

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVP2020/0001

BETWEEN:

R.G. INVESTMENTS INC.

Appellant

and

COMPTROLLER OF CUSTOMS AND EXCISE

Respondent

Before:

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara QC

Justice of Appeal [Ag.]

The Hon. Mde. Margaret Price-Findlay

Justice of Appeal [Ag.]

Appearances:

Mr. Leslie Prospere and with him Mr. Alberton Richelieu and Ms. Kristian Henry for
the Appellant

Mr. Rene Williams and with him Mr. George K. Charlemagne for the Respondent

2020: December 9;
2021: January 29.

Civil Appeal — Customs (Control and Management) Act, Cap 15.05 of the Revised Laws of Saint Lucia — Evidence Act, Cap 4.15 of the Revised Laws of Saint Lucia — Forfeiture and Condemnation of Container and Goods — Whether High Court had jurisdiction to determine claim by Comptroller for condemnation and forfeiture having regard to section 137 of Customs (Control and Management) Act — Date of seizure of container and its contents by Comptroller and whether purported seizure of consignment was premature and unlawful — Whether learned judge failed to analyse or properly analyse effect of sections 48, 50 and 51 of Evidence Act in determining whether there were objectively ascertainable facts to ground Comptroller's decision to seize container — Whether learned judge failed to properly consider the requirements of sections 55(1) and (2) of Evidence Act in permitting respondent to rely at trial as admissible evidence on documents which respondent obtained during investigations and erred in considering section 55(3) of the said Act — Whether appellant

was entitled to immediate release of declared goods — Whether appellant was entitled under the rules of natural justice and procedural fairness to receive copy of 'seizure report' from Comptroller — Whether Comptroller was empowered under section 130(5) of Customs (Control and Management) Act to stipulate payment of a restoration fee as a penalty or condition for release of container and its contents — Whether Comptroller breached rules of natural justice by failing to provide appellant with explanation of legal authority to stipulate payment of restoration fee as condition for release of container and its contents and by terminating administrative proceedings and commencing condemnation and forfeiture proceedings — Whether appellant entitled to release of undeclared goods upon tendering payment of sum assessed as custom duties thereon — Whether judge erred in interpretation of section 131(1)(b) of Customs (Control and Management) Act by determining that entire contents of container were liable to forfeiture and condemnation — Whether judge erred in finding that appellant made untrue declaration rendering goods liable to forfeiture and whether Comptroller was entitled to condemnation and forfeiture of container and its entire contents in all the circumstances of the case

The appellant, R.G Investments Inc., imported into Saint Lucia one (1) 40ft container identified by Number GESU 480661-6 listed on Bill of Lading No. SMLU 477392A ("the container"). On 17th March 2019, the appellant submitted the Bill of Lading and customs declaration C11769 dated 3rd March 2017 to the Customs and Excise Department ("Customs"). The appellant also presented to Customs a cheque in payment of customs or import duties chargeable on the goods in the container declared on the Bill of Lading ("the declared goods"), which cheque was never returned to the appellant by the respondent, the Comptroller of Customs ("the Comptroller"). On 18th March 2017, an examination of the container was conducted by Customs Officer Junior Hippolyte in the presence of the operations manager for the appellant, Mr. Anselm Clauzel, where it was discovered by Officer Hippolyte that certain items from the container had not been declared by the appellant on its customs declaration and, hence, no duty had been assessed or paid on these undeclared goods. These undeclared goods consisted of items purchased from several suppliers in the United States of America including Makita Latin America ("Makita"). Upon the conclusion of the examination on 18th March 2017, Officer Hippolyte ordered the container and its contents taken to the Port of Castries, and a more detailed examination was conducted on 11th and 12th April 2017 in the presence of Mr. Clauzel where it was discovered that there were 708 items of undeclared goods ("the undeclared goods"). On 13th April 2017, Officer Hippolyte served Mr. Clauzel with a written Notice of Seizure of the container and its contents for breach of section 113(1)(a) of the Customs (Control and Management) Act ("the Customs Act"), including both the declared and undeclared goods. By letter dated 4th May 2017, the appellant requested administrative processing with the objective of having the Comptroller reach a resolution of the appellant's alleged breaches of the Customs Act, which request was accepted by the Comptroller. The Assistant Comptroller of Customs ("the Assistant Comptroller"), Mr. Sandy, thereafter embarked upon meetings and discussions with Mr. Clauzel on behalf of the appellant. In pursuance of the administrative proceedings, at a meeting on 30th May 2017, between Mr Clauzel and Mr. Peter Lee David (customs broker for the appellant) on the one hand, and Mr. Sandy and Customs Officers Hippolyte and Grantley Promesse representing the Comptroller on the other hand, Mr. Sandy read out or at least referred to the findings in the seizure report prepared by Officer Hippolyte. However, he did not provide a copy to the representatives of

the appellant. The end result of the said meeting was that the Comptroller required the appellant to pay to the Government of St. Lucia the sum of \$15,344.36 being the assessed duties on the undeclared goods in the container, and the sum of \$30,000 as a restoration fee for the release of the container and its contents.

By letter dated 23rd August 2017 the appellant requested a copy of the list of undeclared items, sent a cheque in the sum of \$15,344.36 in payment of the assessed customs duties on the undeclared goods in the container, and stated the appellant's refusal to pay the restoration fee. The Comptroller thereafter sent a memorandum to the Attorney General informing him that the administrative processing had failed to reach a settlement and requesting consideration of court proceedings for condemnation of the seized goods. This was followed by a letter dated 17th November 2017 from the Comptroller to the appellant returning the appellant's cheque for \$15,344.36 given the appellant's disagreement on the terms of settling the seizure through administrative processing. Formal legal proceedings for condemnation and forfeiture of the container and its contents were then commenced in the High Court by the Comptroller against the appellant on 16th February 2018.

Having found that the container and its contents were liable to forfeiture and that their seizure by the Comptroller was lawful, the learned judge made an order that the said container and its entire contents were deemed condemned as forfeited to the Comptroller pursuant to section 130(4) and paragraph 5 of Schedule 4 of the Customs Act. The appellant appealed against the judgment and decision of the learned judge. The grounds of appeal give rise to several issues for determination. They concern in summary, (i) the jurisdiction of the High Court to determine the Comptroller's claim for condemnation and forfeiture; (ii) the effective date and lawfulness of the seizure of the container and its contents; (iii) the admissibility of certain evidence relied on by the Comptroller at trial and whether there were sufficient objectively ascertainable facts; (iv) the appellant's entitlement to the release of the declared goods and/or the undeclared goods; (v) alleged breaches of fairness and natural justice; (vi) the powers of the Comptroller under the Customs Act including section 130(5); (vii) the judge's interpretation of section 131(1)(b) of the Customs Act; and (viii) the Comptroller's entitlement to condemnation and forfeiture of the container and its entire contents in all the circumstances of the case.

Held: allowing the appeal in part only to the extent that the judge's order condemning as forfeited the declared goods is set aside; ordering that the declared goods in container identified by Number GESU 480661-6 listed on Bill of Lading No. SMLU 477392A be released from seizure forthwith by the Comptroller to the appellant; affirming the judge's order to the extent that the container identified by Number GESU 480661-6 and the undeclared goods therein not listed on Bill of Lading No. SMLU 477392A be condemned as forfeited to the Comptroller of Customs; ordering the appellant to pay the respondent two-thirds of its costs in the appeal, which costs shall not exceed two-thirds of the prescribed costs in the High Court, and two-thirds of its prescribed costs in the High Court, that:

1. Section 136 of the Customs Act provides for any person who disputes the amount of duty demanded by a Customs Officer to pay the said amount and, within 3 months of paying the disputed amount, by notice in writing setting out the grounds upon which the amount is disputed, to require the Comptroller to reconsider the amount

of duty demanded. Section 138 provides for a right of appeal against the decision of the Comptroller under section 136. Accordingly, it is clear that the jurisdiction of the Customs Appeal Commissioners appointed under section 137 of the Customs Act relates only to issues concerning the amount of duty demanded by the Comptroller and/or the legal justification for charging the disputed duty. The jurisdiction of the Customs Appeal Commissioners does not relate to disputes concerning any failure to declare goods or the making of a false declaration under section 113 of the Customs Act, which is the gravamen of the claim made by the Comptroller against the appellant in the High Court.

Sections 113, 136, 137 and 138 of the **Customs (Control and Management) Act**, Cap. 15:05 of the Revised Laws of Saint Lucia considered.

2. The claim in this matter does not concern an issue as to the quantum of any 'duty', as defined in the Customs Act, assessed or demanded by a Customs Officer or by the Comptroller. The restoration fee imposed by the Comptroller during administrative proceedings is not a 'duty' chargeable or imposed under the Customs Act. The restoration fee is a sum which the Comptroller required the appellant to pay, in addition to the duties assessed on the undeclared goods, pursuant to his powers under section 130(5) of the Customs Act, and as a condition or penalty for the release of the container and the goods therein to the appellant without proceeding to condemnation and forfeiture. There is no provision of the Customs Act which provides for a right of appeal to the Customs Appeal Commissioners from the exercise by the Comptroller of his functions or powers under section 130(5). Accordingly, the jurisdiction of the Customs Appeal Commissioners was not engaged, and the learned judge had jurisdiction to determine all issues relating to the Comptroller's claim for condemnation and forfeiture of the container and its contents.

Sections 136(1), 136(2), 137, 138, 130(4), 130(5) and paragraph 5 of Schedule 4 of the **Customs (Control and Management) Act**, Cap. 15:05 of the Revised Laws of Saint Lucia considered; **The Attorney General of Saint Lucia et al v Vance Chitolie**, Saint Lucia Civil Appeal No. 14 of 2003 distinguished.

3. There is no basis upon which the learned judge's finding as to the effective date of the seizure can or ought to be disturbed. In determining the effective date of the seizure, the learned judge had regard to the distinction between 'seizing' and 'detaining' the container and correctly determined that the seizure was effectuated when the Notice of Seizure was issued by the Comptroller on 13th April 2017 following the completion on 12th April 2017 of a more thorough examination of the container and its contents.

Econo Parts Ltd. v The Comptroller of Customs and Excise SLUHCV2014/0309, (delivered 10th May 2017, unreported) applied; **Rambally Blocks Limited v The Comptroller of Customs and Excise** SLUHCV2014/0100, (delivered 18th March 2019, unreported) applied.

4. The exception to the hearsay rule under section 55(3) of the Evidence Act is not a stand-alone one but is qualified by the provisions of sub-sections (1) and (2) of section 55. Accordingly, the requirements of subsections (1) and (2) must be satisfied in addition to the requirements under subsection (3), in order for the documents to be admissible into evidence in the proceedings. The learned judge erroneously did not consider the requirements of subsections (1) and (2) of section 55 when determining the admissibility of the documentary evidence relating to the Makita goods in the container. Moreover, the learned judge failed to appreciate that the respondent had led no evidence whatsoever capable of satisfying any of the conditions in section 55(2) and in those circumstances had failed to bring these documents within the exception to the hearsay rule in section 55(3). In the circumstances, the learned judge erred in admitting the Makita documents into evidence. However, notwithstanding the inadmissibility of the Makita documents as evidence, the Comptroller had, at the time of seizure on 13th April 2017, sufficient objectively ascertainable evidence upon which to forfeit the container and its contents where the appellant had presented to Customs an untrue or false declaration, in breach of section 113(1)(a) of the Customs Act. This rendered the undeclared goods liable to forfeiture pursuant to the said provision.

Econo Parts Ltd v The Comptroller of Customs and Excise SLUHCv2014/0309, (delivered 10th May 2017, unreported) applied; **Paul Hackshaw v St. Lucia Air and Sea Ports Authority** SLUHCv2008/827 (delivered 6th April 2017, unreported) considered; sections 55(1), (2) and (3) of the **Evidence Act** Cap 4.15 of the Revised Laws of Saint Lucia applied.

5. The learned judge erred when she failed to properly construe the relevant words of section 131(1)(b) and erred in concluding that the seizure of the entire contents of the container (both the declared and undeclared goods) was lawful. Sub-paragraphs (a) and (b) of section 131(1) of the Customs Act are to be read disjunctively and not conjunctively. The effect of this is that a thing which was 'mixed with' or 'packed with' or 'found with' an item liable to be seized and forfeited, may be forfeited under sub-paragraph (b), whether any other thing found is liable to be forfeited under sub-paragraph (a). Furthermore, under section 131(1)(b), the 'other thing' need not be identical to or of the same nature as the goods liable to be forfeited. Section 131(1)(b) of the Customs Act, properly construed, applies to circumstances where the 'other thing' is liable to forfeiture, because it has been used or put in such a way in relation to the goods liable to forfeiture, as to be intermeddled with them. This is a question of fact to be determined based upon the particular circumstances of each case. In coming to her conclusion on this issue, the learned judge made no findings of fact necessary to underpin such a conclusion. It is therefore open to this Court to consider this issue afresh. There was no evidence before the learned judge to the effect that the 'declared goods' were somehow so inextricably linked with the 'undeclared goods' or to their carriage, concealment or handling, or that they were in any way used in the commission of the breaches of the Customs Act by the appellant, as to satisfy the requirement that they were 'found with' the 'undeclared goods' and to therefore also be liable to forfeiture pursuant to section 131(1)(b). As a matter of fact and law, the 'declared goods' were never liable to be forfeited by the Comptroller, whether pursuant to section 131(1)(b) of the Customs Act or otherwise.

Accordingly, the said goods were wrongly seized and forfeited by the Comptroller, and the learned judge's decision to the contrary is set aside.

Sections 131(1)(a) and (b) of the **Customs (Control and Management) Act**, Cap. 15.05 of the Revised Laws of Saint Lucia considered; **Travell v Commissioners of Customs and Excise** (1997) 162 JP 181 considered; **Commissioners of Customs and Excise v Jack Bradley (Accrington) Ltd and Another** [1958] 3 All ER 487 distinguished; **R v Uxbridge Justices, Ex Parte Webb** (1998) 162 JP 198 at page 206 distinguished; **R (on the application of Sissen) v Newcastle-upon Tyne Crown Court** [2004] EWHC 1905 (Admin) distinguished; **Grenada Electricity Services Limited v Isaac Peters** Grenada High Court Civil Appeal No. 10 of 2002 (delivered 28th January 2003, unreported) applied; **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 applied.

6. The Comptroller, having embarked upon administrative proceedings, pursuant to his powers under section 130(5)(a) of the Customs Act, was under a duty to act fairly, reasonably and proportionately in arriving at a sum to be paid for the release of the container and the undeclared goods, which includes informing the appellant of the contents of the seizure report or providing a summary of its contents or of the results of the investigation into the alleged breaches. In circumstances where the contents of the seizure report were made known to the representatives of the appellant by the Assistant Comptroller during the meeting on 30th May 2017 and where the representatives of the appellant were apprised by the investigating officers of the results of the investigations conducted by Customs into the alleged breaches of the Customs Act during the investigations, the failure of the Comptroller to provide the appellant with a copy of the seizure report did not constitute a breach of the principles of fairness or to act reasonably.

Sections 125 and 130(5)(a) of the **Customs (Control and Management) Act**, Cap. 15.05 of the Revised Laws of Saint Lucia considered; **R v Commissioners of Customs and Excise Ex parte Tsahl** (1989) Times, 12 December considered.

7. In circumstances where the appellant disagreed to the payment of the restoration fee and took no further steps to continue or to reopen the administrative proceedings with the Comptroller or to commence proceedings for judicial review to challenge the legal authority of the Comptroller to stipulate \$30,000 as the restoration fee, the Comptroller was entitled to terminate the administrative proceedings and proceed to instruct the Attorney General to institute condemnation and forfeiture proceedings against the appellant relating to the undeclared goods. Furthermore, the learned judge was correct in finding that the legality and reasonableness of the restoration fee cannot be challenged by the appellant by way of its defence in these proceedings for condemnation and forfeiture of the undeclared goods. For the appellant to seek to mount such a challenge by way of its defence in these proceedings amounts to using the process of the court for a purpose and in a way that is not permissible.

