably.⁵
- [46] The Act, having provided the Comptroller all necessary regulatory means and powers to regulate the import and export of goods, ensure collection of duties, and enforce the provisions of the Act, it is incumbent upon the Comptroller of Customs and his officers to utilize the provisions of the Act. It is not rational, reasonable or procedurally proper for Customs to be complacent and neglect to utilize the powers granted it under the Act.
- [47] The defendant has argued that the claimant was obligated by virtue of section 26(1) of the Act to submit a perfect entry for the importation of its Consignment, being a declaration representing the true value and all information pertaining thereto.

⁴ SLUHCV2014/0513, delivered 28th November 2017, unreported.

⁵ At paragraphs [31] – [33].

[48] Section 26(1) of the Act reads as follows:

“26. Entry of goods on importation

(1) The importer of any goods, other than goods which are exempt from the requirements of this section, and whether imported by air or sea, shall before entry of those goods transmit to the proper officer an entry of those goods, in such form and manner and containing such particulars as the Comptroller may direct.”

[49] Section 36 of the Regulations provides as follows:

“36. Entry for goods

(1) The importer of any goods shall at the time of making entry, or within such period thereafter as the Comptroller may in special cases allow, produce a declaration in respect of the goods duly completed in Form 61 or 62 or in such other form as the Comptroller may require, and shall give such further particulars as the Comptroller may think necessary for a proper valuation and account of the goods.

(2) The importer of any such goods shall at the time of making entry deliver to the proper officer a commercial invoice in the form set out in Schedule 3 of these Regulations.”

[50] The defendant also relies on section 102 of the Act which in subsection (1)(a) requires importers to “furnish to any officer in such form and manner as he or she may require, any information relating to the goods” and in subsection (2) provides that “the Comptroller may require evidence to be produced to his or her satisfaction in support of any information provided by virtue of subsection (1)...”

[51] The defendant says that the claimant has failed to submit a perfect entry and provide the information as required by the Comptroller. The defendant has further argued that, in the absence of a perfect entry, save for the claimant invoking section 27 of the Act providing for entry by bill of sight, which the claimant has not done, the defendant has no obligation to assess the value of the claimant’s Consignment to enable its release.

- [52] The Court, in light of the statutory scheme of the Act, does not accept this position. There are a number of provisions in the Act which give Customs the power to ascertain the value of the goods and/or determine whether the claimant has breached the provisions of the Act. Part 9 of the Act entitled *Powers* and encompassing sections 86 to 103 is dedicated to such powers. Among the powers the defendant has at its disposal to ascertain whether the goods ought to be assessed and released or seized as liable to forfeiture are the power to: examine and take account of goods⁶, require provision of facilities⁷, take samples⁸, search premises⁹, search persons¹⁰, require information and production of evidence¹¹, and require security.¹²
- [53] The claimant's contention is that the defendant's inaction amounts, at minimum, to constructive seizure of the Consignment. In support, the claimant relies on section 130 of the Act and asserts that this is the basis of the defendant's detention and/or seizure of its Consignment. The defendant on the other hand says the goods were neither seized nor detained as no notice of seizure was issued.
- [54] It is without a doubt that the defendant has detained the claimant's Consignment, which is and must remain in the possession and control of Customs until released or condemned as forfeited. This is the only reasonable construction to be given to the Act, in particular section 130 read together with Schedule 4, which deals with detention, seizure and forfeiture. The defendant's representatives stated in their affidavit evidence that the Consignment was not seized. Neither was the Consignment released to the claimant.
- [55] Having determined that the claimant's Consignment was detained by the defendant, the question is the basis of that detention? It is useful to note that

⁶ Section 91.

⁷ Section 92.

⁸ Section 93.

⁹ Section 94.

¹⁰ Section 96.

¹¹ Section 102.

¹² Section 103.

neither section 26 nor section 102 of the Act under which the defendant purports to act, gives Customs a power to detain goods.

