

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

SAINT LUCIA

SLUHCVP2018/0001

BETWEEN:

THE COMPTROLLER OF CUSTOMS

Appellant

and

CHINA TOWN INC.

Respondent

Before:

The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster
The Hon. Mr. Humphrey Stollmeyer

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Dexter Theodore, Q.C. with Mr. Kurt Thomas for the Appellant
Mr. Vandyke Jude and Mr. Mervin Steele for the Respondent

2019: July 4;
2020: December 8.

Civil appeal — Judicial review — Customs (Control and Management) Act — Power of the Comptroller of Customs to forfeit goods which were seized based on a reasonable suspicion — Reasonable time in which to initiate forfeiture proceedings — Delay in initiating forfeiture proceedings — Who is the proper defendant to a judicial review claim involving a public body — Whether the failure to join and/or serve the Attorney General is fatal to the claim against a public body — Damages payable for breach of a constitutional right — Whether the comptroller of customs is immune from an award of damages

China Town Inc. is a company incorporated and carrying on business in Saint Lucia as a retailer ("the Company") or ("the respondent"). Its managing director is Mr. Yi Xun Xu ("Mr. Xu"). On 2nd December 2013, the Company imported a 20-foot container from China

("Container 1"). A customs declaration of value was made by the Company and it paid the assessed duty of \$27,016.77 to secure the release of the container.

Subsequently, officers of the Customs Department examined the Company's documents concerning the cargo in Container 1 and discovered anomalies. Following several interviews with Mr. Xu, and being dissatisfied with his answers, the Customs Department issued a notice of seizure of the goods in Container 1. Pursuant to the notice and in order to secure the release of Container 1, Mr. Xu requested administrative settlement of the matter. The Company thereafter paid the amount of \$33,007.68 demanded by the officers for the release of Container 1. Container 1 was released to the Company on 16th January 2014.

On 16th January 2014, the Company imported another container of merchandise from China ("Container 2"). The merchandise in Container 2 was declared and the Company paid import duty of approximately \$63,000.00 on the declared value. On 6th February 2014, the Company was informed that the Customs Department was alleging that the declaration in respect of Container 2 was false. The following day the Comptroller of Customs ("Comptroller") issued a notice of seizure in respect of Container 2. This time the Company did not seek administrative processing. Instead, it chose to challenge the seizures of both containers.

The challenge to Container 1 was an appeal against the administrative settlement amount of \$33,007.68 that was paid to secure the release of the container. The challenge to the seizure of Container 2 was that the goods in the container were not liable to forfeiture and the forfeiture was invalid. The Company's challenges were dated 4th March 2014 and made by letters from its attorneys-at-law.

There was no evidence that the Comptroller replied to the challenge letters, considered the appeal against the taking and retention of the \$33,007.68 in respect of Container 1, or took steps to initiate proceedings in the High Court or the Magistrates' Court for the forfeiture and condemnation of Container 2.

Having taken the legal steps required for the release of Container 2 and the return of the settlement amount, and in the absence of any steps by the Comptroller to start proceedings for the forfeiture of the items in Container 2 and the return of the settlement amount, the Company applied ex parte to the High Court for leave to bring a judicial review claim. The application was granted, and the claim was filed on 2nd September 2014.

The learned judge tried the claim and delivered his decision on 28th November 2017. The judge declared that:

- a. the seizure of the two containers was ultra vires section 130 of the Customs Act and an unconstitutional breach of the Company's rights to its properties; and
- b. the breach of the Constitution was so grave that the Company should be awarded aggravated damages to be assessed.

The learned judge ordered:

- a. the return of the deposit of \$33,007.68 for Container 1 and the immediate release of Container 2, free of any port charges; and
- b. costs of action to the Company to be assessed if not agreed

The Comptroller appealed against the learned judge's findings.

Held: dismissing the appeal; remitting the case to the High Court to assess the quantum of vindictory damages; and ordering costs of the appeal to be paid by the appellant at the rate of two-thirds of the amount assessed for the proceedings in the lower court; that:

1. An appellate court is generally reluctant to interfere with the findings of fact by a lower court and will interfere with those findings only where it is satisfied that the trial judge did not take proper advantage of having seen and heard the witnesses. An appellate court has a more flexible approach when dealing with challenges to findings of fact that are inferences drawn by the trial judge from his evaluation of oral and written evidence, but the court is still cautious especially where these inferences are drawn from disputed facts and/or the credibility of the witnesses. However, where the findings are based on undisputed facts or the interpretation of written evidence, an appellate court is more likely to conclude that it is in as good a position as the trial judge to evaluate the undisputed or written evidence, and, if it is satisfied that the wrong inference was drawn, it may be inclined to substitute its own finding.