Sections 125 and 130(5) of the **Customs (Control and Management) Act**, Cap. 15.05 of the Revised Laws of Saint Lucia considered; **Mark v Minister of Home Affairs** [2008] SC (Bda) 5 Civ (6 February 2008) considered; **Myran Norder v Jacqueline Mannix** ANUHCVP2015/0034 (delivered 16th February 2017, unreported) considered; Section 17 of the **Eastern Caribbean Supreme Court (Saint Lucia) Act** Cap 2.01 of the Laws of Saint Lucia distinguished.

8. The Comptroller was fully empowered under section 130(5)(a) of the Customs Act to stipulate the payment of a sum of money (not exceeding the value of the goods) for the release of the goods seized and liable to forfeiture. The fact that part of the sum stipulated is referred to as a restoration fee, which is not a term to be found in section 130(5)(a), does not lead to the conclusion that the Comptroller acted without authority or exceeded his authority under the Act.

Section 130(5)(a) of the **Customs (Control and Management) Act**, Cap. 15.05 of the Revised Laws of Saint Lucia applied.

9. Under Paragraph 5 of Schedule 2 of the Customs Act, once the appellant failed to give notice within the requisite period claiming that the goods or certain of them are not liable to forfeiture, the goods seized were deemed to have been condemned as forfeited. In light of this provision, the learned judge was correct in so far as her finding and order related to the undeclared goods.

Paragraph 5 of Schedule 2 of the **Customs (Control and Management) Act**, Cap. 15.05 of the Revised Laws of Saint Lucia applied.

JUDGMENT

- [1] **FARARA JA [AG.]**: This is an appeal, commenced by notice of appeal filed 8th January 2020, against the decision and judgment of the learned judge delivered on 5th December 2019 in the High Court of Justice in Civil Claim No. SLUHCVP2018/0106. The learned judge gave judgment in favour of the Comptroller of Customs and Excise (“the Comptroller” or “the respondent”), who was the claimant in the court below, on his claim against R.G Investments Inc. (“the appellant”) for forfeiture and condemnation, pursuant to section 130(4) of the **Customs (Control and Management) Act**¹ (“the Customs Act”), of one (1) 40ft container with identification number GESU 480661-6 (“the container”) and its contents. The container and contents had been imported into the State of Saint

¹ Cap. 15.05 of the Revised Laws of Saint Lucia.

Lucia by the appellant on or about 3rd March 2017. In the case below there was no counterclaim filed by the appellant.

- [2] In delivering her written judgment, the learned judge made the following orders consequent upon her finding that the container was liable to forfeiture and that its seizure by the respondent was lawful: -

“(1) That the container identified by Number GESU 480661-6 and its contents be deemed condemned as forfeited pursuant to section 130(4) and the provisions of paragraph 5 of Schedule 4 of the Customs (Control and Management) Act to the Comptroller of Customs.

(2) Prescribed costs on the claim to be paid to the Comptroller in the sum of \$7,500.”

The appellant, being dissatisfied with the said decision and judgment, appealed to the Court of Appeal.

The Facts

- [3] The primary facts were carefully set out by the learned judge in the judgment. Most of the primary facts which undergirded both the claim and the defence are not in dispute. It is not in dispute that the appellant imported the container (which is referred to in the judgment below as the ‘first container’), and that the said container contained certain goods which had not been declared by the appellant on its Bill of Lading and customs declaration. It is also not in dispute that when the appellant submitted the Bill of Lading and customs declaration C11769 dated 3rd March 2017 on 17th March 2019, they also presented a cheque in the sum of \$14,882.34 in payment of customs or import duties on the sum of US\$41,143.38, being the value of the goods in the container declared on the Bill of Lading (“the declared goods”). Likewise, the evidence discloses that the said cheque was never returned by the respondent to the appellant (and was, inferentially, accepted and cashed), when it was discovered that certain goods in the container had not been declared by the appellant on its Bill of Lading and customs declaration (“the undeclared goods”).

- [4] It was the evidence on behalf of the Comptroller that the undeclared goods consist of some 708 items of building materials, general hardware, clothing and electronics

purchased from several suppliers in the United States of America ("the US"). These suppliers include Makita Latin America ('Makita').

- [5] It is not seriously disputed and was admitted by Customs Officer Junior Hippolyte ("Officer Hippolyte") in his evidence at the trial, that the container was first examined by the Customs and Excise Department ("Customs") on 18th March 2017 at the appellant's business premises at Cul De Sac in St. Lucia, the examination on 17th March 2017 having been aborted as full access to the container was impeded by a scissors lift parked at the entrance to the container. It is also not disputed that at the examination on 18th March 2017, which was conducted in the presence of the appellant's agent Mr. Anselm Clauzel, it was discovered by Officer Hippolyte that certain items which had been off-loaded from the container had not been declared by the appellant on its customs declaration and, hence, no duty had been assessed or paid on these undeclared goods. The undeclared goods included power tools bearing the name of the company Makita.
- [6] It is also accepted that upon the conclusion of the inspection on 18th March 2017, Officer Hippolyte ordered all goods previously removed put back into the container and the container taken to the Port of Castries for further examination. It is the appellant's case, based on the testimony of Mr. Clauzel, that Officer Hippolyte made this order after having telephoned and consulted with his superior and orally informing Mr. Clauzel that the container was 'liable to seizure'.
- [7] It is the case for the appellant (both before the learned judge and before this Court) that the actual seizure by the respondent of the container and its contents took place on 18th March 2017 as communicated orally by Officer Hippolyte to Mr Clauzel. It is the appellant's case that the said seizure on 18th March 2017 was premature, without authority and unlawful. The appellant contends that at that time the Comptroller did not have sufficient evidence upon which he could 'objectively ascertain' that there had been breaches of the Customs Act, so as to properly ground his seizure of the container; and, in any event, there was no legal basis

under the Customs Act upon which the Comptroller could or ought to have seized the declared goods in the container, in respect of which duty had been paid by the appellant and accepted by the respondent. The appellant's version of what transpired on 18th March 2017 concerning the seizure of the container and its contents, finds evidential support in this statement at paragraph 2 of a letter dated 11th July 2017 from the Comptroller to the appellant. It states –

“On March 18 2017, the above container of building materials...was seized by the Customs and Excise Department after examination of its contents.”

[8] The respondent on the other hand contends that no actual seizure took place during the inspection of the container on 18th March 2017. They argue that the use of the expression ‘liable to seizure’ could only mean that ‘there is the likelihood that the goods could have been seized for a breach of the Customs Act’. Furthermore, it is not really in dispute that the examination of the container on 18th March 2017 was not completed, that the container (with contents) was taken to the Port of Castries as instructed by Officer Hippolyte and a more detailed examination of its contents was conducted by the Customs Officers Hippolyte, Mr. Grantley Promesse, Mr. Edmund Charley, Mr. Marcus Thomas and Ms. Mahanda Antoine on 11th and 12th April 2017 in the presence of Mr. Clauzel. It is also not in dispute that on 13th April 2017, Officer Hippolyte, on behalf of the Comptroller, served Mr. Clauzel, on behalf of the appellant, with a written Notice of Seizure (“Notice of Seizure” or “The Notice”) of the container and its contents for breach of section 113(1)(a) of the Customs Act, including both the declared and undeclared goods.

[9] The Notice of Seizure listed ‘one 40ft container GESU 4806616 containing 16 pallet building materials (87 PJ BDSL) and one used scissor lift as per attached Bill of Lading #SMLU 477392A at 22/03/2017 Customs Entry C11769 at 08/03/2017’ as seized pursuant to section 113(1)(a) of the Customs Act. It is not in dispute that the Notice of Seizure concerned 705 undeclared items discovered in the container. In particular, the Notice of Seizure advised the appellant that it had three options available to it concerning the said seizure. These were: (i) choose to take no action in which case after one month from the date of the Notice of Seizure, Customs will

condemn the said property as forfeited in accordance with section 130 and paragraph 5 of Schedule 4 of the Customs Act; or (ii) choose administrative processing in which case within the said one month period the appellant must make an appointment with the Comptroller or someone designated by him 'where you will be advised of the decision of the Customs department regarding this matter'; or (iii) claim against the seizure that the property listed in Schedule 1 to the Notice is not liable to forfeiture by giving notice of the claim in writing to the Comptroller at any office of Customs within one month of the date of the Notice.

[10] The issue of whether the container and its contents were seized on 18th March 2017 or on 13th April 2017 when the Notice of Seizure was issued and served on the appellant, and whether the said seizure was premature or unlawful, will be fully explored later in this judgment.

[11] It is also not in dispute that during the period April to July 2017, Officers of Customs conducted certain investigations into the importation of the goods in the container consigned to the appellant. These investigations involved contacting representatives of the various companies in the US who supplied certain of the goods in the container. In the course of these investigations, Customs, specifically Officers Hippolyte and Promesse, received certain information and documents. This information and documents were admitted into evidence by the learned judge at the trial over the objections of counsel for the appellant. The ground of his objection was that this evidence offended the rule against hearsay evidence, did not satisfy the mandatory requirements of sections 50 and 51 of the **Evidence Act**² for admissibility and, accordingly, did not fall within the exception to the hearsay rule in section 55(3) of the **Evidence Act**, and was therefore inadmissible.

[12] Furthermore, it is not disputed that during the period of April to July 2017 Officers of Customs conducted interviews, had meetings with, and requested copies of invoices from representatives or agents of the appellant, including Mr. Clauzel,

² Cap 4.15 of the Revised Laws of Saint Lucia.

concerning the importation of the undeclared goods and their values, and received certain explanations from them. These meetings took place on 13th, 19th, 21st, 23rd and 24th April 2017.

- [13] During the said meetings, (of which a full account is given at paragraphs 20 to 35 of the judgment) certain explanations were proffered by Mr. Clauzel, on behalf of the appellant, as to why the undeclared goods did not appear on the Bill of Lading and customs declaration form. These included: (i) that the error in not listing all the goods in the container on the Bill of Lading was that of their freight forwarder, Automotive Export in the US, who is responsible for generating the invoices for goods which were not purchased from them, and which company would create invoices for part shipments when they cannot ship the entire consignment of goods from a particular supplier; and (ii) that the said undeclared goods were discovered to have been short-shipped from a consignment in a second container imported by the appellant and declared on 23rd March 2017 as entry C14182 (“the second container”), which had been examined on behalf of the Comptroller by Customs Officer Ms. Karen George (“Officer George”), who had reported to Mr. Clauzel that several items declared on the Bill of Lading had not been found in the second container. These explanations or defences were pleaded in the appellant’s defence filed in this matter.
- [14] In fact, Officer George gave evidence at the trial to the effect that when she examined the second container, there were items listed on the invoices from the suppliers which were not found in the second container, and that she had discussed this with Mr. Clauzel. With respect to this explanation, Officer Hippolyte testified that: (i) the items listed as short-shipped on the customs declaration dated 23rd March 2017 pertaining to the second container, were identical with the undeclared items in the container; (ii) the customs declaration pertaining to the second container was created 5 days after the examination had been conducted of the container, the subject of these proceedings; (iii) the Bill of Lading for the second container was generated 14 days after the Bill of Lading pertaining to the container; (iv) there had been no indication during his investigation, up to the date of issuance of the Notice

of Seizure, from those representing the appellant, that the undeclared goods were short-shipped or that they had been declared on some prior shipment, (which was a requirement of Customs in relation to short shipped-goods); and (v) there was also no indication that the second container had been shipped or had arrived and been declared, prior to the container which he had examined in relation to these proceedings. It is pellucid that the Comptroller and his Officers conducting the investigations into this matter did not believe or accept any of the explanations proffered or made by the appellant and those representing its interest.

- [15] In this regard, it is important to note that the case for the respondent was that the appellant had imported in the container certain items or goods with respect to which it had failed, in breach of the Customs Act, to declare, and that the appellant had presented to Customs a false declaration in which the goods were not listed or were falsely described or undervalued. The breaches alleged were of sections 32(1)(a)(iii), 32(1) (e), 32(3)(b), 113(2)(a), 116(2)(a) and 114(b) of the Customs Act. This was the testimony of Officer Hippolyte, one of the investigating officers.
- [16] Furthermore, it is not in dispute that by letter dated 4th May 2017, the appellant, 'notwithstanding its rights to appeal against the seizure', requested 'administrative processing' with the objective of having the Comptroller, in exercise of his powers under section 130(5) of the Customs Act, reach a resolution of the breaches or alleged breaches of the Customs Act by the appellant in failing to declare certain goods in the container. In the said letter, the appellant listed several factors which it urged the Comptroller to take into consideration during the administrative processing. This process was seen by the appellant as a quick and efficacious 'administrative' mechanism which would facilitate or enable the timely release of the container and its contents, and by which the more serious steps or proceedings under the Customs Act for the forfeiture and condemnation of the container and its contents by the Comptroller, or the commencement of criminal proceedings for breaches of the Customs Act, could be avoided. Indeed, this was the gravamen of the submissions before us on the issue of fairness by learned counsel Mr. Leslie

Prospere, for the appellant, who argued strenuously that this was the legislative intent and commercial sense underpinning section 130(5) of the Customs Act in providing a quick mechanism for the release of imported goods. The appellant's request to engage in 'administrative' proceedings was accepted by the Comptroller, and the Assistant Comptroller, Mr. Sandy, embarked upon meetings and discussions with Mr. Clauzel on behalf of the appellant.

[17] It is common ground that the Customs Act does not use the expression 'administrative proceedings' or 'administrative processing'. Apparently, these are expressions coined or used by Customs in describing the process by which the Comptroller, in exercise of his undoubted power and authority under section 130(5) of the Customs Act, can decide to deliver-up to the importer, goods seized as liable to forfeiture which have not, as yet, been condemned as forfeited, or considered to have been condemned as forfeited, upon the payment by the importer of a sum of money. Indeed, the term 'administrative processing' is used in the Notice of Seizure. Pursuant to section 130(5), that sum is not to exceed 'that which in the Comptroller's opinion represents the value of the thing, including any duty chargeable thereon which has not been paid'. I will return to this provision of the Customs Act, and its correct interpretation and effect, later in this judgment. However, suffice it to be said at this juncture, that the power under section 130(5) is one which the Comptroller may exercise of his own initiative and he has the sole authority to set the quantum to be paid by the importer for the release of the seized goods, but ultimately it is for the importer to agree to the quantum and terms stipulated by the Comptroller.

[18] In pursuance of the so-called 'administrative proceedings' or 'administrative processing' entered upon by both the appellant and the Comptroller, a meeting took place on 30th May 2017 at the office of the Assistant Comptroller of Customs ("the Assistant Comptroller") with responsibility for enforcement (Mr. Sandy), between Mr Clauzel (operations manager for the appellant) and Mr. Peter Lee David (customs broker for the appellant) on the one hand, and Mr. Sandy and Customs Officers Hippolyte and Promesse representing the Comptroller on the other hand. While

there is some dispute in the evidence as to exactly what transpired at the said meeting, it is clear from the evidence that Mr. Sandy read or referred to the findings in the 'seizure report' prepared by Officer Hippolyte. However, he did not provide a copy to the representatives of the appellants. All subsequent requests by the appellant for a copy of the 'seizure report' were not acceded to by the Comptroller.

- [19] It is also clear from the evidence, that the end result of the said meeting was that the Comptroller (represented by Assistant Comptroller, Mr. Sandy and with the approval of the Deputy Comptroller) required the appellant to pay to the Government of St. Lucia the sum of \$15,344.36 being the assessed duties on the undeclared goods in the container, and the sum of \$30,000 as a 'restoration fee', for a total payment of \$45,344.36 for the release of the container and its contents. To give effect to what those representing the Comptroller considered to be an agreed upon settlement or resolution reached at the said meeting of the breaches or alleged breaches by the appellant of the Customs Act relative to the undeclared goods, which breaches and seizure Mr. Sandy had satisfied himself from the case file ought to be upheld, Mr. Sandy prepared a Customs Administrative settlement form reflecting those terms. This was read by Mr. Sandy to Mr. Clauzel and Mr. David (who, according to the evidence of Mr. Sandy, stated their agreement thereto). It was then submitted by Mr. Sandy to the Deputy Comptroller who approved its terms on behalf of the Comptroller before Mr. Clauzel and Mr. David were asked to sign it on behalf of the appellant. The upshot was that the said form was not signed at the meeting by either the representatives of the appellant or by Mr. Sandy or the Deputy Comptroller on behalf of the Comptroller, and the original of the form was retained by Mr. Sandy while Mr. Clauzel and Mr. David sought the approval or acceptance of the terms by the appellant. However, the evidence on behalf of the appellant at the trial was that it had not agreed to pay the stipulated 'restoration fee' but had subsequently requested in writing from the Comptroller an explanation as to his legal basis to stipulate a 'restoration fee' as a condition or penalty for the release of the container and its contents.