[56] If as the claimant asserts, detention was on the basis of section 130 of the Act, this section entitled *Detention, Seizure and Condemnation of goods*, under the Part entitled *Forfeiture*, in subsection (1) provides that “anything which is liable to forfeiture is seized or detained by any officer or police officer.” In the case of **Econo Parts Ltd. v The Comptroller of Customs and Excise; Mr. Parts Ltd. v The Comptroller of Customs and Excise**¹³, Smith J stated that “it is instructive to observe that an alternative is provided between seizing and detaining... there is a distinction between the two for the purposes of interpretation of the Act.”¹⁴

[57] It appears that detention and seizure are often treated together. This is probably so, as goods which have been seized are necessarily detained, though not the converse. Once seized and the forfeiture procedure initiated, the distinction between the two becomes less important. However, in a case such as this, where the defendant denies seizure of the goods, it is important to distinguish between detention and seizure and the consequences arising in either case.

[58] On the evidence of both parties, no notice of seizure was ever issued by Customs and neither was the Consignment seized in the presence of the claimant, in accordance with paragraph 1 of Schedule 4 of the Act. It is therefore doubtful that the claimant’s Consignment was seized, whether actual or constructive seizure. The question then is whether the Claimant’s Consignment was detained under section 130 and the circumstances in which the power to detain ought to be exercised.

[59] In examining the power to detain goods under section 130, and relying on the UK case of **R (On the Application of Eastenders Cash and Carry plc and others**

¹³ SLUHCV2014/0309 and SLU/HCV2016/187 consolidated, delivered 10th May 2017, unreported.

¹⁴ At paragraph [9].

(Respondents) v The Commissioners for Her Majesty's Revenue and Customs (Appellant); R (on the application of First Stop Wholesale Limited) (Appellant) v The Commissioners of Her Majesty's Revenue and Customs (Respondent),¹⁵ Smith J in **Econo Parts** concluded as follows:

“(1) Section 130 of the Act confers two distinct powers on the Comptroller, a power of seizure and a power of detention.

(2) Detention is an alternative to the seizure of the goods in question. It differs from seizure in that **it is a temporary assertion of control over goods** which does not necessarily involve any seizure with a view to forfeiture. It does not trigger the commencement of proceedings for the condemnation of the goods.

(3) **The purpose of detaining goods without seizing them is to enable the goods to be examined or secured, pending investigations, which might lead to their seizure later. It is to enable the Comptroller to retain control over the goods temporarily until he has arrived at a conclusion as to the duty payable or as to whether the goods are liable to forfeiture.**

(4) **The right to seize or detain property under section 130 of the Act is dependent on that property actually being liable to forfeiture.** This turns on the objectively ascertained facts and not on the beliefs or suspicions of the Comptroller, however reasonable.”¹⁶ (my emphasis)

Liable to Forfeiture

[60] As stated by Smith J in **Econo Parts**, the Consignment must have been actually liable to forfeiture, and whether this is so is to be based on objectively ascertained facts and not on the beliefs or suspicions of the Comptroller or his officers, however reasonable.

[61] The Act provides that goods are liable to forfeiture upon certain breaches of the Act. Therefore, before Customs is entitled to detain or seize goods, Customs must have objectively ascertained that the importer committed a breach of one or more of those provisions.

[62] Based on the evidence, it does not appear that Customs ever informed the claimant of the provision(s) of the Act it was alleged to have breached, giving rise

¹⁵ [4014] UKSC 34.

¹⁶ SLUHCV2014/0309 and SLU/HCV2016/187 consolidated at paragraph [21].

to detention of the Consignment. It can be inferred however from the defendant's affidavit evidence that the Custom's officers suspected that the claimant was guilty of making an untrue declaration and evasion of customs duties by under-invoicing. Both of these would be offences under the Act, each of which render the goods in question liable to forfeiture.

[63] Nonetheless, the defendant's representatives voluntarily state in their respective affidavits "the claimant and his legal representative knew that the goods were not seized...there were no indications that there was any suspicion or allegation that the prices quoted on the invoice were false and constituted a fraudulent attempt to evade the payment of duties."¹⁷

[64] The defendant admits that it ascertained that the claimant's Consignment was not liable to forfeiture. On the defendant's own admission therefore, the detention was unlawful.