Watt (or Thomas) v Thomas [1947] 1 All ER 582 applied; **Henderson v Foxworth Investments Ltd and another** [2014] 1 WLR 2600 applied; **Beacon Insurance Co Ltd v Maharaj Bookstores Ltd** [2014] UKPC 21 applied.

2. The Comptroller of Customs is the proper defendant where a party seeks to challenge a seizure. According to the **Customs (Control and Management) Act** ("the Act"), the Comptroller is ultimately responsible for all major decisions made by the Department, including decisions to seize a person's property. This is confirmed by the fact that, procedurally, the notices of seizure are in a form to be signed by the Comptroller and, substantively, that it is the Comptroller who must give notice of seizure to the owner of the property seized.

Customs (Control and Management) Act Chapter 15:05, Revised Laws of Saint Lucia 2008 applied; **Quorum Island (BVI) Ltd v the Attorney General and the Virgin Islands Environmental Council**, HCVAP2009/021 (delivered 12th August 2011, unreported) considered.

3. While a claimant who seeks constitutional relief is under a mandatory requirement to serve the Attorney General with the claim in the court below, the failure to do so is a procedural defect. The point was not taken in the lower court, and, if taken, could have been cured by ordering service on the Attorney General. In any event, in the absence of clear authority showing that the failure to serve the Attorney

General made the claim fatally defective, the appellant's challenge to the form of the proceedings is not sustainable.

Part 56.9(1) of the Civil Procedure Rules 2000 ("CPR") considered; **Richard Frederick and another v Comptroller of Customs and another** [2009] ECSCJ No. 98 considered.

4. It is not for the court, on a judicial review application, to second-guess the Comptroller's decision to issue notices of seizure, as its role is to ensure that the Comptroller followed the correct procedure, which the learned trial judge did correctly. Section 130 of the Act gives the Comptroller of Customs the power to detain, seize and condemn goods that are liable to forfeiture. The trial judge in determining whether the Comptroller followed the correct procedure, properly assessed the evidence and the credibility of the witnesses in deciding whether the officers had enough evidence to form a reasonable suspicion that the Company was attempting to evade payment of duty. He concluded, initially, that the seizure of the containers was based on reasonable suspicion and was not unlawful or ultra vires the Act. This is a finding of mixed fact and law with which this Court will not lightly interfere as it does not appear to be plainly wrong.

Econo Parts Ltd. v The Comptroller of Customs SLUHCV2014/0309 consolidated with SLUHCV2016/0187 (delivered 10th May 2017, unreported) applied; **Watt (or Thomas) v Thomas** [1947] 1 All ER 582 applied.

5. Where goods are seized by the Comptroller based on a reasonable suspicion, proceedings for the forfeiture and condemnation of those goods must be initiated in a reasonable time. The finding of the learned judge that the initial period of six months of total inaction by the Comptroller was an unreasonable delay was one that he was entitled to make. Further, the judge was entitled to conclude from the delay that the Comptroller never had sufficient evidence to proceed to forfeiture. This was also a reasonable inference for the trial judge to have drawn based on the evidence. The learned judge did not err in concluding that the seizure of Container 2 was unlawful and ultra vires the provisions of section 130 and schedule 4 of the Act.
6. The detention or seizure of goods under the Act must be for only so long as is necessary to carry out the legitimate purposes of the Act. The Comptroller's delay in commencing condemnation proceedings of the goods in container 2 and not dealing with the Company's appeal against the restoration fee for Container 1, was unreasonable and breached the Company's constitutional right not to be deprived of its property except in accordance with section 6 of the Constitution.

Customs (Control and Management) Act Chapter 15:05, Revised Laws of Saint Lucia 2008 applied; **Constitution of Saint Lucia** Chapter 1.01, Revised Laws of Saint Lucia 2008 applied.

7. When exercising its constitutional jurisdiction, the court is concerned to uphold or vindicate a constitutional right that has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases, more will be required than words to uphold or vindicate the dignity of the constitutional right that has been infringed. Having regard to all the circumstances of the case including, but not limited to the length of deprivation and the conduct of the customs officers, this is a proper case for an award of vindicatory damages.