- [20] What followed was that by letter dated 11th July 2017 from the Comptroller to the appellant, it was pointed out that on two occasions (22nd June and 4th July 2017) subsequent to the meeting on 30th May 2017 Mr. Anselm Clauzel of the appellant company had confirmed to the Acting Deputy Comptroller the appellant's agreement to pay the restoration fee of \$30,000. Further, that on the latter occasion he had stated that the restoration fee would be paid within 2 weeks. The Comptroller ended the letter by stating that the Custom Department awaits the payment of both the restoration fee and all outstanding duties before the goods can be released.
- [21] By letter dated 23rd August 2017, the appellant responded requesting a copy of the list of the 705 items undeclared, sent a cheque in the sum of \$15,344.36 in payment of the assessed custom duties on the undeclared goods in the container, and stated the appellant's disagreement with paying the restoration fee 'as it is in no form referred to as revenue due to the Government of St. Lucia, and does not form any part of assessment of goods'. This triggered a memorandum dated 22nd September 2017 from the Comptroller to the Attorney General informing him that the administrative processing had failed to reach a settlement and requesting consideration of court proceedings for 'condemnation of the seized goods'.
- [22] This was followed by a letter dated 17th November 2017 from the Comptroller to the appellant returning the appellant's cheque for \$15,344.36 'given that [it had] expressed [its] disagreement on settling the above seizure...through administrative processing and the matter being referred to the Attorney General's Chambers for condemnation proceedings...'. Formal legal proceedings for condemnation and forfeiture of the container and its contents were commenced in the High Court by the Comptroller against the appellant on 16th February 2018.
- [23] It is not disputed that the 'administrative settlement form', which signifies the settlement between the Comptroller and an importer of goods, as testified by the Assistant Comptroller for enforcement, Mr. Sandy, and accepted by the learned judge, was never signed by or on behalf of the appellant. Accordingly, there was

never any agreement on the part of the appellant accepting the terms of the 'administrative settlement' sanctioned or agreed to by the Comptroller, and payment of the sum of \$30,000 as a 'restoration fee' or penalty was never made by the appellant.

- [24] It must be noted that the expression 'restoration fee' is a term used by Customs in referring to the sum or part of the sum, upon payment of which the Comptroller would release or to deliver-up to the importer the seized goods for violations of the Customs Act. It is not a term of art or a term used or sanctioned by or under the said Act, specifically not by section 130(5) of the said Act under which the Comptroller purported to act in stipulating a restoration fee of \$30,000.
- [25] After a trial on the merits, the Comptroller obtained an order condemning the container and all the goods imported therein pursuant to section 130(4) and paragraph 5 of Schedule 4 of the Customs Act. It is of significance, by virtue of the judgment and order made by the learned judge, that the declared goods, with respect to which custom duties of \$14,882.34 was paid and accepted by the Comptroller, and the undeclared goods, with respect to which the sum of \$15,344.36 was tendered by the appellant undercover of a letter dated 23rd August 2017 in payment of the assessed chargeable duties, were condemned as forfeited to the Comptroller.
- [26] It is the appellant's contention that the Comptroller was required, as a matter of procedural fairness and natural justice, to (i) disclose to the appellant the 'seizure report' upon which the Comptroller was purporting to act in seizing the container and the goods on the basis that the appellant had committed breaches of the Customs Act in making a false declaration; (ii) to explain or to justify his legal authority to impose a \$30,000 'restoration fee' as a condition for the release of the container and its contents; and (iii) to do these things and to engage in further discussions with the appellant rather than immediately moving the authority of the

State to commence condemnation proceedings to forfeit the container and all the goods therein.

[27] Moreover, and this is perhaps the most unfortunate aspect of this matter, the container and its entire contents remains seized over 3 years later and continues to incur demurrage charges at the Port of Castries up to today.

[28] I shall return to section 130(5) of the Customs Act and its correct meaning, scope and effect, and whether the imposition of such a fee or payment was a lawful exercise by the Comptroller of his powers under the section.

The Claim and Defence

[29] As stated above, the Comptroller commenced forfeiture and condemnation proceedings against the appellant in the High Court of Justice on 16th February 2018. In the Claim Form and statement of claim, the respondent sought the following orders: -

- (i) That the container identified by Number GESU 480661-6 and its contents be deemed condemned as forfeited pursuant to Section 130(4) and the provisions of Paragraph 5 of Schedule 4 of the Customs Act;
- (ii) That the said container and its contents be deemed condemned as forfeited to the Claimant.
- (iii) Costs; and
- (iv) Any further or other relief as the Court deems just.

[30] The particulars of breaches of the Customs Act pleaded by the respondent were as follows:-

- “(i) The imported goods that were found did not correspond with the Customs Entry C11769 contrary to section 32(1)(e) of the Customs Act;

- (ii) The imported goods that were found did not correspond with the Customs Entry C11769 contrary to section 32(3)(b) of the Customs Act;
- (iii) That the supporting documents attached to Customs entry C11769 stated an untrue customs value for items in the consignment contrary to section 113(2) of the Customs Act;
- (v) The Defendant used false invoices from Automotive Export Enterprises Inc. of Hialeah, Florida USA attached to Customs Entry C11769 to make a declaration to the Claimant contrary to section 114(b) of the Customs Act;
- (vi) The Defendant failed to declare items and attempted to evade duties payable in respect of the undeclared items found and the untrue values of the items listed on the invoices contrary to [section] 116(2) of the Customs Act.”

[31] The respondent also pleaded that the appellant, having received the Notice of Seizure on 13th April 2017, elected ‘administrative proceedings’ on 4th May 2017 ‘to resolve the seizure for the release of the consignment’. It was also pleaded that at a meeting on 4th July 2017, the appellant agreed to pay the outstanding chargeable duties of \$15,344.36 and a restoration fee of \$30,000 ‘as the conditions of the Administrative Proceedings to resolve the seizure for the release of the consignment’, which payment conditions were agreed to by the Comptroller as notified by letter dated 11th July 2017. However, by letter dated 23rd August 2017 the appellant “provided a cheque” for settlement of the outstanding chargeable duties, but ‘refused to pay the restoration fee on the premise that the amount was not the revenue due to the Government of Saint Lucia’, which refusal ‘cancelled the Administrative Proceedings’. The cheque for the outstanding chargeable duties was returned to the appellant by letter dated 17th November 2017. At paragraph 17 of the statement of claim, the respondent pleaded –

“17. As from the date of the service of the Notice of Seizure and the cancellation of the Administrative proceedings, the Defendant has failed to contest or make any claim against the seizure pursuant to the provisions of Schedule 4 of the Customs Act.”

[32] In its defence, filed 6th April 2018, the appellant asked the court to dismiss the claim and that the consignment of goods including the over landed items be immediately released to it 'free of a restoration fee and any port charges.' In substance, the appellant, in its defence pleaded –

- (i) having admitted paragraphs 5 to 7 of the statement of claim (by which the respondent had pleaded that the appellant had imported the container and its contents, had declared on the Customs Entry certain items as purchased from certain named companies in the USA, and had paid the chargeable duties on those declared items), that it will establish at trial that the failure to declare the other items in the container was due to 'inadvertence' on the part of its freight forwarders who either included in the container items intended for inclusion with another consignment in another container or had inadvertently included the over landed items in the appellant's Bill of Lading No. SMLU 4773892A;
- (ii) that the examination of the consignment in the container on 18th March 2017 was aborted after the respondent's representatives discovered 'discrepancies between the consignment and the entries on the [appellant's] Bill of Lading number SMLU 4773892A' and they orally advised the appellant's representatives of their decision "to seize the ...container";
- (iii) that the said seizure was premature and without legal authority 'and that the proper course of action was for the [respondent] to have detained only the over landed items pending the completion of its investigations into the discrepancies';
- (iv) denied that it had breached any of the provisions of the Customs Act as alleged and that the first time it became aware of the alleged contravention was by letter dated 11th July 2017 from the

respondent, some 3 months and 23 days after the consignment and over landed goods had been seized;

- (v) that it selected administrative proceedings 'in an attempt to recover the consignment and over landed items without recourse to unnecessary litigation...';
- (vi) that its representatives had, at the meeting on 4th July 2017, requested an explanation from the respondent's representatives as to their basis for levying the restoration fee 'having regard for the provisions of section 130(5)(a) of the [Customs] Act', to which request there was a refusal to respond;
- (vii) that the respondent's representatives 'cancelled the administrative proceedings as a retaliatory act after the [appellant] requested an explanation as to their basis for levying the restoration fee...for the over landed items';
- (viii) that the condemnation proceedings are retaliatory and contravene the provisions of the Customs Act;
- (ix) that its ability to challenge the appellant's decision to levy the restoration fee under section 136 et seq of the Customs Act 'has been stymied by the Government of Saint Lucia's failure to constitute Customs Appeals Commissioners under...section 137 of the said Act'.

Decision of the Judge

- [33] After a trial in June 2019, the learned judge delivered a written judgment on 5th December 2019. Having found that the container No. GESU 480661-6 and its contents were liable to forfeiture and their seizure by the Comptroller was lawful, the learned judge made an order that the said container and contents were deemed

condemned as forfeited to the Comptroller pursuant to section 130(4) and the provisions of paragraph 5 of Schedule 4 of the Customs Act.³ By the latter provision, where no notice has been given to the Comptroller under paragraph 3 of Schedule 4 claiming against the goods being liable to forfeiture, the goods are deemed condemned as forfeited pursuant to paragraph 5.

Grounds of Appeal

[34] The appellant has appealed the judgment and decision of the learned judge on eight grounds. These are: -

“(1) The learned trial judge erred fundamentally when she wrongly assumed jurisdiction to determine the Respondent’s claim notwithstanding the clear requirements of section 137 of the Customs (Control and Management) Act Cap. 15:05 of the Revised Laws of Saint Lucia 2008 that provides the Customs Appeal Commissioners with the **exclusive** jurisdiction to determine all challenges of the Respondent’s decisions to levy duties for imported goods. The learned trial judge failed to have regard or sufficient regard for the appellant’s uncontested evidence that the Government of Saint Lucia had failed to constitute the Customs Appeal Commissioners that would have provided it with the gateway to challenge the Respondent’s decision to levy a restoration fee against the disputed imported goods.

(2) The learned trial judge erred fundamentally when she misapplied the provisions of section 131(1)(b) of the Customs Act in determining that the entire contents of the container were liable to forfeiture. The learned trial judge’s misapplication of section 131(1)(b) of the Customs Act thus resulted in the Respondent’s forfeiture of a very large quantity of goods that were never in dispute in the proceedings and for which the appellant had paid the applicable custom duties of \$14,882.34 along with the small quantity of disputed goods for which the Appellant had paid the applicable custom duties of \$15,344.36.

(3) The learned trial judge erred fundamentally when she determined that the proceedings were the inappropriate forum for the Appellant to challenge the matter of the exercise of the Respondent’s discretion to levy a restoration fee for the disputed goods. The learned trial judge in making this determination failed to consider or properly consider that the Respondent had grounded its decision to pursue condemnation proceedings upon the appellant’s alleged reneging upon the conditions set out in administrative settlement proceedings for the disputed goods. The administrative settlement proceedings constituted a significant plank of the parties['] respective pleadings, Pre-trial memoranda, cross examination and written closing submissions thus making it one of the central issues for the court to determine.

³ Paragraph 78(1) of the judgment below.

(4) The learned trial judge erred fundamentally when she refused to consider that the Respondent had refused to provide the Appellant with a copy of its seizure report thus depriving it an opportunity to be heard during the administrative settlement proceedings, behaved in an appallingly high handed and unfair manner towards the Appellant during the said administrative settlement proceedings and moreover exerted improper pressure upon the Appellant to pay a restoration fee for the disputed goods.

(5) The learned trial judge erred fundamentally when she failed to analyse or properly analyse the effect of the Respondent's failure to comply with the provisions of sections 48, 50 and 51 of the **Evidence Act** in establishing the requisite objectively ascertainable facts to ground its decision to seize the container.

(6) The learned trial judge erred fundamentally when she misapplied the provisions of section 55(3) of the **Evidence Act** in determining that the documents that the respondent had received from Makita constituted admissible evidence in the trial proceedings. The learned trial judge failed to consider or adequately consider that the Respondent had failed to satisfy the mandatory requirements of section 55(1) of the **Evidence Act** and as such should not have gone on to consider section 55(3) of the said legislation.

(7) The learned trial judge erred fundamentally in finding that the Respondent's representatives had seized the container on 13th April, 2017. The learned trial judge failed to have sufficient regard for the unchallenged testimony of Mr. Anselm Clauzel on the important matter of Mr. Junior Hippolyte's statement to him on 18th March 2017 during the inspection of the container on 18th March 2017 along with the Respondent's very own letter dated 11th July 2017 that supports Mr. Anselm Clauzel's version of these events.

(8) The learned trial judge fundamentally erred when she determined that the Appellant had made an untrue declaration thus rendering the goods liable to forfeiture. The learned trial judge in reaching this conclusion failed to consider that the Appellant had paid the Respondent the applicable custom duties on all goods in the container."

Issues for Determination

[35] The issues for determination in this appeal may be stated as follows: -

- (1) Whether the High Court had jurisdiction to determine the claim for condemnation and forfeiture brought by the Comptroller having regard to section 137 of the Customs Act ("the Jurisdiction Issue");
- (2) On what date was the container and its contents seized by the Comptroller and whether the purported seizure of the consignment was premature and unlawful ("the Date of Seizure Issue");

(3) Whether the learned judge failed to analyse or to properly analyse the effect of sections 48, 50 and 51 of the **Evidence Act** in determining whether there were objectively ascertainable facts to ground the Comptroller's decision to seize the container ("the Objectively Ascertainable Facts Issue");

(4) Whether the learned judge failed to properly consider the requirements of sections 55(1) and (2) of the **Evidence Act** in permitting the respondent to rely, at trial as admissible evidence, on the documents which the respondent had obtained from Makita Latin America and erred in considering section 55(3) of the said Act ("the Evidence Act Issue");

(5) Whether the appellant was entitled to the immediate release of the declared goods ("the Declared Goods Issue");

(6) Whether the appellant was entitled under the rules of natural justice and procedural fairness to receive a copy of the 'seizure report' from the Comptroller ("the Seizure Report Issue");

(7) Whether the Comptroller was empowered under section 130(5) of the Customs Act to stipulate the payment of a restoration fee of \$30,000 as a penalty or condition for the release of the container and its contents ("the Restoration Fee Issue");

(8) Whether the Comptroller breached the rules of natural justice when he failed to provide the appellant with an explanation as to his legal authority to stipulate payment of a restoration fee as a condition for the release of the container and its contents but, instead, terminated the administrative proceedings and moved to commence condemnation and forfeiture proceedings ("Natural Justice and Termination of Administrative Proceedings Issue");

(9) Whether the appellant was entitled to the release of the undeclared goods upon tendering payment of the sum of \$15,344.36 assessed custom duties thereon ("the Release of the Undeclared Goods Issue");

(10) Whether the learned judge erred in her interpretation of section 131(1)(b) of the Customs Act when she determined that the entire contents of the container were liable to forfeiture and condemnation (“the Section 131(1)(b) Issue”);

(11) Whether the learned judge erred in finding that the appellant had made an untrue declaration rendering the goods liable to forfeiture and whether the Comptroller was entitled to condemnation and forfeiture of the container and its entire contents in all the circumstances of the case (“the Entitlement to Order for Condemnation as Forfeited Issue”).

[36] Some of these issues may be conveniently dealt with together. Accordingly, issues 3 and 4; 5 and 10; and 6, 7, 8 and 9 will be dealt with together.