Length of Detention

[65] The fact of the detention itself being unlawful, there is no need to determine whether the period of detention is also unlawful for disposal of this case. However, for completeness and in case the Court is wrong on that conclusion, the reasonableness of the period of detention will be considered.

[66] At the outset, it is noted that section 130 of the Act does not prescribe any time period for which goods may be detained, or even stipulate that goods may only be detained for a reasonable period of time. However, section 32(10) of the **Interpretation Act**¹⁸ of Saint Lucia provides that:

"An enactment requiring or authorizing the doing of anything but not prescribing or limiting the period within which that thing is to or may be

¹⁷ Affidavit of Grantley Promesse filed 22nd June 2017 at paragraph 71; Affidavit of Edmund Charlery filed 3rd October 2017 at paragraph 71.

¹⁸ Chapter 1.06 of the Laws of Saint Lucia.

done, shall be construed as requiring or as the case may be authorizing that thing to be done with all convenient speed and not otherwise.”

[67] Bearing in mind the purpose of detention as set out by Smith J in **Econo Parts**, Customs is only entitled to detain goods for such reasonable period as is necessary to complete its investigation and make a determination as to the duty payable or whether the goods are liable to forfeiture.¹⁹

[68] The question then is what is a reasonable period of time for Customs to conduct its investigation and make a determination? Has Customs conducted its investigation and made its determination with all convenient speed and not otherwise in this case?

[69] It cannot be said that Customs has conducted any investigation or made any determination within a reasonable time or with all convenient speed, as Customs has done neither. Instead, it blames the delay on the claimant’s failure to provide the information requested by it. However, quoting Smith J in **Econo Parts**,

“But as Belle J observed at the leave stage, the customs department ‘has many weapons at its disposal in enforcing the law’; it has ‘a myriad of options when it comes to imposing sanctions on offenders’. Indeed it has wide powers of investigation. **The department therefore cannot be heard to say that the Claimants refusal to cooperate caused or contributed to the delay.**”²⁰ (my emphasis)

[70] What is certain is that the reasonable period of detention cannot exceed the point at which Customs determined that there was no breach of the Act rendering the Consignment liable to forfeiture. Though it is not stated on the evidence when exactly Customs determined that the Consignment was not liable to forfeiture, several aspects of the evidence are indicative.

¹⁹ R (On the Application of Eastenders Cash and Carry plc and others (Respondents) v The Commissioners for Her Majesty’s Revenue and Customs (Appellant); R (on the application of First Stop Wholesale Limited) (Appellant) v The Commissioners of Her Majesty’s Revenue and Customs (Respondent) [2014] UKSC 34 at paragraph 49.

²⁰ At paragraph [14]

[71] On 25th September 2013, the defendant's representatives delivered to the claimant a letter from the Comptroller informing of the issues related to the invoices and requiring certain information to be submitted by "Wednesday, 9th October 2013 failing which necessary action will be taken in accordance with the dictates of law." By implication, at this time Customs was of the opinion that it did not have sufficient evidence of any breach of the Act rendering the goods liable to forfeiture. It is reasonable to assume that, otherwise, this letter would have contained a notice of seizure, especially since issuance of a notice of seizure had been threatened. This letter is also an admission by the defendant that it had at its disposal the necessary measures under the law to deal with the claimant's Consignment. Still, Customs chose not to implement these measures for some five years.

[72] Further, the claimant's letter to the Comptroller of 15th October 2013, which raised the question of detention and seizure of the claimant's Consignment, reads:

"Is there a practice and procedure of detaining containers without prescribing a timeframe for their examination? Is there a practice and procedure for your department to detain containers without giving the importer reasons for the detention and a guideline as to the steps necessary to secure the examination of the container(s) by your agents?"

Right now what is the status of these four containers, is your department going to be issuing seizure notices, and if so when?"²¹

[73] In the defendant's representatives' affidavit evidence, they quote the above section of the claimant's letter and say with respect to it:

"it is inferred from that statement that the claimant, being aware of the request for information that would allow him to comply with the requirements for the perfect entry which was not provided to the Comptroller, knew that the four (4) containers were not seized."²²

[74] This is combined with their further statement in their affidavits that:

²¹ Letter from Vandyke Jude to the Comptroller of Customs and Excise, dated 15th October 2013.