Attorney General of Trinidad and Tobago v Ramanoop [2005] UKPC 15 applied; **Romauld James v The Attorney General of Trinidad and Tobago** [2010] UKPC 23 applied; **Inniss v the Attorney General of Saint Christopher and Nevis** [2008] UKPC 42 applied; **Sir Gerald Watt, KCN, QC v Prime Minister and another**; [2013] ECSCJ No. 142 applied; **Merson v Cartwright and another** [2005] UKPC 38 applied.

8. There is no basis to disturb the award of special damages for losses occasioned by the actions of the Comptroller of Customs.
9. Section 133 of the Act gives the Comptroller of Customs immunity from an award of damages under the Act where (a) a certificate relating to the seizure has been granted under subsection (1); or (b) the court is satisfied that there were reasonable grounds for seizing or detaining the thing seized. In this case a certificate was not issued under subsection 1 and there were no reasonable grounds for seizing the containers. The Comptroller is therefore not entitled to immunity in this case.

Customs (Control and Management) Act Chapter 15:05, Revised Laws of Saint Lucia 2008 applied.

JUDGMENT

- [1] **WEBSTER JA [AG.]**: The essence of this appeal is summed up in the opening paragraph of the learned trial judge's judgment in the lower court:

"The issue of importance in this matter is whether the Comptroller of Customs' authority to initiate forfeiture proceedings on imported goods by way of seizure can be exercised on the basis of reasonable suspicion of a breach of the law and if so what is a reasonable time in which to institute forfeiture proceedings."

The learned judge tried the case and made orders, inter alia, declaring that the seizure of the respondent's two containers was ultra vires to section 130 of the **Customs**

(Control and Management) Act¹ (“the Act”) and an unconstitutional breach of the respondent’s right to ownership of its property. The judge found that the breach of the **Constitution of Saint Lucia**² (“the Constitution”) was so grave that the respondent should be awarded aggravated damages to be assessed. Further details of the trial judge’s order are set out in paragraph 16 below. This is an appeal against the learned judge’s order.

Background

- [2] The respondent, China Town Inc.(“the Company”), is a company incorporated and carrying on business in Saint Lucia as a retailer for over 15 years. The Company is regularly involved in importing merchandise into Saint Lucia from China, the United States of America and other places, in connection with its business.

- [3] The managing director of the Company is Mr. Yi Xun Xu (“Mr. Xu”), a person who played a major role in this case.

- [4] On 2nd December 2013 the Company imported a 20-foot container from China which I will describe in this judgment as “Container 1”. The appropriate customs declaration of value was made by the Company and it paid the assessed duty of \$27,016.77 to secure the release of the container.

- [5] Officers of the Customs Department examined the Company’s documents concerning the cargo in Container 1 and discovered anomalies in the documents submitted by the Company. The officers interviewed Mr. Xu on the 10th and 16th December 2013 regarding the anomalies. The officers were not satisfied with Mr. Xu’s answers and issued a notice of seizure of the goods in Container 1.

- [6] The power to detain, seize and forfeit imported goods is contained in section 130 of the Act. Subsection (1) provides that “Anything which is liable to forfeiture is (sic) seized or

¹ Chapter 15.05, Revised Laws of Saint Lucia 2008.

² Chapter 1.01, Revised Laws of Saint Lucia 2008.

detained by any officer or police officer.” Subsection (4), which comes into play after goods are seized, provides that –

“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.”

[7] Following the seizure of Container 1, the Comptroller of Customs (“Comptroller”) gave notice of the seizure to the Company. This brought into play the provisions of schedule 4 of the Act which, insofar as it is material to this appeal, provides –

- (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) ...
- (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 and, in the case of a claimant who is outside Saint Lucia, shall specify the name and address of a solicitor in Saint Lucia who is authorised to accept service and act on behalf of the claimant, and service upon a solicitor so specified is considered to be proper service upon the claimant.
- (5) If, on the expiration of the relevant period under paragraph 3 for the giving of a 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.
- (6) **Where notice of claim in respect of anything seized is duly given in accordance with paragraphs 3 and 4, the Comptroller shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of its seizure liable to forfeiture, that court shall condemn that thing as forfeited.** (Emphasis supplied)

[8] The notice of seizure was duly served on the Company on 16th December 2013. The notice contains information for the owner of the goods seized as to the steps that he can take regarding the seizure of goods. This information reflects in a general way the

guidelines in Schedule 4 of the Act.³ The notice informed the Company that its property had been seized and gave the Company three options in the following terms:

- “1. You may choose to take no action. If you take no action the Customs Department will after one (1) month from the date of this Notice condemn the said property as forfeited by administrative action, in accordance with section 130 and the Fourth Schedule paragraph 5 of the Customs Act.; or
2. You may choose administrative processing. If you choose administrative processing you must within one (1) month of the date of this Notice make an appointment with the Comptroller of Customs to appear in his office or that of a designated officer where you will be advised of the decision of the Comptroller of Customs regarding this matter; or
3. You may claim against the seizure. If you claim that the seized property listed in schedule 1 to the notice is not liable to forfeiture you must within one (1) month of the date of this notice given notice of your claim in writing the Comptroller of Customs at any office of Customs and Excise...

...On receipt of your notice (under the third option) the Comptroller of Customs shall initiate proceedings for the condemnation of the property by the Court.”

- [9] The Company chose the second option of administrative processing and on 20th December 2013, Mr. Xu approached the valuation department of the appellant and requested administrative settlement of the matter. Following discussions and meetings with officers of the Customs Department, the Company paid the amount of \$33,007.68 demanded by the officers for the release of Container 1. The stated breakdown of the \$33,007.68 was \$13,007.68 for outstanding duties and a "restoration fee" of \$20,000.00. There was a further payment of \$4,173.75 for storage charges. Container 1 was released to the Company on 16th January 2014.

Container 2

- [10] On 16th January 2014 the Company imported another container of merchandise from China ("Container 2"). The merchandise in Container 2 was declared and the Company paid import duty of approximately \$63,000.00 on the declared value.

³ The forfeiture notice for Container 1 is at page 312 of the Core Bundle of the record of appeal.

- [11] On 6th February 2014 the Company was informed through its customs broker that the Customs Department was alleging that the declaration in respect of Container 2 was false. The following day the Comptroller issued a notice of seizure in respect of Container 2 in the same form as the notice in respect of Container 1.⁴ This time the Company did not seek administrative processing. Instead, it chose the third option under the notice of forfeiture and issued letters through its legal representatives, Jude, Steele & Associates, challenging the seizures of both containers.
- [12] The challenge to Container 1 was in respect of the administrative settlement amount of \$33,007.68 that was paid to secure the release of the container. The challenge was made by way of an appeal to the Comptroller under section 135 of the Act. Section 135 provides that a person who disputes the amount of duty demanded by a customs officer can appeal to the Comptroller to reconsider the amount demanded based on the grounds of appeal set out in the challenge. The Comptroller can increase, decrease, or confirm the amount demanded, and must notify the person appealing of his decision.
- [13] The challenge to the seizure of Container 2 was that the goods in the container were not liable to forfeiture and the forfeiture was invalid.
- [14] The Company's challenges are dated 4th March 2014 and there is no dispute that they were effective as of that date. The Comptroller chose not to reply to the challenge letters. There is no evidence that the Comptroller considered the appeal by the Company against the taking and retention of the \$33,007.68 in respect of Container 1 and he did not return the \$33,007.68 or any part of it to the Company. Further, and this is not disputed, he did not take any steps under paragraph 6 of Schedule 4 of Act, to initiate proceedings in the High Court or the Magistrates' Court for the forfeiture and condemnation of Container 2.
- [15] Having taken the steps provided in the Act for the release of Container 2 and the return of the settlement fee, and in the absence of any steps by the Comptroller to start

⁴ Core Bundle, page 374.

proceedings for the forfeiture of the items in Container 2 and the return of the settlement fee, the Company applied ex parte to the High Court for leave to bring a judicial review claim complaining about the Comptroller's conduct concerning the two containers. The application was filed on 24th July 2014. The High Court granted permission and the claim was filed on 2nd September 2014, almost six months after the Company's letters challenging the seizures.