The Statutory Framework – The Customs (Control and Management) Act (“the Customs Act”)

[37] The term ‘duty’ is defined in section 2 (the interpretation section) of the Customs Act as ‘a duty of customs chargeable under any law on goods on importation or exportation’.

[38] By section 4(1) of the Customs Act, the office of the Comptroller is created as a ‘public office’. The office holder is ‘charged with the duty of collecting and accounting for, and otherwise managing, the revenue of customs’. By sub-section (2), the Comptroller is responsible for the ‘administration of [the] Act’. Importantly, section 5(1) provides in these terms for the delegated authority of the Comptroller –

“5. Delegation and appointment by the Comptroller

(1) Any act or thing required or authorised by any customs enactment to be done by the Comptroller may be done by any officer authorised generally or specifically in that behalf, in writing or otherwise, by the Comptroller, except that [not applicable]...”

[39] In the claim for condemnation and forfeiture, the Comptroller pleaded that the appellant breached certain sections of the Customs Act, specifically, sections

32(1)(e), 32(3)(b), 113(2)(a), 114(b) and 116(2)(a). In relation to goods improperly imported, section 32(1)(a)(iii), 32(1)(e) and 32(3)(b) stipulate –

“32. Goods improperly imported

(1) Without prejudice to any other provision of any custom enactment, where –

(a) except as expressly provided by such enactment, any imported goods, being goods chargeable on their importation with any duty are, without payment of that duty–

...

(iii) removed from their place of importation or from any approved wharf, examination station, transit shed or other customs area; or

...

(e) any imported goods are found, whether before or after delivery, not to correspond with any entry made in respect of them; ...

these goods, subject to subsection (2) are liable to forfeiture.

...

(3) If any person –

...

(b) directly or indirectly imports or causes to be imported or entered any goods found, whether before or after delivery, not to correspond with any entry made in respect of them,

he or she commits an offence and is liable to a fine of \$5,000, or 3 times the value of the goods, whichever is the greater.”

[40] The Notice of Seizure issued by the respondent to the appellant on 13th April 2017 stated that one 40ft Container # GESU 4806616 was seized as liable to forfeiture for breaches of the Customs Laws indicated in Schedule 2. Sections 113(1)(a) and (2)(a) of the Customs Act provide as follows: -

“113. Untrue declarations

(1) If any person –

(a) makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Comptroller or an officer, any declaration, notice, certificate, or other document; ...

being a document or statement produced or made for any purpose of any assigned matter, which is untrue in a material particular, he or she commits an offence and is

liable to a fine of \$5,000, and any goods in relation to which the document or statement was made are liable to forfeiture.

- (2) If any person knowingly or recklessly –
(a) makes or signs, or causes to be made or signed or delivers or causes to be delivered to the Comptroller or an officer, any declaration, notice, certificate or other document; ...

being a document or statement produced or made for the purpose of an assigned matter, which is untrue in a material particular, he or she commits an offence and is liable to a fine of \$10,000, or to imprisonment for 2 years, or both, and may be arrested, and any goods in relation to which the document or statement was made are liable to forfeiture.”

- [41] Part 11 of the Customs Act, which comprises sections 119 to 135, deals with ‘Legal Proceedings, Forfeiture and Sale of Goods’. Section 119(1) of the Customs Act provides –

“119. Institution of Proceedings

- (1) Subject to the provisions of subsection (3), and to the powers of the Director of Public Prosecutions under section 73 of the Constitution, proceedings for an offence under any customs enactment, or for condemnation under Schedule 4, shall not be commenced except –
(a) by order of the Comptroller in writing; and
(b) in the name of an officer.”

- [42] Section 125 of the Customs Act provides-

“125. Powers to Compound Offences and Mitigate Penalties

- (1) Subject to the powers of the Director of Public Prosecutions under section 73 of the Constitution the Comptroller may, as he or she thinks fit –
(a) compound any offence;
(b) stay the proceedings for condemnation or anything as being forfeited under the Act; or
(c) restore subject to such conditions, if any, anything seized under this Act.”

- [43] Section 130(1), (4) and (5)(a) of the Customs Act provides-

“130. Detention, Seizure and Condemnation of Goods

- (1) Anything which is liable to forfeiture is seized or detained by any officer or police officer.

...

(4) Schedule 4 has effect in relation to appeals against the seizure of anything seized as liable to forfeiture under any customs enactment, and for proceedings for the condemnation as forfeited of that thing.

(5) Although something seized as liable to forfeiture has not been condemned as forfeited, or considered to have been condemned as forfeited, the Comptroller may at any time if he or she sees fit –

- (a) deliver it up to any claimant upon the claimant paying to the Comptroller such sum as the Comptroller thinks proper, being a sum not exceeding that which in the Comptroller's opinion represents the value of the thing, including any duty chargeable thereon which has not been paid; ...”

[44] Paragraphs 1(1) and (2), 2, 3, 4 and 5 of Schedule 4 of the Customs Act, dealing with ‘forfeiture’ and condemnation, are in the following terms -

“1. (1) The Comptroller shall, except as provided by sub-paragraph (2), give notice of the seizure of anything seized as liable to forfeiture and of the grounds of that seizure to any person who to his or her knowledge was the owner of, or one of the owners of, that thing at the time of its seizure.

(2) Notice shall not be required to be given under sub-paragraph (1) if the seizure was made in the presence of –

- (a) the person whose offence or suspected offence occasioned the seizure;
- (b) the owner or any of the owners of the thing seized or any servant or agent of his or her;...

2. Notice under paragraph (1) shall be given in writing...

3. Where any person, who was at the time of the seizure of anything the owner or one of the owners of it, claims that it was not liable to forfeiture, he or she shall, within one month of the date of service of the notice of seizure or, where no such notice was served, within one month of the date of seizure, give notice of his or her claim in writing to the Comptroller at any customs office.

4. Any notice under paragraph 3 shall specify the name and address of the claimant...

5. If, on the expiration of the relevant period under paragraph 3 for the giving of notice of claim, no such notice has been given to the Comptroller, or where such notice is given, that notice does not comply with any requirement of paragraph 4, the thing seized shall be deemed to have been duly condemned as forfeited.”

[45] On the facts in the instant matter, there was no claim made by the appellant, by way of written notice served on the Comptroller or otherwise, whether within one month

of the actual date of seizure (18th March 2017) contended for by the appellant, or within one month of the Notice of Seizure as stipulated in paragraph 3 of Schedule 4 to the Customs Act, that the container and the goods therein, or any of them, whether declared or undeclared, were not liable to forfeiture. This, and the deeming provision of paragraph 5 of Schedule 4 notwithstanding, it is the case for the appellant that the seizure and subsequent condemnation and forfeiture of all the goods in the container, including the declared goods, was unlawful or without any proper legal authority by the Comptroller.

- [46] Sections 131(1)(a) and (b) of the Customs Act permit the Comptroller to seize as liable to forfeiture with the undeclared goods, anything which was used for the carriage, handling or concealment of the goods liable to forfeiture, any other thing 'mixed, packed or found with' the thing liable to forfeiture. The correct interpretation of sub-paragraph (b) of section 131(1), and the learned judge's interpretation of it to encompass the 'declared goods', is a main bone of contention between the parties in these proceedings. These provisions state -

"131. Forfeiture of Vessels etc., Used in Connection with Goods Liable to Forfeiture

(1) Where anything becomes liable to forfeiture under any customs enactment –

(a) any vessel, aircraft, vehicle, animal, container (including baggage) or any thing which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at the time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and

(b) any other thing mixed, packed or found with the thing so liable, is also liable to forfeiture."

- [47] As to the right of an importer to challenge the amount of 'duty' demanded by a Customs Officer on goods imported, section 136 of the Customs Act provides as follows: –

"136. Appeal to the Comptroller

(1) Where any amount of duty demanded by an officer is disputed by the person required to pay that amount, that person shall pay that amount but then may, at any time before the expiration of 3 months from the

date of payment, require the Comptroller, by a notice in writing under this subsection, to reconsider the amount of duty demanded.

- (2) A notice under subsection (1) shall state the grounds for disputing the amount of duty demanded.
- (3) The Comptroller, after reconsidering the amount demanded and taking into account the grounds contained in the notice, may increase, decrease or confirm that amount, and shall notify the person who paid the amount demanded of his or her decision.”

[48] It is indisputable that the appellant did not give the requisite notice under section 136(1) and (2) of the Customs Act disputing the amount of duty demanded by Customs on the imported goods, neither in relation to the declared goods or the undeclared goods. In fact, the appellant’s primary case is that it paid in full the duties demanded of \$14,882.34 on the declared goods and \$15,344.36 assessed as chargeable on the undeclared goods. Likewise, the appellant did not invoke by notice to the Comptroller under section 136(1) and (2) the authority of the Comptroller to reconsider the stipulation of a ‘restoration fee’ of \$30,000 to the extent that such a sum could be considered to fall within the definition of ‘duty’ under the Customs Act. This is a matter to which I shall return.

Appeals to the Customs Appeal Commissioners, High Court and Court of Appeal

[49] The right to appeal from a decision of the Comptroller under section 136 of the Customs Act (dealing with the amount of duty demanded by a Customs Officer) is to the Customs Appeal Commissioners under section 138, with the right of further appeal therefrom to the High Court under section 139 and thereafter to the Court of Appeal pursuant to section 140. Section 137 of the Customs Act provides for the Minister (responsible) to appoint ‘by notice in the Gazette such persons as he or she thinks fit to be Customs Appeal Commissioners (in this Part referred to as ‘Commissioners’)’. As noted above, it is accepted as a fact that at the material time, that is, in the year 2017, no one had been appointed as a Commissioner, and hence the Customs Appeal Commissioners tribunal was not and could not have been

legally constituted to discharge their jurisdiction and functions under section 138 of the Customs Act to hear and determine appeals from the decisions of the Comptroller upon an appeal to him or her for reconsideration of the amount of any duty demanded by a Customs Officer. Sections 138 (1), (2) and (3) provide as follows: -

“138. Appeal to the Customs Appeal Commissioners

(1) Any person notified of a decision under section 136 (thereafter in this Part referred to as ‘the appellant’) may, subject to subsection (2), appeal against that decision to the Commissioners by serving a notice of appeal on the Secretary to the Commissioners and the Comptroller within 30 days of the notification or such longer period as the Commissioners may permit.

(2) An appeal shall not be made under subsection (1), unless the amount notified as the duty due by the decision of the Comptroller is paid.

(3) A notice of appeal under subsection (1) shall be in writing and must state –

(a) the date of the decision of the Comptroller which is appealed against,

(b) the name and address of the person to whom the decision appealed against was sent,

(c) the amount of duty in dispute; and

(d) The grounds for claiming that the amount of duty in dispute is not due and payable.”

[50] Section 138 also provides for the hearings of the Customs Appeal Commissioners, who are required under section 137 to sit in panels of three, to be in public unless the chairman otherwise directs,⁴ and for their decisions to be in writing under the signature of the chairperson presiding at the hearing and to be published, except in certain circumstances.⁵ Interestingly, the powers given by section 137(6) are confirmatory of their status as a quasi-judicial body or tribunal and include the power to summon persons to attend the hearing, to examine such persons on oath, to

⁴ Section 138(5) of the Customs (Control and Management) Act, Cap 15.05 of the Revised Laws of Saint Lucia.

⁵ Section 138(8) of the Customs (Control and Management) Act, Cap 15.05 of the Revised Laws of Saint Lucia.

require persons to produce books or documents in their custody or under their control, all the powers of a magistrate's court to enforce the attendance of witnesses and the hearing of evidence on oath and punishment for contempt, power to admit or reject evidence adduced 'although the evidence would or would not be admissible in any court', and a duty to determine its own procedure to be followed at that hearing.

[51] Appeals against decisions of the Customs Appeal Commissioners are to the High Court and may be lodged by either the Comptroller or the 'appellant' on questions of law, including questions of mixed fact and law;⁶ and from decisions of the High Court to the Court of Appeal.⁷ The appeal process and jurisdiction provided for in Part 11 of the Customs Act relating to questions or issues as to the amount of duty demanded by a customs office, as summarized above, was never invoked in relation to this matter and so the jurisdiction of the Customs Appeal Commissioners was never brought into play by the appellant.

[52] I now turn to a consideration of the issues raised in this appeal.

Issue 1 – The Jurisdiction Issue

[53] This issue, which was not addressed by the learned judge in her judgment, is devoid of merit and fatally flawed.

[54] The appellant submits that the High Court (and hence the learned judge) did not have jurisdiction to determine the respondent's claim for condemnation and forfeiture of the container and its contents. They argue that this matter fell within the ambit and jurisdiction of the Customs Appeal Commissioners under section 138 of the Customs Act, as the statutory tribunal imbued by Parliament with exclusive jurisdiction to determine disputes between the Comptroller and an importer (or

⁶ Section 139(1) of the Customs (Control and Management) Act, Cap 15.05 of the Revised Laws of Saint Lucia.

⁷ Section 139(2) of the Customs (Control and Management) Act, Cap 15.05 of the Revised Laws of Saint Lucia.

exporter) of goods. They submit that as at the material time no Commissioners were appointed, the appellant's 'ability to challenge the [Comptroller's] decision to levy the restoration fee in exchange for [his] release of the container' was entirely stymied. Instead, the respondent 'improperly invoked the High Court's jurisdiction to have the entire contents of the container forfeited to it'. Accordingly, they submit that 'the High Court was incurably deprived of jurisdiction to entertain the [r]espondent's claim that had arisen from its decision to levy the restoration fee in exchange for its release of the container'; and the parties to the litigation were powerless to clothe the High Court with this want of jurisdiction.

[55] In support of the latter submission, the appellant relied on the observations of Gordon JA at paragraphs 9 and 10 in the judgment of this Court in **The Attorney General of Saint Lucia et al v Vance Chitolie**.⁸ In my respectful view, these poignant observations by the learned Justice of Appeal, with which I am entirely in agreement, do not apply to the circumstances of the instant matter. They have no application to the facts of this case for the simple, but telling, reason that this matter does not concern an issue as to the quantum or incidence of a 'duty' assessed or charged by a Customs Officer or by the Comptroller. Accordingly, the jurisdiction of the Customs Appeal Commissioners, on any reasonable reading of sections 137 and 138 of the Customs Act, was not engaged. Moreover, the appellant did not take any step proscribed by section 138 to invoke the appeal process under the Customs Act.

[56] As observed above, and as was conceded by learned counsel for the appellant in his oral arguments before this Court, the appeal process under the Act consists of four tiers: (i) from a decision of a Customs Officer as to the amount of duty demanded upon the importation of goods, one has a right of appeal to the Comptroller for a reconsideration of the amount of the duty imposed; (ii) from a decision of the Comptroller on that issue, the right of appeal is to the Customs Appeal Commissioners; (iii) from the Customs Appeal Commissioners to the High

⁸ Saint Lucia Civil Appeal No. 14 of 2003.

Court on a matter of law or mixed fact and law; and (iv) finally to the Court of Appeal. However, as is pellucid from sections 137 and 138 of the Customs Act, the right of appeal relates only to circumstances where the importer disputes or does not accept the amount of duty imposed by a Customs Officer. This would, in my opinion, encompass circumstances where the amount imposed is disputed by the importer both as to quantum and as to the legal basis for charging the disputed duty. However, pursuant to the provisions of sections 136(1) and (2), 137 and 138 of the Customs Act, the dispute must concern the imposition or demand for payment of a 'duty', as defined in section 2 of the Act. These provisions, and hence the right of appeal, do not relate to any other kind of dispute or issue concerning the importation of goods. They do not relate or extend to a failure to declare goods or the making of a false declaration, whether as to the goods imported or as to the value of certain goods imported, which is the gravamen of the allegations of breaches of the Customs Act made by the Comptroller against the appellant.

[57] Furthermore, where an importer of goods disputes the amount of chargeable duty imposed by a Customs Officer, pursuant to sections 136(1) and (2), he must, in order to invoke the statutory appeal process, give notice of a claim to the Comptroller within 3 months, asking for the Comptroller to reconsider the said quantum upon stated grounds. It is the submission of Mr. Prospere, learned counsel for the appellant, that this requirement was satisfied and that the jurisdiction of the Comptroller under sections 136(1) and (2) was invoked by the appellant's letter to the Comptroller dated 23rd August 2017.