²² Affidavit of Grantley Promesse filed 22nd June 2017 at paragraph 54-55; Affidavit of Edmund Charlery filed 3rd October 2017 at paragraph 54-55.

“the claimant and his legal representative knew that the goods were not seized... In each of these circumstances, there were no indications that there was any suspicion or allegation that the prices quoted on the invoice were false and constituted a fraudulent attempt to evade the payment of duties.”²³

[75] This suggests that at the date of the claimant’s letter of 15th October 2013, a decision had been made by the defendant not to seize the Consignment as it was not liable to forfeiture, and that the claimant ought to have been aware of this also.

[76] On September 26th 2016, some three years after detention and after these proceedings had been instituted, the defendant communicated to the claimant’s Attorney for the first time that the Consignment had not been seized²⁴, despite the claimant’s numerous inquiries/demands in this regard. Even at that date Customs refused to assess and release the Consignment, and still has not done so to date.

[77] The Court is of the view that by 15th October 2013, the Consignment had been determined not to be liable to forfeiture, hence the reason it was not seized as threatened. That being so, detention of the Consignment after this date is not reasonable. In any event, certainly the failure of Customs to take any action after four and a half years of detaining the Claimant’s consignment under section 130 constitutes an unreasonable delay, especially given the wide investigative and administrative powers of the Customs Department under the Act.

[78] The only other section of the Act which gives the Comptroller the power to detain goods is section 94, entitled *Power to Search Premises*, which provides:

“(1) Where an officer has reasonable grounds to believe that anything which is liable to forfeiture by virtue of any customs enactment is kept at or concealed in any building or other place or any offence has been committed under or by virtue of any customs enactment he or she may after being authorised by the Comptroller in writing so to do—

²³ Affidavit of Grantley Promesse filed 22nd June 2017 at paragraph 71; Affidavit of Edmund Charlery filed 3rd October 2017 at paragraph 71.

²⁴ Affidavit of Rudolph Rambally filed 9th May 2017 at paragraph 26.

- (a) enter any building or place at any time, and search for, seize, detain or remove anything which appears to him or her may be liable to forfeiture;”

[79] This section allows the Comptroller to detain goods that ‘appear to him to be liable to forfeiture’. This is a lower threshold than section 130. However, the power to detain under section 94 is incidental to the power to search premises, which the Comptroller is entitled to do on merely having reasonable grounds to believe that goods liable to forfeiture are kept at the premises. On the evidence, this section would not be applicable as there was no search of any premises from which goods were detained. For the reasons stated, even if the defendant’s detention of the claimant’s Consignment had been based on section 94, detention beyond 15th October 2013 and the length of the detention would have rendered it unlawful.

[80] For the reasons stated also, the defendant’s detention of the claimant’s Consignment for the period of some five years is irrational, unreasonable, procedurally improper, and breached the principles of natural justice. The defendant did not formally provide the claimant with the reasons why the revised invoice was unacceptable and afford him the opportunity to address the concerns, although the defendant insists that the reasons were provided at the meetings which were held and the claimant made promises to address the concerns. However, there is nothing in writing to substantiate this.

v. Whether the defendant has breached the claimant’s constitutional right guaranteed by section 6 of the Constitution not to be deprived of its property?

[81] Both the claimant and the defendant rely on section 6 of the Constitution. The claimant relies on section 6(1) which enshrines the right to protection from deprivation of property and the defendant on section 6(6) which restricts the right in section 6(1) in the circumstances specified therein. On a reading of these sections together, the question is whether the claimant’s Consignment was detained under the authority of a law that makes provision for the taking of

possession of a thing for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry.²⁵

[82] As discussed above, the power to detain property under section 130 of the Act, read with section 32(10) of the **Interpretation Act**, and bearing in mind the purpose of detention, is a law that makes provision for the taking possession of property for only so long as necessary for the purpose of investigation. However, for the reasons stated above the defendant has detained and continued detention of the claimant's Consignment in breach of section 130. In the circumstances, the defendant cannot be said to be acting under the authority of such a law as to fall within the section 6(6) exceptions. The claimant's constitutional right to protection of its property has therefore been infringed.

iii. Whether there is a statutory duty on the defendant to inspect and re-value the claimant's consignment and whether the defendant has breached such duty?