[16] The permission granted by the learned judge gave the Company permission to bring proceedings against the Comptroller seeking the following relief:

- (i) A declaration that the matters complained of were contrary to the literal interpretation of the Act.
- (ii) A declaration that the Comptroller of Customs came to a conclusion that was so unreasonable that no reasonable customs and excise department would ever have come to it and/or they have taken into account matters which they ought not to take into account, or, conversely, the Comptroller refused to take into account or neglected to take into account matters which he ought to take into account under the Act.
- (iii) A declaration that the matters complained of were so unfair as to amount to an abuse of power on the part of the appellant.
- (iv) A declaration that the Company is entitled to apply for an order in the form of (a) an order of certiorari to remove to the High Court the notices of seizure dated 19th December 2013 and 7th February 2014 for the purpose of being quashed; and (b) an order of mandamus to compel the respondent to act lawfully and in accordance with the Act.
- (v) A declaration that the actions of the respondent were arbitrary, oppressive and unconstitutional ("the Constitution") and contrary to sections 6 and 7 of the St. Lucia Constitution Order, Cap 1.01, and the Company is entitled to damages, including aggravated and exemplary damages.

- (vi) A declaration that the Company is entitled to the common law remedy of detinue for unlawful detention of its property.

[17] The Company filed its fixed date claim form on 2nd September 2014. The claim was heard on 20th April 2016 and the learned judge delivered his decision on 28th November 2017. The judge declared:

- (a) that the seizure of the two containers was ultra vires section 130 of the Act and an unconstitutional breach of the Company's rights to its properties; and
- (b) the breach of the Constitution was so grave that the Company should be awarded aggravated damages to be assessed.

The learned judge ordered:

- (a) the return of the deposit of \$33,007.68 for Container 1 to the Company and the immediate release to the Company of Container 2, free of any port charges; and
- (b) costs of action to the Company to be assessed if not agreed.

The Appeal

[18] The Comptroller appealed against the judge's decision. The amended notice of appeal lists 23 grounds of appeal, some of which overlap. I have distilled the following issues from the grounds to be resolved by this Court:

- (i) The role of an appellate court in reviewing findings of fact by the trial judge.
- (ii) The proper defendant to the claim.
- (iii) The failure to join and/or serve the Attorney General with the claim.
- (iv) The validity of the seizure of the containers.
- (v) The Comptroller's failure to commence forfeiture proceedings in respect of Container 2.

- (vi) The validity of the restoration fee collected for the release of Container 1.
- (vii) The Constitutionality of the seizure of the containers
- (viii) Damages.

Findings of fact

[19] The decision of the learned trial judge contains several findings of primary fact and inferences drawn from those facts. The law on the approach to be taken by an appellate court when reviewing the findings of fact by a lower court is settled and often repeated by this Court. An appellate court is generally reluctant to interfere with the findings of fact by a lower court since that court had the opportunity of seeing and hearing the witness give their evidence and to assess their demeanor and credibility. The Court of Appeal will interfere with those findings only where it is satisfied by the reasons given by the trial judge that he has not taken proper advantage of having seen and heard the witnesses: per Lord Thankerton in **Watt (or Thomas) v Thomas**;⁵ or if the decision was plainly wrong – per Lord Reed in **Henderson v Foxworth Investments Ltd and another**.⁶

[20] Appellate courts have a more flexible approach when dealing with challenges to findings of fact that are inferences drawn by the trial judge from his evaluation of oral and written evidence. But even at this level the appellate court still has a cautious approach. Where the inferences are drawn from disputed facts and/or the credibility of the witnesses the appellate court will be similarly reluctant to interfere with the findings. The reluctance will diminish when the findings are based on undisputed facts or the interpretation of written evidence. In this situation, the appellate court is more likely to conclude that it is in as good a position as the trial judge to evaluate the undisputed or written evidence, and, if it is satisfied that the wrong inference was drawn, may be inclined to substitute its own finding. The principles in this paragraph are taken from the speech of Lord Hodge in

⁵ [1947] 1 All ER 582.

⁶ [2014] 1 WLR 2600 at paragraph 62.

Beacon Insurance Co Ltd v Maharaj Bookstores Ltd,⁷ a recent decision of the Privy Council from the Court of Appeal of Trinidad and Tobago.

[21] I will bear these principles in mind when reviewing the findings in this case such as the trial judge's finding that the Comptroller delayed in taking steps to forfeit the goods in Container 2 and the inferences that he drew from the delay.

The proper defendant

[22] The learned judge found that the claim was properly made against the Comptroller of Customs. The Comptroller challenged this finding.