[58] However, for several reasons, it is manifest that this contention does not bear proper scrutiny. First, by letter dated 4th May 2017 to the Comptroller, the appellant made specific reference to its right of appeal 'against the seizure' under section 130 of the Customs Act, and its election, instead, to proceed to 'administrative processing'. It is clear from this letter that the appellant was not then disputing the imposition of any duty or the quantum of any duty assessed as chargeable on any of the goods in the container. Second, in its letter dated 23rd August 2017 (in response to the

Comptroller's letter dated 11th July 2017 which was sent after the meeting on 30th May 2017), the appellant, in relation to the 'restoration fee' states – 'You also refer to a restoration fee of \$30,000.00 which we do not agree to pay as it is in no form referred to as revenue due to the government of Saint Lucia, and does not form any part of assessment of goods.' While it is clear that the appellant was not agreeing to pay the 'restoration fee' on the basis that it was not 'revenue' due to the Government of Saint Lucia (and therefore not properly demanded), the appellant did not appeal to nor did they request a reconsideration of the imposition of the 'restoration fee' by the Comptroller. Put simply, the appellant did not exercise any right under sections 136(1) and (2) of the Customs Act requiring the Comptroller to reconsider the imposition of the 'restoration fee' of \$30,000. No such 'notice' was given to the Comptroller. In addition, the requirement to have paid the amount of the 'disputed duty' had not been met by the appellant, who, by its letter of 23rd August 2017, refused to agree to pay the said amount and have not done so up to the hearing of this appeal.

- [59] Moreover, it is pellucid on a straightforward reading of the definition of 'duty' in section 2 of the Act, that the so-called 'restoration fee' is not a 'duty' chargeable or imposed under the Customs Act and was not imposed or demanded as such by the Comptroller. On the evidence before the learned judge, apart from the sum of \$15,344.36 assessed as duty chargeable on the 708 'undeclared goods' in the container, the Comptroller did not impose or seek to impose any other sum as a 'duty' on the imported goods. The so-called 'restoration fee' is a sum which the Comptroller required or purported to require the appellant to pay, in addition to the sum of \$15,344.36 duties assessed on the 'undeclared goods', pursuant to his powers under section 130(5) of the Customs Act and as a condition or penalty for the release of the container and the goods therein to the appellant as part of the administrative processing or administrative proceedings. This process is not one which the Comptroller is required by the Act to engage in or to embark upon and may be exercised in circumstances where the Comptroller 'sees fit'. Furthermore, there is no provision of the Customs Act which provides for a right of appeal to the

Customs Appeal Commissioners from the exercise by the Comptroller of his functions or powers under section 130(5). Any terms of settlement stipulated or required by the Comptroller for the release of good liable to forfeiture for breaches of the Customs Act as a result of engaging in 'administrative processing', are not binding upon the importer and requires the full agreement of both the Comptroller and the importer for the settlement or resolution to be effective. No such agreement or settlement was reached between the Comptroller and the appellant as stated clearly in the appellant's letter of 23rd August 2017.

[60] Furthermore, the appellant did not invoke or seek to commence an appeal to the Customs Appeal Commissioners against the assessment or imposition of any 'duty' by the Comptroller. The appellant also did not invoke or set in motion the provisions of section 138 of the Customs Act in relation to the request for payment of the 'restoration fee' as being a 'duty' assessed or imposed upon it as a condition for his release of the container and its contents. Before this Court, learned counsel for the appellant sought to characterise the 'restoration fee' as a 'duty' without fully developing the argument or citing any authority to this effect. As stated above, such an argument is, in any event, fundamentally flawed and unsustainable. While the payment of a 'duty' or 'duties' chargeable under the Act on goods imported is enforceable by way of legal proceedings and process under the Act, there is nothing 'enforceable' about a 'restoration fee' or any sum required by the Comptroller to be paid pursuant to 'administrative process' under section 130(5) of the Act. Accordingly, such a sum, the payment of which must be agreed to by the importer, is not a 'duty' such as to give rise to a right of reconsideration by the Comptroller upon satisfying the requirements for notice of a claim being under section 136(2) of the Act or a right of appeal to the Customs Appeal Commissioners pursuant to section 138.

[61] It is only after this process has been properly commenced within the stipulated period, and the importer being dissatisfied with the decision of the Comptroller, that an appeal lies to the Customs Appeal Commissioners under section 138 of the

Customs Act. In short, the Customs Appeal Commissioners, whose role and jurisdiction is solely to hear and determined appeals from decisions of the Comptroller under section 136 as to the amount of duty imposed, cannot assume jurisdiction over a matter, even one of the kind which would fall properly within their jurisdiction, unless and until the importer (in this case the appellant) has, by notice, first requested a review of the amount of duty imposed (whether by a Customs Officer or by the Comptroller) and the Comptroller has issued his decision on such claim.

[62] In this matter, the appellant not only did not invoke this process, but accepted and tendered payment by cheque of the duty assessed on the undeclared goods. In point of fact, this is a central pillar of the appellant's case, both in the court below and on appeal, and underpins their primary submission that, having made payment of the duty assessed, the Comptroller wrongfully and without legal authority failed to release the undeclared goods to them. In summary, the appellant's case is not one of disputing the quantum or legal basis of any 'duty' imposed on the imported goods in the container, but rather the authority of the Comptroller to retain such goods having made or tendered payment of the assessed chargeable duty thereon and his authority to require them to pay the 'restoration fee' as a condition for the release of the container and its contents.

[63] In the circumstance, the jurisdiction of the Customs Appeal Commissioners in relation to this matter, and in relation to these proceedings brought by the Comptroller for condemnation of the container and its contents as forfeited, does not arise, since the issue upon which that argument and ground of appeal is premised, namely, the payment of the 'restoration fee' following 'administrative processing' under section 130(5) of the Customs Act, is not a 'duty' under the Customs Act. Accordingly, the failure by the Minister responsible under the Customs Act to appoint, or have properly constituted, the Customs Appeal Commissioners to hear and determine appeals from decisions of the Comptroller relating to the amount of duty assessed as chargeable on goods imported in the container, as deplorable

as that state of affairs may be, did not 'stymie' the appellant's ability to disagree with and to refuse to pay the 'restoration fee' (which according to the appellant's case he did), as a requirement for him to release the container and its contents to the appellant.

- [64] The genesis of the instant matter, concerns or relates to allegations of breaches of the Customs Act by the appellant in failing to declare certain goods imported in the container, making a false declaration, and failing to declare the true value of certain of the goods imported; whether the container and its contents had become liable to forfeiture; and the entitlement of the Comptroller under Schedule 4 of the Act to move the High Court for condemnation and forfeiture of the container and said goods. There can be no dispute that these issues fall squarely within the jurisdiction of the High Court pursuant to section 130(4) and paragraph 5 of Schedule 4 of the Customs Act. Accordingly, the learned judge had jurisdiction to determine all issues relating to the claim for condemnation and forfeiture of the container and its contents, and the learned judge did not err in assuming such jurisdiction. Accordingly, this ground of appeal fails.

Issue 2 – The Date of Seizure Issue

- [65] The learned judge found that the seizure of the container and its contents was effected by the Notice of Seizure dated 13th April 2017, and not on 18th March 2017 when the container was first examined by Customs Officer Hippolyte at the appellant's place of business, who ordered all contents returned to the container and moved to the Port of Castries. In doing so, the learned judge accepted the evidence of Officer Hippolyte, which evidence the appellant's witnesses did not dispute, that a detailed examination of the container and its contents was conducted on 11th and 12th April 2017 at the Port of Castries by himself and Officers Promesse, Thomas and Antoine, in the presence of Mr. Clauzel representing the appellant. The Notice of Seizure stated that all the articles listed in Schedule 1 to the said notice were 'seized as liable to forfeiture for violations of the Customs Laws or any other Laws enforced and administered by the St. Lucia Customs Department...'.

[66] It is the appellant's case that the actual seizure of the container and its contents occurred on 18th March 2017 after an examination was conducted by Officer Hippolyte. However, the learned judge treated this as a first examination of the contents of the container by Customs, which was followed by more in-depth examinations of the container on 11th and 12th April 2017 and by investigations by Customs during which they obtained certain information and documents about and concerning the goods imported in the container, all of which precipitated the issuance of the Notice of Seizure by the Comptroller. The appellant bases its submissions as to the correct date of the seizure of the container and its contents on the evidence of Mr. Clauzel, that on 18th March 2017 Officer Hippolyte told him he would be seizing the goods; and on the statement by the Comptroller in his letter dated 11th July 2017 that on 18th March 2017 the container and building materials 'w[ere] seized' by Customs. However, in cross-examination Officer Hippolyte testified that what he in fact told Mr. Clauzel on 18th March 2017 was that the goods were 'liable to be seized' and had been detained by Customs.

[67] The learned judge did not resolve this discrepancy in the evidence as to what Officer Hippolyte did say on 18th March 2017. In coming to her conclusion as to the effective date of the seizure, the learned judge had regard to the judgment of Smith J in **Econo Parts Ltd. V The Comptroller of Customs and Excise**⁹ concerning the distinction between 'seizing' and 'detaining', and also to paragraph [57] of the judgment in **Rambally Blocks Limited v The Comptroller of Customs and Excise**¹⁰ to the same effect.¹¹ The learned judge concluded that the provisions of paragraph 1(1) and paragraph 2 of Schedule 4 to the Customs Act are:

"pellucidly clear that seizure of goods by the Comptroller may be given by notice in writing, so that even if which I do not accept, Mr. Hippolyte may have used the words 'seizing the goods' as alleged by Mr. Clauzel, the notice of seizure is what effected the seizure in accordance with the Customs Act."¹²

⁹ SLUHCV2014/0309, (delivered 10th May 2017, unreported).

¹⁰ SLUHCV2014/0100, (delivered 18th March 2019, unreported).

¹¹ See paragraph [41] of the judgment below.

¹² See paragraph [44] of the judgment below.

[68] The learned judge also concluded on the evidence before her, that even though paragraph 1(2) of Schedule 4 provides for the seizure to be effected in the presence of the agent of the owner of the consignment without giving a written notice of seizure, the examination of the container on 18th March 2017 was not completed, and the appellant was verbally requested to move the container to the Port of Castries for a more detailed examination to take place. The learned judge took into consideration that it is not disputed that a more detailed examination did in fact take place on 11th and 12th April 2017 at the Port of Castries, at which inspection 'certain findings which confirmed the presence of the undeclared goods were made'.¹³ Accordingly, the learned judge found as a fact that 'the seizure occurred on 13th April 2017 [by issuance of the Notice of Seizure] and in conformity with the provisions of paragraph 1(1) of Schedule 4 and as required set out the grounds for the seizure'.

[69] I can discern no proper basis upon which to disturb the learned judge's clear finding on this issue. Her finding is supported by the evidence adduced and was not based upon a misunderstanding or misapprehension of the evidence. The learned judge considered the evidence adduced by or on behalf of the appellant on this issue, and took into account the statement in the Comptroller's letter of 11th July 2017 which was written some 4 months approximately after the first inspection of the container on 18th March 2017 and some 3 months after the issuance of the Notice of Seizure. In my view, the learned judge properly applied her mind to the evidence in reasoning to her conclusion on this issue, which conclusion is unassailable.

[70] The appellant also contends that at the time of the actual seizure of the container and its contents on 18th March 2017, the Comptroller did not possess any 'objectively ascertainable facts' upon which to ground a seizure of the container and the goods. The fallacy of this line of argument is two-fold. Firstly, the seizure did not take place on 18th March 2017 (as the learned judge correctly determined), but approximately 1 month later, the day after the Customs Officers had conducted a

¹³ Ibid.

detailed examination and inspection of the goods in the container and were able to ascertain a fuller picture of the goods therein which had not been declared by the appellant on its customs documents. Secondly, while the principle enunciated in **Econo Parts Ltd**, that at the time of seizure the goods must be liable to forfeiture, is not in dispute, section 113(1)(a) of the Customs Act provides that goods are liable to forfeiture for violations of the Customs Act. On the facts of this case, there can be no question that there were some 708 goods in the container which were not declared by the appellant. This gave rise, prima facie, to breaches of section 113(1)(a) and (b) of the Act, which section concerns customs declarations which are untrue in a 'material particular' constituting an offence liable on conviction to a fine of \$5,000. Section 113 expressly provides that 'and any goods in relation to which the document or statement was made are liable to forfeiture'. Also of significance, is the fact that the appellant admitted or accepted that the 708 items in the container were not declared, albeit they did eventually proffer two explanations as to why this had or may have occurred.

- [71] In any event, the appellant did not exercise its right under paragraph 3 of Schedule 4 of the Customs Act to claim that at the time of the seizure of the goods (whether on 18th March or 13th April 2017) the undeclared goods (or any goods imported in the container) were not liable to forfeiture. This it was required to do within a period of one month from the date of the Notice of Seizure, and to do so by a written notice of claim to the Comptroller. No such notice was issued or made by the appellant. Accordingly, by paragraph 5 of Schedule 4 those goods are deemed condemned as forfeited. Indeed, in cross-examination, Mr. Clauzel admitted that the appellant had not claimed against or challenged the seizure of the goods.¹⁴ The legal effect of this is that the appellant must be deemed to have accepted that the 708 items were liable to forfeiture. However, the questions remain as to whether the 'declared goods' in the container were at any time liable to forfeiture, the appropriate amount of duty having been paid in relation thereto; whether those 'declared goods' are nevertheless liable to forfeiture under the provision of section 131(1)(b) of the

¹⁴ See line 24-25 of page 111 and line 1- 21 of page 112 of the transcript of proceedings.

Customs Act; and whether the 'undeclared goods' ought also to have been released by the Comptroller after the appellant had tendered payment of the assessed duty on them in the sum of \$15,344.36.

- [72] Having regard to the above analysis, in my judgment, there is no basis upon which the learned judge's finding as to the effective date of the seizure and whether, at that time, the Comptroller was in possession of sufficient objectively ascertainable facts upon which to lawfully effectuate such seizure, can or ought properly to be disturbed. The learned judge properly analysed the relevant evidence on these issues and came to the correct finding and determination that the seizure was effectuated on 13th April 2017 when the Comptroller issued the Notice of Seizure, and at that date he had before him sufficient objectively ascertainable facts, in circumstances where the appellant did not dispute that there were goods in the container which it had not declared on its customs form and Bill of Lading, upon which to seize the undeclared goods in the container for breaches of the Customs Act; and that the said goods were liable to be forfeited by the Comptroller pursuant to section 113 of the Customs Act. Accordingly, these two grounds of appeal fail.

Issues 3 and 4 – The Objective Ascertainable Facts Issue and The Evidence Act Issue

- [73] As the learned judge stated correctly at paragraph 49 of the judgment, 'at the time of seizure, the consignment must have been actually liable to forfeiture'. This conclusion must be reached by the Comptroller on the basis of objectively ascertainable facts, and not on the beliefs and suspicions of the Comptroller or his Officers, however reasonable those beliefs and suspicions may be.¹⁵ This involves a consideration of the question of whether the evidence led by the respondents at paragraphs 10, 11 and 24 of the witness statement of Customs Officer Junior Hippolyte and at paragraphs 20 to 25 of the witness statement of Customs Officer Grantley Promesse were admissible at the trial as an exception to the hearsay rule.

¹⁵ Econo Parts Ltd v The Comptroller of Customs and Excise SLUHCV2014/0309, (delivered 10th May 2017, unreported).

These paragraphs, which do not warrant repeating here in any detail, pertain to the information and documents obtained by these Customs Officers from the representative for Makita in the US concerning certain of the 'undeclared goods' in the container. The appellant objected at trial to their admissibility, which objection was foreshadowed in its pre-trial written submissions filed on 26th June 2019. The appellant's objection to the admissibility of this evidence was on the ground that it was all hearsay evidence contrary to section 48 of the **Evidence Act** and that the respondent failed to bring any of this evidence within the ambit of the exceptions under sections 50 and 51 of the **Evidence Act**. The respondent countered that the evidence was admissible as an exception to the hearsay rule. It contended that these documents were produced in the course of business and were therefore admissible under section 55(3) of the **Evidence Act**.