[83] The Court is of the view that having determined that the claimant's Consignment was not liable to forfeiture, the defendant had a duty to exercise its powers under the Act to have the claimant's Consignment assessed and released. The Court comes to this conclusion on the basis of the purpose of detention, the general scheme of the Act, the overriding principles of natural justice and the constitutional right to non-deprivation of property without due process of the law.

[84] I would agree with **Econo Parts**, that the purpose of detention has to be to allow for the temporary assertion of control over goods to enable them to be examined or secured pending investigation and until the Comptroller arrives at a conclusion as to the duty payable or whether the goods are liable to be forfeited. It is clear then that the detention cannot be indefinite and must conclude in one action or another being taken in respect of the goods. Since the defendant admits that the goods are not liable to forfeiture, it then had a statutory duty to employ such

²⁵ Richard Frederick and Lucas Frederick v The Comptroller of Customs and The Attorney General SLUHCV2008/0580.

measures as would enable it to assess and release the claimant's Consignment. Section 130(1) of the Act seems to suggest that goods can only be detained if they are liable to forfeiture; but this has to mean that detention can also be for the purpose of investigation to determine whether the goods are in fact liable to forfeiture, which would eventually lead to seizure and continued detention, subject to the process outlined in that section.

[85] The Court notes that where goods are liable to forfeiture, the procedure set out in Schedule 4 of the Act to have such goods condemned as forfeited requires a notice of seizure to be issued by the Comptroller. Where the owner of the goods seized claims that the goods are not liable to forfeiture, the owner is given one month from the date of service of the notice of seizure, to give notice of his claim in writing to the Comptroller. Upon receiving the notice of the owner's claim, the Comptroller is required to take proceedings for the condemnation of the goods by the court. Where the court finds that the goods were at the time of seizure liable to forfeiture, the court will condemn the goods as forfeited.

[86] The relevance of this procedure is that even where goods are seized as liable to forfeiture, the goods cannot be detained indefinitely. Once the importer makes his objection in the proper manner, the Comptroller must initiate forfeiture proceedings, thereby allowing the importer the opportunity to be heard. This accord with the principles of natural justice and the constitutional right to non-deprivation of property. Further, despite goods being seized as liable to forfeiture, the Comptroller is given the power by subsection 130(5) and (6) to deliver such goods to the owner upon the owner paying such sum not exceeding that which in the Comptroller's opinion represents the value of the thing, including any duty chargeable thereon. Even where goods are seized as liable to forfeiture, the owner is given the opportunity to have the goods released upon payment of the relevant duties.

[87] It must be inferred similarly, that detention cannot be indefinite and the principles of natural justice must be observed, either by the assessment and release or institution of forfeiture proceedings, which give the importer the opportunity to be heard. This is the interpretation of the Act that adheres to the constitutional right to protection of property and ensures that a person is not deprived of his property without due process of the law.

[88] The Court finds support for this in **China Town**, where Belle J said:

“To the extent that the forfeiture procedure is invoked in satisfaction of a tax, rate or due as penalty for breach of the law, the seizure is lawful. **However the basic protection of the right to property continues to exist and there is in place thereafter a procedure for the assessment of value and the payment of compensation or to condemn the goods seized, and these procedures would provide the opportunity to the claimant to be heard. It cannot be fair to maintain the seizure of the goods without any procedure being adopted for the compensation of the owner or the condemnation of the goods where his claim can be heard.**”²⁶ (my emphasis)

[89] Relying on further dicta of Belle J in **China Town**:

“But the seizure process in the legislation comes under the heading of forfeiture and in a very real way is a step towards forfeiture or condemnation... **It is the defendant who has started the process which it should be prepared to finish. Consequently, the claimant becomes entitled to know where he stands in relation to this step of seizure. If there is no indication of a next step being taken in a reasonable time, the claimant becomes entitled to demand that such a step be taken in order for their constitutional right to exercise the normal attributes of property ownership to be realized.**”²⁷ (my emphasis)