[74] The learned judge having considered section 55(3) of the **Evidence Act**, concluded at paragraph 53 of the judgment that 'the documentary evidence received from Makita is admissible pursuant to section 55(3) of the Evidence Act'. In reaching this conclusion, the learned judge found that the evidence of Officer Hippolyte:

"...simply revealed the source of the documents which he relied on to do his investigations. The evidence which he provides are his own assertions based on his observations and do not relate [to] anything which the customer service representative said in relation to the contents of the documents. She simply provided the documents relative to the orders placed by [the appellant] and confirmed that the two numbers affixed to the package label were in fact for packages emanating from Makita Latin America and consigned to Rayneau C&I."

The learned judge also concluded that even if the said evidence was not admissible, '[t]here was...an untrue declaration made by [the appellant] which rendered the goods liable to forfeiture'.¹⁶

[75] Sections 55(1), (2) and (3) of the **Evidence Act** state -
"55. **Exception: Documentary Records**

¹⁶ See paragraph 54 of the judgment below.

- (1) A statement in a document is admissible in any proceedings as evidence of any fact stated therein of which direct oral evidence would be admissible if-
 - (a) the document is or forms part of a record compiled by a person acting under a duty, from information supplied by another person, whether the other person was acting under a duty or not, who had, or may reasonably supposed to have had, personal knowledge of the matters dealt with in that information; and
 - (b) any condition set out in subsection (2) is satisfied.
- (2) The conditions mentioned in subsection (1)(b) are –
 - (a) that the person who supplied the information –
 - (i) is dead or by reason of his or her bodily or mental condition unfit to attend as a witness;
 - (ii) is outside Saint Lucia and it is not reasonably practicable to secure his or her attendance;
 - (iii) cannot reasonably be expected, having regard to the time that has elapsed since he or she supplied or acquired the information and to all the circumstances, to have any recollection of the matters dealt with in that information;
 - (b) all reasonable steps have been taken to identify the person who supplied the information but that he or she cannot be identified; or
 - (c) the identity of the person who supplied the information being known, all reasonable steps have been taken to find him or her but that he or she cannot be found.
- (3) Subject to subsections (4), (5) and (6) where oral evidence in respect of a matter would be admissible in proceedings, a statement made in a document that was created or received by a person in the usual or ordinary course of business is admissible as evidence of the truth of its content in proceedings, upon production of the document.”

[76] It is the submission of the appellant that the learned judge erred in admitting the Makita documents under the exception to the hearsay rule at section 55(3). They rely on the provisions of sections 55(1) and (2). They also rely on the dicta of Smith J in **Paul Hackshaw v St. Lucia Air and Sea Ports Authority**¹⁷ at paragraph 31 of his judgment. There, the learned judge opined –

¹⁷ SLUHCv2008/827 (delivered 6th April 2017, unreported).

“[31] Neither is the exception created by section 55 open to the Claimant. That section makes a statement in a document admissible in any proceedings as evidence of any fact stated therein of which direct oral evidence would be admissible, in particular circumstances and based on certain conditions. The conditions are listed in section 55(2); they all involve the lack of availability or identity of the supplier of the information in the statement.”

[77] Accordingly, the appellant submits that the judge fell into serious error when she paid no regard to subsections (1) and (2) of section 55. Furthermore, the appellant submits that the respondent, having not satisfied or attempted to satisfy any of the conditions in section 55(2), the Makita documentary evidence constituted hearsay under section 48 and was therefore inadmissible.

[78] At paragraph 3.43 of the respondent's written submissions, the following concession is made –

“The Learned Judge ultimately agreed with the Respondent's submissions on this issue. As outlined at paragraph 35 of the Appellant's Submissions the learned judge did not take into account sections 55(1) and (2) of the Evidence [Act] in admitting the evidence pursuant to section 55(3).”

[79] That the learned judge did not address her mind to the provisions of subsections (1)(b) and (2) of section 55 of the **Evidence Act** is obvious from a reading of paragraphs 52 and 53 of the judgment. Section 55(1)(a) creates an exception to the hearsay rule in section 48. It permits a statement in a document to be admissible in any proceedings as evidence of any fact stated therein ‘of which direct oral evidence would be admissible’ if the two conditions specified in sub-paragraphs (a) and (b) have been satisfied. The first is that the document is or forms part of a record compiled by a person acting under a duty from information supplied by another person who had or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information; and, secondly, any of the conditions in sub-section (2) is satisfied. These conditions in sub-section (2)(a) relates to the person who supplied the information and not the person who received the information and compiled the record or document as part of their duty. The supplier of the information must be (i) dead or unfit to attend as a witness; (ii) is outside Saint

Lucia and it is not reasonably practicable to secure his or her attendance; (iii) cannot reasonably be expected, due the lapse of time since they supplied the information, to have any recollection of the matters dealt with in that information. Sub-paragraph (b) requires that all reasonable steps have been taken to identify the person who supplied the information but he or she cannot be identified; or (c) the identity of the person who supplied the information being known, all reasonable steps have been taken to find him or her but that he or she cannot be found.

[80] It is clear that section 55(3), which creates its own exception to the hearsay rule where a document was created or received by a person in the usual or ordinary course of business, applies to a situation where 'oral evidence in respect of a matter would be admissible in proceedings'. This exception in section 55(3) is therefore not a stand-alone one but is qualified by the provisions of sub-sections (1) and (2). Accordingly, the requirements of subsections (1) and (2) must be satisfied in addition to the statement being made in a document that was created or received by a person in the usual or ordinary course of business, in order for it to be admissible into evidence in the proceedings. The learned judge erroneously did not consider or take into account the requirements of subsections (1) and (2) of section 55, as conceded by the respondent. When determining the admissibility of the documentary evidence relating to the Makita goods in the container she considered only that the documents relating to the Makita goods in the container, which had been obtained by Customs from the said company's service representatives, were 'provided relative to the orders placed by [the appellant] and [it was] confirmed that the two numbers affixed to the package label were in fact for packages emanating from Makita Latin America and consigned to Rayneau C&I'. Moreover, the learned judge failed to appreciate that the respondent had led no evidence whatsoever capable of satisfying any of the conditions in section 55(2) and in those circumstances had failed to bring these documents within the exception to the hearsay rule in section 55(3). In the circumstances, the learned judge erred in admitting the Makita documents into evidence. This ground of appeal therefore succeeds.

[81] Having found that the Makita documentation was inadmissible as evidence at the trial, the question remains as to whether in the absence of that evidence the Comptroller had at the time of seizure sufficient objectively ascertainable evidence upon which to forfeit the container and its contents. I do not agree with the appellant that when the Makita information and documents are excluded, this would have a 'catastrophic effect upon the respondent's ability to establish that its seizure of the container was premised upon objectively ascertainable facts'. This contention was stoutly rejected by the learned judge at paragraph 54 of the judgment. With her reasoning and conclusions, I express my unqualified agreement. It is clear from the evidence, and not disputed by the appellant, that what was declared was only some of the items found in the container. Accordingly, the appellant had presented to Customs an untrue or false declaration, in breach of section 113(1)(a) of the Customs Act. This rendered the undeclared goods liable to forfeiture pursuant to the said provision. The administrative proceedings having failed to reach an agreed settlement for the release of the container and its contents, the 'undeclared goods', comprising some 708 items, and the container itself, remained liable to forfeiture, and were deemed condemned as forfeited pursuant to paragraph 5 of Schedule 4 of the Customs Act. This deeming provision operated in circumstances where the appellant did not exercise its right to claim, within the prescribed period, that the 'undeclared goods' were not liable to forfeiture.

Issues 5 and 10 – The Declared Goods Issue and The Section 131(1)(b) Issue

[82] In my considered view, the only legal basis upon which the 'declared goods' could be liable to seizure and forfeiture by the Comptroller is pursuant to section 131(1)(b) of the Customs Act as goods or as 'things' which were 'mixed, packed or found with the thing so liable...'. These were goods imported by the appellant in a container, which were declared on the Bill of Lading and customs declaration, and in respect of which the correct amount of duty had been charged. In its true sense, the 'declared goods' were not undeclared goods which made them liable to seizure and forfeiture, unless they were caught by section 131(1)(b) of the Act. Accordingly, section 131(1)(b) falls to be properly construed. However, the learned judge did not

embark upon an interpretation of this provision. Instead, she seems to have treated the meaning of this provision as being so clear or obvious as to not require her to embark upon an interpretive exercise in arriving at her conclusion, at paragraph 57, that '[t]he action of the Comptroller in seizing the entire contents of the first container was therefore in accordance with the Customs Act and cannot be complained about'.

- [83] Section 131(1)(b) is one of the provisions in the Customs Act which this Court, at the conclusion of the appeal hearing, directed counsel for the parties to file short written submissions within 14 days. In their Additional Submissions filed 23rd December 2020, the appellant submitted that as the 'declared goods' were never liable to forfeiture, and the applicable duties of \$14,882.34 having been paid, they were never caught by section 131(1)(b). In support of this submission, the appellant relied on this passage from the judgment of Lightman J in **Ian Fox v HM Customs and Excise**¹⁸ concerning the parallel section 141(1)(b) of the English Customs and Excise Management Act 1979 -

"17. ...Section 141(1)(b) upon its true construction only bites where the Court finds as a fact in the proceedings relating to the seized goods that other goods are liable to forfeiture and the seized goods are mixed, packed or found with those other goods."

- [84] In my view, this statement as to the operative effect of section 141(1)(b) of the English Customs and Excise Management Act, while correct as a matter of principle, does not assist much with the proper approach to be followed in construing the words of this provision, which words are repeated in the statement at paragraph 17 of the judgment relied on by the appellant. Accordingly, it is of little, if any, assistance in construing section 131(1)(b) of the Customs Act of Saint Lucia. The words which fall to be properly construed are 'mixed, packed or found with'. As already found in this judgment, the 'undeclared goods' with which the 'declared goods' were found in the container, were liable to forfeiture. The important question for determination in relation to this issue, is whether the 'undeclared goods' were 'mixed, packed or

¹⁸ [2002] EWHC 1244.

found with' the declared goods within the meaning of those words in subparagraph (b). In reaching her conclusion at paragraph 57, the learned judge may well have considered the answer to that question to be pellucid, particularly having regard to the use of the expression "found with" in sub-section (b).

- [85] The appellant also submits on the authority of **Commissioners of Customs and Excise v Jack Bradley (Accrington) Ltd and another**,¹⁹ that it is only items that were being 'used to assist in the commission of an offence' that fall within the ambit of section 131(1) and are to be forfeited in addition to the goods liable to be forfeited for the commission of the offence. They submit further that there is no evidence which establishes that the 'declared goods' were being used in connection with the commission of the offence of failing to declare the 'undeclared goods'. It must be observed that this decision of Lord Parker, CJ sitting in the Queen's Bench Division, was based specifically on the provisions of section 277(1) of the Customs and Excise Act, 1952 of the UK which provided that: 'anyvehicle ...which has been used for the carriage' of the thing, for the purpose of committing the offence, shall also be forfeited. This provision is similar to section 131(1)(a) of the Customs Act of Saint Lucia where:

"any ...vehicle... or any other thing which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at the time when it was so liable or for the purposes of the commission of the offence for which it later became liable; and
...
is also liable to forfeiture."

However, in the instant matter, reliance was placed by the respondent not on subparagraph (a) but on subparagraph (b) of section 131(1), in arguing that the 'undeclared goods' were 'found with' the 'declared goods' thus making them also liable to forfeiture.

- [86] The respondent, in its additional submissions, relies upon two decisions of the courts of the United Kingdom ("the UK") which directly concern the meaning and

¹⁹ [1958] 3 All ER 487.

legal effect of section 141(1)(b) of the Customs Control and Management Act 1979, which is the equivalent provision in the UK to section 131(1)(b) of the Customs Act of Saint Lucia. Specifically, the respondent relies on this passage from the judgment of Glidewell LJ in **R v Uxbridge Justices Ex Parte Webb**,²⁰—

“The answer to that is that the statutory provision must be read subject to the common principle of interpretation; that a provision in the statute is, broadly speaking, to be interpreted as including things of a like kind, but not things not of a like kind. The rule, translated into Latin, is called the *eiusdem generis* rule. I have no doubt at all that that provision in that section is to be read as meaning that neither Mr. Webb’s electric shaver, nor his socks, nor any other articles of ordinary wear or use would fall to be forfeited because two of the video films were obscene. It seems to me to be quite clear from s. 141 that the Customs and Excise were entitled to forfeit six video films which were admitted to be, in general, of the same nature as the two which the court found to be obscene. Accordingly, on that I see no arguable issue of law.”

[87] The respondent also relies on the decision of the English Administrative Court in **R (on the application of Sissen) v Newcastle-upon Tyne Crown Court**²¹ where it was determined that the other goods did not have to be exactly the same as the goods which are liable to forfeiture. Accordingly, the court held that the provisions of section 141(1)(b) permitted the forfeiture of the other endangered birds as being similar to the endangered parrots which were liable to be forfeited. Based upon these authorities, the respondent submits that section 131(1)(b) must be construed *eiusdem generis* and means that the goods which were ‘mixed, packed or found’ must be similar in nature to, but not necessarily exactly as, the goods which are liable to forfeiture. Applying this to the facts of the instant case, the respondent submits that as the ‘undeclared goods’ (furniture) and the ‘under-invoiced goods’ (power tools) were similar in nature to the rest of the goods in the container, this permitted the forfeiture of the entire consignment.

[88] For the reasons set out above, I do not accept as entirely correct the interpretation of section 131(1)(b) argued for by either the appellant or the respondent. In my

²⁰ (1998) 162 JP 198 at page 206.

²¹ [2004] EWHC 1905 (Admin).

judgment, the interpretation relied on by the respondent is too restrictive and does not accord with the clear wording and literal meaning of the words used in sub-paragraph (b). Firstly, it is pellucid that sub-paragraphs (a) and (b) of section 131(1) are to be read disjunctively and not conjunctively. This approach finds support in the judgment of Brooke LJ in **Travell v Commissioners of Customs and Excise**²² where the Divisional Court was called upon to construe the corresponding sections 141(1)(a) and (b) of the English Customs and Excise Act 1979 which parallel sections 131(1)(a) and (b) of the Saint Lucia Customs Act. The Divisional Court concluded that section 141(1)(a) and (b) were to be read disjunctively. Adopting this approach, the effect of this is that a thing which was 'mixed with' or 'packed with' or 'found with' an item liable to be seized and forfeited, may be forfeited under section 131(1)(b), whether any other thing found is liable to be forfeited under section 131(1)(a).

[89] Secondly, on a clear reading of section 131(1)(b) of the Customs Act, the 'other thing' need not be identical to or of the same nature as the goods liable to be forfeited. The 'other thing' may be 'any other thing', or indeed very different in its nature from the goods liable to be forfeited, as the language of sub-paragraph (b) clearly states. It would therefore be too restrictive and wrong to limit its meaning to only goods or things identical with or of the same nature as the goods or thing liable to be forfeited. This provision, properly construed, permits the forfeiture of 'any thing' which has been found 'mixed with' or 'packed with' or 'found with' the goods or thing liable to be forfeited. For example, where the thing liable to be forfeited is hair products and those hair products were found mixed with or packed with or found with garden products, being products of a completely different nature to the hair products, section 131(1)(b) permits the forfeiture of the garden products as well.

[90] Thirdly, I am also of the firm view, that the expression 'found' or 'found with' in sub-paragraph (b) must be construed ejusdem generis, or more appropriately noscitur a sociis (words are known by their associates), with the words 'mixed with' or 'packed

²² (1997) 162 JP 181.

with'. The latter two expressions speak to some form of physical intermingling of or close physical connection between the other thing and the items liable to be forfeited, so as to lead to the conclusion that they were found together physically. Accordingly, the 'any other thing' must have been 'found with' the goods liable to forfeiture, in such a way physically as to lead to the conclusion that they were closely connected with the goods liable to be forfeited or were so placed or connected thereto as to aid in the commission of the offence. In short, section 131(1)(b) of the Customs Act, properly construed, applies to circumstances where the 'other thing' is liable to forfeiture, because it has been used or put in such a way in relation to the goods liable to forfeiture, as to be intermeddled with them. This is a question of fact to be determined based upon the particular circumstances of each case.

[91] In this matter, there is no evidence that the 'declared goods' were either mixed with or packed with the 'undeclared goods' in the container. Therefore, the narrow question is whether the 'declared goods' were 'found with' the 'undeclared goods' within the meaning of those words in section 131(1)(b). In my judgment, the learned judge erred when she failed to properly construe the relevant words of section 131(1)(b). Moreover, she erred in concluding that the seizure of the entire contents of the container (both the declared and undeclared goods) was lawful. In coming to her conclusion on this issue, the learned judge did not engage in any or any proper analysis or assessment of the relevant evidence before reaching the conclusion that the 'declared goods' were also liable to be forfeited by the Comptroller. Accordingly, she made no findings of fact necessary to underpin such a conclusion. Likewise, it is readily apparent that the learned judge did not provide any reasons for reaching the bald conclusion which she stated at paragraph 57 of the judgment. It is therefore open to this Court to consider this issue afresh and to arrive at its own conclusions thereon.²³

²³ See *Grenada Electricity Services Limited v Isaac Peters* Grenada High Court Civil Appeal No. 10 of 2002 (delivered 28th January 2003, unreported) and *Beacon Insurance Company Limited v Maharaj Bookstore Limited* [2014] UKPC 21.

[92] In this matter, the 'declared goods' were properly declared and the chargeable duty paid in full by the appellant on or about 17th March 2017. The fact that the 'declared goods' were, for the purposes of shipment to the appellant in Saint Lucia, packed in the same 40ft. container in which the 'undeclared goods' liable to forfeiture were also packed or placed, does not, simpliciter, render the 'declared goods' liable to forfeiture by the Comptroller. There was no evidence before the learned judge to the effect that the 'declared goods' were somehow so inextricably linked with the 'undeclared goods' or to their carriage, concealment or handling, or that they were in any way used in the commission of the breaches of the Customs Act by the appellant, as to satisfy the requirement that they were 'found with' the 'undeclared goods' and to therefore also liable to forfeiture pursuant to section 131(1)(b).

[93] In the circumstances, and being mindful of the principles upon which an appellate court are entitled to review findings of fact made by the trial judge, I conclude that the learned judge's conclusion on this issue at paragraph 57 cannot stand. I find therefore, as a matter of fact and law, that the 'declared goods' were never liable to be forfeited by the Comptroller, whether pursuant to section 131(1)(b) of the Customs Act or otherwise. Accordingly, the said goods were wrongly seized and forfeited by the Comptroller, and the learned judge's decision to the contrary is set aside. I therefore order that the 'declared goods' be released forthwith to the appellant.

[94] As to the 'undeclared goods', I have already upheld the learned judge's decision that these goods were liable to forfeiture by the Comptroller for alleged breaches of the Customs Act, and that the Comptroller had sufficient independent objectively ascertainable facts upon which to effect their seizure by Notice of Seizure issued and served on the appellant on 13th April 2017. As to whether the said 'undeclared goods' ceased to be liable to forfeiture and ought to have been released to the appellant upon payment by the appellant of the assessed duty of \$15,344.36 on 23rd August 2017, I observe, at this juncture, that the determination of this issue rests, in

part, upon the lawfulness of the request or stipulation by the Comptroller for the appellant to pay both the assessed duty and a 'restoration fee' of \$30,000 as a condition for the release of the container and its contents. I will return to this when I come to deal with the provisions of section 130(5) of the Customs Act.

- [95] Finally, on this aspect, in my judgment the container in which the 'undeclared goods' were shipped to Saint Lucia from the United States was liable to forfeiture under section 131(1)(a) of the Customs Act. While the appellant did not directly address this issue in their written submissions on the appeal, learned counsel for the appellant in his oral argument did accept that section 131(1)(a) makes specific reference to any 'container' in which the undeclared goods were transported or carried, being also forfeited. Furthermore, the gravamen of the appellant's submissions on this issue was that both the 'declared goods' and 'undeclared goods' ought not to have been forfeited. There was no assertion that the learned judge was wrong to have forfeited the container itself. Accordingly, the order of the learned judge forfeiting the container is sustained.

**Issues 6, 7, 8 and 9 – Natural Justice and Termination of Administrative Proceedings Issue – The Seizure Report Issue – The Restoration Fee Issue – The Release of the Undeclared Goods Issue
The Administrative Proceedings**

- [96] Section 125 of the Customs Act empowers the Comptroller to compound offences and to stay proceedings for condemnation. This provision must be read in conjunction with section 130(5)(a) by which the Comptroller is authorised, with respect to goods seized as liable to forfeiture which have not been condemned as forfeited or considered to have been condemned as forfeited, to deliver up the said goods to the importer, 'if he or she sees fit', upon the importer 'paying to the Comptroller such sum as the Comptroller thinks proper'. The combined effect of these two provisions and powers is to confer a wide discretion and power upon the Comptroller to effectively and finally resolve or settle issues concerning breaches or alleged breaches of the Customs Act, upon the payment by the consignee of such sum as the Comptroller, in his judgment, may determine. However, the

determination of that sum is subject to the maximum amount prescribed by section 130(5). That maximum sum cannot exceed the total value of the thing or things liable to forfeiture, as determined by the Comptroller, 'including any duty chargeable thereon which has not been paid'.

[97] Accordingly, the decision whether or not to engage upon the settlement of any issue concerning the seizure by Customs of goods liable to forfeiture, is that of the Comptroller, who may, in his discretion, either decline to do so or may enter upon administrative processing which, if successful, would obviate the need to seek condemnation and forfeiture of the goods or institute criminal proceedings for breaches or alleged breaches of the Customs Act. This is obviously an immensely useful and practical process put in place by Parliament to facilitate the proper and continued functioning of commerce within Saint Lucia by quickly and finally resolving issues and alleged breaches of the Customs Laws by an importer which has led to the seizure of certain goods by Customs. It provides, in a summary way, for the timely release of the seized goods to the consignee. However, this is not a mandatory process which the Comptroller must enter upon in each and every case involving the seizure of goods. Furthermore, the efficacy of this process is directly dependent upon the full and unqualified agreement of both the Comptroller, as the functionary empowered to stipulate the sum to be paid for the release of the seized goods, and the consignee of those goods.²⁴ Where no such agreement to pay a sum stipulated by the Comptroller has been reached with the consignee, or the consignee resiles from the agreement reached, the administrative process pursuant to sections 125 and 130(5) fails, and the Comptroller is entitled to proceed with the condemnation and forfeiture of the goods seized by initiating, or causing to be initiated, before the High Court, proceedings for condemnation by forfeiture. Likewise, the consignee is entitled to exercise his statutory right to claim that the goods seized are not liable to forfeiture by giving the appropriate notice within the time stipulated by paragraph 3 of Schedule 4 of the Customs Act. In the instant matter, it is the appellant who chose administrative processing or administrative

²⁴ See *Patel v Spencer* [1976] 1 WLR 1268.

proceedings as a means of quickly resolving the seizure of the goods in the container by virtue of the Notice of Seizure issued on 13th April 2017 by the Comptroller. However, the appellant did not exercise its right to institute a claim to the Comptroller or to Customs Appeal Commissioners that the goods seized were not liable to be forfeited.

Section 130(5) of the Customs Act

[98] It is clear from the wording of section 130(5)(a) that the power therein conferred upon the Comptroller is stated in wide terms. It confers on the Comptroller a wide discretion to determine the appropriate sum to be paid as a condition for the release of goods seized and liable to forfeiture by him, subject to the stipulated maximum. It is not suggested by the appellant that the sum of \$45,344.36 (comprising the chargeable duties of \$15,344.36 plus the restoration fee of \$30,000) stipulated by the Comptroller exceeded the value of the undeclared goods, whose value is accepted to be \$49,789.05, a difference of \$4,444.69. The appellant's contention is that the Comptroller had no authority to stipulate a restoration fee and that, in any event, the sum of \$30,000 stipulated was a wholly unreasonable and disproportionate exercise by the Comptroller of any authority which he had by virtue of sections 125 and 130(5).

[99] I have found the decision of Nolan J in the Queen's Bench Division in England in **R v Commissioners of Customs and Excise Ex parte Tsahl**²⁵ (relied on by the respondent) quite helpful when construing both section 125 and section 130(5) of the Customs Act. In that case, the court was called upon to construe the power to restore under the corresponding section 152(b) of the UK Customs Control and Management Act 1979 which is in identical terms to section 125 of the Saint Lucian Customs Act. At page 7, the learned judge stated:

"The power to restore which is conferred upon the respondents by section 152(b) is expressed as plainly as possible in the language of discretion. Mr Zollner accepts, rightly in my judgment, that the words 'restore, subject to such conditions (if any) as they think proper' must be taken to authorise

²⁵ (1989) Times, 12 December.

restoration upon the payment of a sum of money. Light is thrown upon this point, and also upon the nature of the section 152(b) power generally, by the rather fuller terms of paragraph 16 of Schedule 3. These provide that the respondents 'may at any time if they see fit' deliver goods which have not yet been condemned as forfeit to a claimant upon his paying to them a sum not exceeding the value of the goods. It seems to me reasonable to infer that section 152(b) includes a similar power, exercisable after the goods have been condemned. The language of paragraph 16 and of section 152(b) seems to me to point away from, rather than towards, the notion that the respondents are obliged to restore the goods to the former owner free of charge unless they can prove that he has been guilty of some offence."

[100] In **Ex parte Tsahl** the court also gave full recognition to the wide discretion conferred by the equivalent provision to section 130(5) in the UK Customs Control and Management Act 1979. At page 10, the learned judge puts it this way:

"The applicant's difficulty here lies in the virtually unfettered discretion which Parliament has conferred upon the respondents as to the terms upon which they will restore forfeited goods to the former owner. The only limit which can be inferred from the Act is the value of the forfeited goods to which reference is made in paragraph 16 [and] 17 of Schedule 3; and that is a limit which would only have any practical significance -- since normally the former owner of the goods would not in any event pay more for their restoration than they were worth -- if they had some special personal value to him, over and above their market value. However surprising the powers of the respondents under section 152 may seem the fact remains that they are conferred in plain terms, that they have been there for a long time (and were reviewed only 10 years ago) and that the manner of their exercise has withstood by and large the scrutiny of the Keith Committee. If they are to be cut down, they must be cut down by the legislature."

Duty to act in a fair, reasonable, consistent, and rational manner

[101] In my view, having entered upon 'administrative processing' or 'administrative proceedings' in the exercise of his powers under sections 125 and 130(5) of the Customs Act, the law imposes on the Comptroller a corresponding duty to act in a fair, consistent and rational manner. This principle of natural justice is illustrated by the decision in **Ex parte Tsahl** referred to above. That case concerned proceedings brought for judicial review of the quantum of the 'restoration sum' imposed by the Customs and Excise for the release of the goods seized as liable to forfeiture. The court found that, in the discharge of their powers under section 152(b) and

paragraph 16 of Schedule 3, the Customs Department had a duty to act in a 'fair, consistent and rational manner'. The court concluded that they acted unfairly in failing to give an explanation as to how the sum requested as a condition for restoration had been determined. This principle of administrative law was accepted by counsel for the parties in the appeal. It is also well established, that in arriving at or stipulating a sum to be paid by the consignee for the release of the goods liable to forfeiture, the Comptroller must act reasonably and with proportionality, and not arbitrarily or capriciously.

[102] The decision in **Alcatel Submarine Networks Ltd v The Commissioners of Customs and Excise**²⁶ was relied on by the appellant in its additional submissions. It concerned an appeal to the appeals tribunal from the decision of the Customs and Excise department to impose the sum of GBP £30,391.36 as a 'restoration fee' following the incorrect entry in August 1998 and consequent forfeiture of equipment of a value in excess of GBP £990,000, which decision was upheld upon a formal review. A formal notice of seizure had been issued on 18th September 1998 by the Customs and Excise department setting the restoration fee of GBP £30,391.36, which sum was paid under protest by the appellant in order to release the equipment seized. The power to allow goods seized to be released or restored to the importer/exporter is contained in section 152(b) of the UK Customs and Excise Management Act 1979 and rests with the Customs and Excise Commissioners. An appeal from a decision of the Commissioners lies to the appeal tribunal under section 16(4) of the UK Finance Act 1994. Pursuant to that section, the appeal tribunal upon being satisfied that 'the Commissioners... could not reasonably have arrived at [the decision]' may either direct that the decision shall cease to have effect for such time as the tribunal may direct, or require the Commissioners to conduct a further review of the original decision in accordance with the directions of the tribunal.

²⁶ [1999] Lexis Citation 7989.

[103] In **Alcatel** there were no written department guidelines setting out the factors to be considered in determining the level of restoration fee to be paid for the release of goods seized because of incorrect import entries, but the policy of the department was for restoration fees for that category of consignments to be within the range of 0-2% of the value of the incorrectly entered goods. Although there were no 'local' guidelines for Heathrow Cargo, the port at which the equipment had been entered, in practice restoration fees at Heathrow were never set at less than 5%. The appeal tribunal accepted that the issue for determination was whether the original decision to impose the sum of GBP £30,391.36 as a restoration fee was one which the officers could reasonably have made, that is, whether it was 'Corbitt reasonable'. This involved a determination as to whether the person setting the fee had acted reasonably and with proportionality. In finding that the restoration fee was unreasonable, the appeal tribunal determined that it was 'a wholly disproportionate fee for an innocent error in the manner of entry of goods that could have been entered duty free'.

[104] The appellant submits that the Comptroller failed to observe the principles of natural justice in that he did not provide the appellant with a copy of the seizure report upon which the Notice of Seizure was issued, nor did he explain to the appellant the legal basis for imposing a 'restoration fee' as a condition for the release of the container and its contents. Once the appellant in its letter dated 23rd August 2017 challenged the legal authority of the Comptroller to impose the said fee, the latter acted capriciously and in a vindictive manner by terminating the 'administrative proceedings', and in referring the matter to the Attorney General for the commencement of condemnation proceedings in the High Court. The appellant also submits that it was unjust and disproportionate for the Comptroller to require the appellant to pay almost the full value of the undeclared goods to obtain the release of the container and its contents.

[105] The appellant relies on the decision of the English Court of Appeal in **Gascoyne v Customs and Excise Commissioners**²⁷ where the court determined that a letter written by the importer/appellant to the Comptroller is to be construed as an application for a restoration of the said goods and not a notice challenging the seizure of the goods, in submitting that any review of the amount of the restoration must be determined upon principles of reasonableness.

[106] As to how the sum of \$30,000 came to be stipulated as the restoration fee, it is the evidence of Customs Officer Promesse that he, and Officer Hippolyte, attended a meeting on 13th April 2017 with Mr. Charley of the appellant company, at which they discussed the findings of the examinations of the container and of the discrepancies discovered during said examination.²⁸ Furthermore, the Assistant Comptroller responsible for enforcement, Mr. Sandy, testified that at the 30th May 2017 meeting following the appellant's election of administrative proceedings, he read out the contents of the seizure report in the presence of Mr. Clauzel and Mr. Peter David (of the appellant). He then invited them to suggest a restoration fee and they proposed the sum of \$50,000. However, Mr. Sandy suggested the lower sum of \$30,000 having taken into account that the outstanding duties would be \$15,344.36. This resulted in the total amount stipulated to be paid for the release of the container and its contents being \$45,344.36, to which sum, Mr. Sandy testified, both Mr. Clauzel and Mr. David agreed. However, they declined to sign the settlement form which Mr. Sandy had produced until they had spoken to the manager of the appellant. However, both Mr. Clauzel and Mr. David dispute this version of what transpired at the 30th May 2017 meeting. It is their evidence that they never agreed to the appellant paying the sum of \$30,000 as a restoration fee. On this aspect, the Comptroller's evidence is that Mr. Clauzel had, subsequent to the 30th May 2017 meeting, confirmed or re-iterated the appellant's agreement to pay the restoration fee of \$30,000 and the outstanding duties, which he assured the Comptroller would be paid within two weeks of the date of a follow-up meeting.²⁹ This version of the

²⁷ [2004] EWCA Civ 1162.

²⁸ See paragraph 30 of the judgment.