[90] The same principles must be equally applicable to detention. Detention also comes under the heading of *Forfeiture* in the Act and like seizure is a step towards forfeiture. It is a process started by the defendant, which it should be prepared to finish, either by instituting forfeiture proceedings or assessment and release of the goods. This must be done within a reasonable time. At all times, the claimant's constitutional right to protection of property subsists. The claimant would thereby

²⁶ At paragraph [37]

²⁷ At paragraph [25]

be made aware of where it stands, and not be left in a state of uncertainty. The claimant would have the opportunity to be heard. Failing this it is entitled to demand action to be taken by the Comptroller to enforce its property rights.

[91] It is clear on the evidence however, that at no time did the defendant contemplate any action post detention of the claimant's goods. The claimant has said in its affidavit evidence that it has no obligation to assess the value of the claimant's goods to enable its release, unless the claimant submits an entry by bill of sight pursuant to section 27 of the Act. The defendant has also said un-categorically that the goods have not been seized as their investigations did not prove any breach of the Act. As asserted by counsel for the claimant, the defendant, by this, implies that it is impotent to take action.

[92] The defendant could have assessed and released the claimant's Consignment pursuant to section 27 of the Act in conjunction with section 78 and Schedule 2 of the Act. Section 27 of the Act, subsections 1-6 provide:

"27. Entry by bill of sight

(1) Without prejudice to section 26, where on the importation of any goods the importer is unable for want of any document or information to make perfect entry of those goods, he or she shall make a signed declaration to that effect to the proper officer.

(2) Where a declaration under subsection (1) is made to the proper officer, he or she shall permit the importer to examine the goods imported.

(3) Where an importer has made a declaration under subsection (1), and submits to the proper officer an entry, not being a perfect entry, in such form and manner and containing such particulars as the Comptroller may direct, and the proper officer is satisfied that the description of the goods for tariff and statistical purposes is correct, and in the case of goods liable to duty according to number, weight, measurement or strength such number, weight, measurement or strength is correct, the proper officer shall, on payment to him or her of the specified sum, accept that entry as an entry by bill of sight and allow the goods to be delivered for home use.

(4) For the purposes of subsection (3) the specified sum shall be an amount estimated by the proper officer to be the duty payable on such goods, together with such further sum as the proper officer may require, that further sum being not less than $\frac{1}{2}$ of the estimated duty.

(5) If, within 3 months from the date of making an entry by bill of sight under subsection (3), or such longer time as the Comptroller may in any

case permit, the importer shall make a perfect entry, and that perfect entry shall show the amount of duty—

(a) to be less than the specified sum, the Comptroller shall pay the difference to the importer; or

(b) to be more than the specified sum, the importer shall pay the difference to the Comptroller.

(6) Where no perfect entry is made within the time limit laid down by subsection (5), the specified sum paid is considered to be the amount of duty payable on the importation of the goods.”

[93] Section 41 of the Regulations reads:

“41. Bills of sight

The declaration required in cases where the importer is unable for want of full information to make perfect entry of any goods shall be in Form 21.”

[94] Section 78(1) provides:

“78. Valuation

(1) Where under any enactment relating to an assigned matter duty is chargeable on goods by reference to their value, that value shall in the case of imported goods be determined in accordance with the provisions of Schedule 2.”

[95] It is correct that section 27 says that where the importer is unable to make a perfect entry, the importer shall make a signed declaration to that effect to the proper officer. However, it cannot be inferred from the wording of the section that if the importer does not submit such a declaration, Customs can opt to take no action.