²⁹ See paragraph 68 of the judgment.

facts was set out, substantively, in the Comptroller's letter dated 11th July 2017 to the appellant.

Seizure Report

[107] The learned judge was of the opinion that the seizure report was not 'germane' to this issue. She arrived at this conclusion on the basis that, in any event, the 'administrative proceedings' had failed to result in a settlement acceptable to both the Comptroller and the appellant. Indeed, the appellant's evidence and case is that it never agreed to pay the restoration fee and only paid the assessed duties on the undeclared goods of \$15,344.36.³⁰ Accordingly, the payment of a restoration fee was never agreed to by the appellant who did not sign the 'administrative settlement form', and who, by letter dated 23rd August 2017, disputed the basis upon which payment of such a fee was being requested or stipulated by the Comptroller.

[108] I respectfully disagree with the learned judge that the seizure report was not germane to the administrative proceedings embarked upon by the Comptroller and the appellant. The purpose of such proceedings, as is clear from section 130(5) of the Customs Act, is to resolve issues concerning the seizure of goods which had not been forfeited without having to resort to condemnation and forfeiture proceedings or criminal prosecution. It is my view that the Comptroller, having embarked, at the invitation of the appellant, upon a process, pursuant to his powers under section 130(5)(a) of the Customs Act, to resolve administratively the dispute over the importation of the undeclared goods, was under a duty to act fairly, reasonably and proportionately in arriving at a sum to be paid for the release of the container and the undeclared goods. This duty to act in accordance with the principles of fairness and reasonableness would have required the Comptroller, whether acting directly, or through those authorised to act on his behalf during the administrative processing, to disclose, at minimum, the substance of the allegations of breaches of the Customs Act in the seizure report upon which, presumably, the notice of seizure had been issued.

³⁰ See paragraph 65 of the judgment.

[109] In my view, the contents of the seizure report are directly relevant to the determination by the Comptroller of the sum of money, if any, which the appellant should be required to pay in order to secure the release of the container and its contents as a result of the administrative proceedings. The seizure report would contain a summary of the investigations and findings made by Customs leading to the issuance of the Notice of Seizure. It would be expected to catalog and to document, among other things, the alleged breaches of the Customs Act in relation to the importation of the undeclared goods, the nature and seriousness (or lack thereof) of the alleged breaches, the evidence (documentary and oral) gathered during the investigations into the matter conducted by Customs, and its assessment of the truthfulness of the explanations offered by the appellant during the course of such investigations. These are all matters germane to the Comptroller's determination of the appropriate sum to be paid under section 130(5) for the release of the container and its contents. Accordingly, the principles of fairness dictate that the appellant ought, at minimum, as part of the administrative proceedings, to have been informed by the Comptroller of the contents of the seizure report or provided with a summary of its contents or with a summary of the results of his department's investigation into the alleged breaches resulting in the issuance of the Notice of Seizure on 13th April 2017, and the basis upon which the Comptroller determined the quantum of the restoration fee to be paid for the release of the container and its contents. This is particularly so because in arriving at a sum to be paid by the importer in the exercise of his discretion and authority, and within the maximum sum prescribed by section 130(5) of the Customs Act, the Comptroller is required to act reasonably and proportionately having regard to all the facts and circumstances of the case under his consideration, including any explanations offered by the consignee. Moreover, the exercise by the Comptroller of that authority and discretion is subject to review, in an appropriate case, by the courts.

[110] In this matter, it is not seriously disputed that the contents of the seizure report were read out by the Assistant Comptroller, Mr. Sandy, during the meeting with the representatives of the appellant on 30th May 2017 as part of the administrative

processing and at which a restoration fee of \$30,000 was stipulated or arrived at during the discussions and exchanges at said meeting. Further, at various meetings during the investigations, both prior to and after the issuance of the Notice of Seizure on 13th April 2017, the representatives of the appellant were apprised by the investigating officers of the results of the investigations conducted by Customs into the alleged breaches of the Customs Act. Accordingly, I am satisfied that the learned judge was correct in finding that the appellant, through its representatives, were kept informed by the Customs Officers of the results of the investigations, and were made aware of the contents of the seizure report. In such circumstances, it strikes me that the failure to provide the appellant with a copy of the seizure report did not constitute a breach of the principles of fairness or to act reasonably, as submitted by the appellant.

Refusal to pay the Restoration Fee and termination of the administrative proceedings

- [111] The appellant's letter dated 23rd August 2017 effectively brought the administrative proceedings to an end. The Comptroller had stipulated certain payments as a condition for the release of the container and its contents, and the appellant had by its 23rd August 2017 letter made clear its refusal to agree to the payment of the sum of \$30,000 as one of the sums to be paid to secure their release. The said letter did not request an explanation of the Comptroller's authority to stipulate a restoration fee of \$30,000. In short, the crux of the appellant's 23rd August 2017 letter was that they would only pay the assessed duties on the undeclared goods and nothing else. Furthermore, the statutory basis upon which the Comptroller could request or stipulate payment by the importer of a sum of money not exceeding the value of the goods including the assessed duty thereon, must have been well-known to the appellant who elected for administrative proceedings and who, at minimum, engaged through its representatives, at the meeting on 30th May 2017 in a discussion as to what would be the appropriate quantum of the restoration fee to be paid in addition to the amount of the assessed duties.

[112] In any event, these legal proceedings, brought by the Comptroller, were not commenced until some 4 months after the appellant's 23rd August 2017 letter, during which time the appellant did not seek to continue or to reopen the administrative proceedings with the Comptroller in an effort to reach a settlement and to secure the release of the container. Likewise, the appellant did not commence proceedings for judicial review to challenge the legal authority of the Comptroller to stipulate a sum, over and above the assessed duty, for the release of the container and its contents, or to contest the reasonableness of the sum which the Comptroller had requested be paid as a restoration fee. These steps were all open to the appellant who did nothing until the Comptroller brought proceedings in the High Court for condemnation and forfeiture of the container and its contents, which proceedings the Comptroller had foreshadowed in his letter dated 17th November 2017.

[113] I am therefore of the considered view that the respondent, having received the appellant's letter dated 23rd August 2017 not agreeing to pay the restoration fee, was entitled to proceed to instruct the Attorney General to institute condemnation and forfeiture proceedings against the appellant relating to the undeclared goods. Pursuant to section 125 of the Customs Act, the Comptroller has the power to compound any offence and to stay the proceedings for condemnation. He also has the power under section 130(5) to agree terms of payment for the release of the goods seized and liable to forfeiture, upon payment of a sum not exceeding the value of the goods liable to forfeiture, inclusive of the amount of the assessed duty on the said goods. Notwithstanding the failure by the Comptroller to explain or to justify setting an amount of \$30,000 as the restoration fee, in my view the appellant having stoutly refused to pay any restoration fee, the Comptroller was entitled under the Customs Act to commence proceedings for condemnation and forfeiture of the undeclared goods, the declared goods not being liable to seizure and forfeiture as held above.

Whether challenge to legality and reasonableness of the restoration fee permissible in these proceedings

- [114] The learned judge, at paragraph 75 of the judgment, expressly declined to permit the appellant to challenge in these proceedings the legality or exercise by the Comptroller of his discretion to stipulate the payment of a restoration fee of \$30,000 for the release of the container and its contents. The judge was of the opinion that any such challenge ought to have been brought, presumably by way of judicial review proceedings, as far back as June 2017 and up to February 2018 when the proceedings below for condemnation and forfeiture were commenced. Specifically, that such a challenge could not be mounted by the appellant by way of its defence of the claim. Accordingly, the learned judge declined to make any determination as to either the legality or the reasonableness of the quantum of the restoration fee.
- [115] I agree with the learned judge that the legality and reasonableness of the restoration fee cannot be challenged by the appellant by way of its defence in these proceedings for condemnation and forfeiture of the undeclared goods. The central question for the court's determination in these proceedings was whether, on the admissible evidence led by the Comptroller, the said goods became liable to seizure and forfeiture for alleged breaches of the Customs Act, or were deemed forfeited pursuant to paragraph 5 of Schedule 4 of the Act. It is accepted that the said goods were not declared by the appellant on its Bill of Lading and customs declaration submitted when the container arrived in Saint Lucia. It is also accepted that the sum of \$14, 882.34 was paid by the appellant as chargeable duty on only certain of the goods imported in the container - the declared goods. Accordingly, the appellant had submitted a 'false' declaration in apparent breach of section 113(1)(a) of the Act. The restoration fee requested or stipulated by the Comptroller during the administrative proceedings, was never agreed to by the appellant, and accordingly not paid. Therefore, any question as to the reasonableness of the said sum is moot and not a matter for determination in these proceedings. Furthermore, the appellant's refusal to pay the restoration fee was not on the basis that it was too

high or unreasonable or disproportionate. It was on the sole basis that it was not 'revenue' to which the Government of Saint Lucia was entitled.

- [116] If the appellant wished to challenge the legality of the Comptroller's authority to stipulate a restoration fee or the reasonableness or proportionality of the amount stipulated, it was entitled to bring an application for permission to commence judicial review proceedings.³¹ This the appellant did not do. Further I agree with the respondent that for the appellant to seek to mount such a challenge by way of its defence in these proceedings amounts to using the process of the court for a purpose and in a way that is not permissible.³² Furthermore, the appellant did not file a counterclaim in these proceedings challenging the legality or reasonableness of the exercise of the said powers by the Comptroller. Had they done so, they could have invited the court to consider exercise its discretion and powers under CPR 56.6 to treat such a challenge as a claim for an administrative order under Part 56.

Section 17 of the Supreme Court Act

- [117] On this issue, the appellant also prays in aid the powers of the court under section 17 of the **Eastern Caribbean Supreme Court (Saint Lucia) Act**³³ to determine all matters in controversy between the parties and to bring finality to a multiplicity of proceedings, in support of their submission that the learned judge erred when she failed to take cognizance of the full extent of her powers under that section. Section 17 in material part states:

"The High Court and Court of Appeal respectively... shall, in every cause or matter pending before the Court, have power to grant... all the remedies or relief whatsoever to which any of the parties appear to be entitled in respect of any and every claim properly brought forward by him or her or them respectively in the cause or matter; so that, as far as possible, all matters in controversy between those parties respectively may be completely and finally determined, and all multiplicity of proceedings concerning any of those matters avoided."

³¹ Mark v Minister of Home Affairs [2008] SC (Bda) 5 Civ (6 February 2008).

³²See Myran Norder v Jacqueline Mannix ANUHC VAP2015/0034 (delivered 16th February 2017, unreported) per Carrington JA [Ag.] at para. 5, citing Lord Bingham in Attorney General v Paul Evan John Marker [2000] EWHC 453.

³³ Cap 2.01 of the Laws of Saint Lucia.

In my judgment, the appellant's reliance on this provision and the powers therein granted is misplaced and without any proper foundation on the facts and procedural history of this matter. I say so because the appellant has failed to commence judicial review proceedings challenging the legality or the reasonableness or rationality of the Comptroller's exercise of his powers in determining and stipulating a restoration fee of \$30,000 and did not exercise its rights under the Customs Act to dispute that the undeclared goods were liable to be forfeited.

[118] It was also open to the appellant to pay the restoration fee requested under protest and without prejudice to its rights to dispute the legality and or reasonableness of this sum, and to thereby secure the release of the container and its contents by the Comptroller. They did not seek to challenge the restoration fee, but essentially did nothing until they had been served with the claim for condemnation and forfeiture of the container and its contents brought by Comptroller in November 2017. Furthermore, it was not open to the appellant in its defence filed in these proceedings to challenge either the legality or reasonableness of the restoration fee stipulated. That challenge ought to have been brought by way of judicial review of the exercise by the Comptroller of his powers under section 125 and 130(5) of the Customs Act.

Whether appellant was entitled to release of the Undeclared Goods

[119] In my judgment, the Comptroller was fully empowered under section 130(5)(a) of the Customs Act to stipulate the payment of a sum of money (not exceeding the value of the goods) for the release of the goods seized and liable to forfeiture. The fact that part of the sum stipulated is referred to as a restoration fee, which is not a term to be found in section 130(5)(a), does not lead to the conclusion that the Comptroller acted without authority or exceeded his authority under the Act. That is as far as this Court can or ought to go on that aspect of the matter, and I expressly decline the appellant's invitation to embark upon a consideration of the reasonableness and proportionality of the sum of \$30,000 sum or the total sum of \$45,344.36.

[120] Having found that the Comptroller was within his power to stipulate, as part of the administrative processing, the payment by the appellant of the sum of \$15,344.36 duty and a restoration fee in order to secure the release of the container and its contents from seizure, and to refrain from proceedings with condemnation and forfeiture proceedings, in my judgment it was not open to the appellant to unilaterally elect to only pay the assessed duties on the undeclared goods. Payment of the total sum of \$45,344.36, inclusive of the assessed duties, is what the Comptroller had stipulated in order for the container and its contents to be released to the appellant, notwithstanding that the declared goods in the container ought to have been released much earlier, the chargeable duties on those goods having been paid in full in March 2017. Accordingly, the Comptroller was entitled to return the appellant's cheque for the outstanding duties on the undeclared goods and to consider that the administrative proceedings had failed and was at an end, as the learned judge found.³⁴ In those circumstances, the learned judge was also correct in concluding that the administrative proceedings having failed, the undeclared goods remained liable to condemnation and forfeiture and were deemed to have been duly condemned as forfeited pursuant to paragraph 5 of Schedule 2 to the Customs Act.³⁵

Issue 11 – The Entitlement to Order for Condemnation and Forfeiture Issue

[121] This is a short point, having regard to the determinations made on the other issues raised in this appeal. The learned judge held that the appellant having not claimed against the seizure of the container and its contents, the administrative proceedings having failed, and no other proceedings (for judicial review or otherwise) having been brought by the appellant concerning this matter, the goods seized are deemed condemned as forfeited pursuant to paragraph 5 of Schedule 2 of the Customs Act.³⁶ This provision is clear and definitive in its terms and legal effect. It stipulates that once the consignee of seized goods has failed to give notice within the requisite

³⁴ See paragraph 72 of the judgment.

³⁵ See paragraph 77 of the judgment.

³⁶ See paragraph 77 of the judgment.

period, claiming that the goods or certain of them are not liable to forfeiture, the goods seized 'shall be deemed to have been forfeited'.

- [122] In light of this provision, the undeclared goods and the container were lawfully deemed to have been condemned as forfeited, and the learned judge was correct in so far as her finding and order related to those items. However, as found in this judgment there was no basis in law upon which the declared goods could have been seized and accordingly, they were never liable to be condemned as forfeited pursuant to paragraph 5 of Schedule 2.

Disposition

- [123] In the premises, this appeal succeeds to the extent that the judge's order condemning as forfeited the declared goods is set aside. Accordingly, it is ordered that the order made by the learned judge at paragraph 78(1) of the judgment is set aside and, in its stead, it is ordered that –

(1) The container identified by Number GESU 480661-6 and the undeclared goods therein not listed on Bill of Lading No. SMLU 477392A ("the undeclared goods") are condemned as forfeited to the Comptroller of Customs and Excise pursuant to section 130(4) and paragraph 5 of Schedule 4 of the **Customs (Control and Management) Act**.

(2) The declared goods in container identified by Number GESU 480661-6 listed on Bill of Lading No. SMLU 477392A are to be released from seizure forthwith by the Comptroller to the appellant.

- [124] The appellant has been successful in the appeal only on one issue. The respondent, however, has largely been successful in defending the appeal, save for the limited success which the appellant has gained in relation to the seizure and forfeiture of the declared goods. In my considered view, the appellant's limited success does not change the overall conclusion that the respondent is the successful party and therefore should receive its costs proportionate to their success. In the

circumstances, the respondent is entitled to an order for costs in the appeal. Accordingly, it is ordered that the appellant shall pay to the respondent two-thirds of its costs in the appeal which costs shall not exceed two thirds of the prescribed costs in the High Court. It is further ordered that the appellant shall pay to the respondent two-thirds of its prescribed costs in the High Court.

I concur.

Louise Esther Blenman

Justice of Appeal

I concur.

Margaret Price-Findlay

Justice of Appeal [Ag.]

By the Court

Chief Registrar