[96] This failure of the defendant to take any action is even more troubling in the face of the claimant’s Attorney’s repeated written requests for the defendant to adopt such procedure to allow the claimant’s Consignment to be examined, assessed and released given the daily accruing demurrage and storage fees which were causing unnecessary hardship to the claimant. The substance of these numerous requests (letter dated 2nd October 2013 which accompanied the revised invoice) was to ask the defendant to permit entry by bill of sight, even if not stated to be pursuant to section 27 of the Act or in the proper form as set out in section 41 of the Regulations or using the terminology ‘bill of sight’. At the very least, as the

regulator with responsibility for enforcing the provisions of the Act, the defendant ought to have simply informed the claimant of the entry by bill of sight procedure available to it under the Act and the proper form for invoking same.

vi. Whether the claimant suffered loss or damage as a result of the defendant's actions so as to entitle it to damages, aggravated damages and/or exemplary damages and the quantum thereof?

[97] For the reasons given above, the Court declares that the detention of the claimant's Consignment was *ultra vires* section the Act, irrational, unreasonable, procedurally improper, and therefore breached the principles of natural justice, and is a breach of the claimant's constitutional right to protection of its property.

[98] The claimant, by its further amended fixed date claim form filed 9th May 2017, sought to add to the prayer of relief, special damages for port and demurrage charges and loss of use and income; interest on special damages, general damages and interest thereon; and aggravated and exemplary damages. However, at the hearing on 31st January 2018 these additions were objected to by counsel for the defendant and after hearing counsel for the claimant, these additional relief in the further amended fixed date claim form were struck out on the basis that these amendments sought to expand the claim for judicial review for which leave had been granted and would have required further leave of the court which had not been obtained.²⁸

[99] The relief sought on the claim after striking out the reliefs for damages is therefore the orders for mandamus, various declarations and costs. The Court having struck out the claims for damages in the further amended claim filed on 9th May 2017 need not concern itself with the particulars of special damages for the port and demurrage charges as well as a sum for loss of use of the plant and machinery set out in the supporting affidavit which were updated to XCD\$1,433,124.00 in port and demurrage fees and XCD\$3,000.00 per day for loss of use. However, even if the Court were to consider special damages, no documentary evidence of any

²⁸ On the authority of *The Minister of Agriculture v DYC Limited* [2015] JMCA Civ 8 at para 14.

kind whatsoever was exhibited to the supporting affidavits or otherwise introduced into evidence to show that these amounts claimed as special damages had indeed been incurred and/or paid. I am also of the view that the reports of Anthonia Alcindor do not assist in this regard.

[100] This precise and manifest omission in the pleadings and evidence also occurred in the **Econo Parts** case. In the circumstances, Smith J held that the claim for special damages was pleaded and particularized in the claimants' fixed date claim forms, however found that he was unable, in the absence of proof, to make an award for special damages as claimed by the Claimants. I find myself similarly circumstanced in the case at bar.

[101] The words of the Lord Chief Justice in **Bonham-Carter v Hyde Park Hotel Ltd.** are instructive in this regard:

“On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw things at the head of the court saying “this is what I have lost; I ask you to give me damages”. They have to prove it. The evidence in this case with regards to damages is extremely unsatisfactory.”²⁹

[102] This Court would only take this opportunity to reiterate that claimants must plead and prove their damage if they wish the court to consider an award of damages and counsel for claimants must be more meticulous in drafting their pleadings and adducing the necessary evidence to support the claims made.

[103] The Court is empowered by CPR 56.8 to make an award of damages on a claim for judicial review or breach of the Constitution if the facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief and the court is satisfied that, at the time when the application was made the claimant could have issued a claim for such remedy. The Court is satisfied on the

²⁹ At paragraph [24].

claimant's affidavit that the continued detention of the claimant's machinery would be subject to port and demurrage charges. The Court therefore finds it appropriate in these circumstances to order that the defendant pay the port and demurrage charges incurred by the claimant as a result of the unlawful detention of containers from 2nd October 2013 (being the date the revised invoice was first submitted and to which there was no response) to the date of their release.

[104] Following the cases of **Tamara Merson v Drexel Cartwright and the Attorney General**³⁰ and **The Attorney General of Trinidad and Tobago v Ramanoop**³¹, the Court is entitled on a claim for breach of constitutional rights to make a monetary award enough to acknowledge that a right has been violated.

[105] The Privy Council in the case of **Attorney General of Trinidad and Tobago v Ramanoop**, considered the question of damages in public law and in an oft-cited passage, the Judicial Committee advised:³²

“When exercising the constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. **An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.** All these elements have a place in this additional award. “Redress” in section 14 is apt to encompass such an

³⁰ [2005] UKPC 38.

³¹ [2005] UKPC 15.

³² [2006] 1 AC 328, at [18]-[19].

award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions ‘punitive damages’ or ‘exemplary damages’ are better avoided as descriptions of this type of additional award.” (my emphasis)

[106] This will be the case where the Court finds that a declaration alone is not sufficient to vindicate a party’s constitutional rights. It is to be noted however that such an award is not meant to be punishment. Having found that the claimant’s constitutional right to protection of its property has been breached, the Court finds it appropriate in the circumstances of this case to make such an award. Neither the claimant nor the defendant has addressed what measure of damages should be awarded for the breach of its constitutional rights.

[107] In **Christopher Lezarre and Others v Attorney General of Trinidad and**

Tobago³³ Stollmeyer J said:

“An award of damages must be commensurate with the right that has been breached, the manner in which it is breached and the consequences that flow from the breach. ... The quantum of an award will reflect the seriousness of the right that has been breached, the manner in which it was breached and the consequences flowing from the breach, including the element of distress and inconvenience. The quantum will vary from case to case, and will depend upon an assessment of these factors.”

“It is inappropriate to award damages for breach of a constitutional right solely by reference to what award might be made in a writ action claiming the equivalent relief, because the latter has no reference to the constitutional right that has been breached. I accept, however, as de la Bastide CJ said in Jorsingh, that in quantifying damages payable on constitutional motions some proportion must be maintained with the levels of damages that have been awarded for wrongful deprivation of liberty, or at common law for personal injuries caused by negligence, or defamation. I also accept what was said in Russell (at page 140 g – h) that the award should not create” ... a precedent for abusive or unreasonable exploitation.”

³³ HCA Cv 2098.

In the circumstances of this case and given the delay of just over five years in dealing with the claimant's Consignment, I consider that an award of \$50,000.00 is appropriate for the breach of the claimant's constitutional rights.

- [108] The claim for aggravated and exemplary damages having been struck out, the Court will not make any findings in this regard. The Court however wishes to comment on the behaviour of the Customs Department in the discharge of its functions. I highlight the following which I think deserve to be mentioned as behaviours which the Court cannot condone: the complacent and neglectful attitude of the officers of the Customs Department; their unresponsiveness and refusal to consider the claimant's numerous requests to assess and release its Consignment upon payment of the relevant duties; and the length of unreasonable delay. The combined effect of these amounts to a significant injustice inflicted upon the claimant by the State. It is also noteworthy that similar behaviour is referenced in several decisions of this Court and it therefore suggests that there is need for the Customs Department and its officers to evaluate the way they operate and carry out the very important functions which are given to them under the **Customs Act** so that they are within the bounds of the law.

Costs

- [109] Rule 56.13(5) deals with costs on administrative claims and provides that where costs are to be awarded these costs fall to be assessed.

Orders

- [110] In light of the foregoing, I make the following orders and grant the following reliefs:
1. A declaration that the detention of the claimant's Consignment is *ultra vires* the Act, irrational, unreasonable, procedurally improper, breached the principles of natural justice, and is unconstitutional.

2. Mandamus compelling the defendant to forthwith assess the value of the claimant's Consignment and upon payment of the relevant duties by the claimant, release the Consignment.
3. The defendant shall pay all port and demurrage charges incurred in relation to the detention of the claimant's Containers from 2nd October 2013 to the date of release of the said Containers.
4. Damages to the claimant in the sum of \$50,000.00 in respect of the breach of the claimant's constitutional right to protection of its property to be paid within 30 days of the date of this judgment.
5. Costs to the claimant to be assessed costs in accordance with CPR 65.12 if not agreed by the parties within 21 days of the date of judgment.

[111] I wish to sincerely apologise to counsel and the parties for the delay in delivering this judgment.

**Kimberly Cenac-Phulgence
High Court Judge**

By The Court

Registrar