[23] Learned counsel for the Comptroller, Mr. Dexter Theodore QC, submitted that in a judicial review claim challenging a decision made by a public body, the proper defendant is the person who made the decision. In support of this submission he relied on the case of **Quorum Island (BVI) Ltd v the Attorney General and the Virgin Islands Environmental Council**,⁸ a judicial review claim where Chief Justice Sir Hugh Rawlins opined that in a claim for prerogative relief (judicial review) the decision maker and not the Attorney General is the proper defendant. Mr. Theodore, QC submitted that in this case there is no evidence that the Comptroller made any of the two decisions to seize the containers. The decisions were made by officers of the Customs Department. Therefore, the officers who made the decisions to seize the containers, and not the Comptroller, should have been the defendant or defendants. I find this argument unattractive and I do not accept it.

[24] The Comptroller of Customs is the head of the Customs Department. Section 4(1) of the Act provides that the office of Comptroller of Customs is a public office and the Comptroller is charged with the duty of collecting and accounting for, and otherwise managing the revenue of customs. Section 4(2) further provides that the Comptroller is responsible for the administration of the Act. This means that the Comptroller is

⁷ [2014] UKPC 21.

⁸ BVIHC VAP2009/021 (delivered 12th August 2011, unreported).

ultimately responsible for all major decisions made by the Department, including decisions to seize a person's property. The fact that the notices of seizure are in a form to be signed by the Comptroller confirms this.

- [25] But it is not just a matter of form and good management that make the Comptroller the decision maker when a person's property is being seized. Paragraph 1 (1) of Schedule 4 of the Act states that the Comptroller shall give notice of seizure to the owner of the property seized. This is a further statutory confirmation of the Comptroller's responsibility for seizures. If the notices of seizure in this case were signed by one or more officers in the Department, the officer would have been doing so on behalf of the real decision maker, the Comptroller. It is not surprising that the learned judge found at paragraph 72 of his judgment that –

“This department of government is headed by a Comptroller of Customs who has overall responsibility for the actions of the Department. This is clearly shown by the legislation which repeatedly refers to the Comptroller of Customs' duty to make decisions. Where a notice of seizure is concerned there is no getting away from the fact that the goods are placed in the possession of the Comptroller of Customs and any application to settle the matter administratively or by way of an objection is made to the Comptroller of Customs. This is the only reasonable construction to give to Section 130 of the Act and Schedule 4.”

- [26] I am satisfied that the true decision maker in matters of seizure under the Act is the Comptroller of Customs and the learned judge was correct in so finding at paragraph 73 of the judgment. The notices of seizure, if not signed by him, were signed on his behalf. It was the Comptroller's decision to seize the containers and he was the proper defendant in the court below.

The failure to join and/or serve the Attorney General

- [27] The appellant also took issue with the Company's failure to join the Attorney General as a defendant and to serve him or her with the claim. The fixed date claim form includes a claim for constitutional relief and the **Civil Procedure Rules 2000** (“CPR”) at Part 56.9(1) provides that a claim form seeking relief under the Constitution must be served on the Attorney General. The rule speaks for itself and the requirement for service on

the Attorney General is mandatory. This was emphasised by George-Creque JA in **Richard Frederick and another v Comptroller of Customs and another**⁹ where the learned Justice of Appeal said –

“What is clear is that the claim form seeking constitutional relief must be served on the Attorney General. This however does not preclude other persons being joined as defendants.”¹⁰

The Company is in breach of this requirement and there is no evidence that it has attempted to cure the defect by serving the Attorney General. Service of the claim would have given the Attorney General the option of deciding whether he or she would defend the claim. Mr. Theodore, QC submitted that the result of the failure to join the Attorney General and serving with the claim is that the claim is a nullity and should be struck out. It appears that this submission was not made in the lower court, but the issue was raised in the notice of appeal and counsel for both parties made submissions to the Court. I will deal with this issue, but I note that the Court was not provided with any authority to suggest that the failure to join and serve Attorney General made the claim a nullity. The mandatory requirement is to serve the Attorney General and in my opinion failure to do so is a procedural defect that can be cured by the trial judge ordering service on the Attorney General, if and when the point is taken. In any event, in the absence of clear authority that the failure to serve the Attorney General made the claim fatally defective, I would dismiss this challenge to the form of the proceedings.

[28] In summary on the issue of the proper defendant to the claim, I agree with the learned judge’s conclusion that the decision maker in this matter was the Comptroller of Customs and he is the proper defendant to the claim for judicial review. The claim includes relief under the Constitution and the failure to serve the Attorney General was a clear omission but not sufficient to set aside the proceedings.

Validity of the seizures

⁹ [2009] ECSCJ No. 98.

¹⁰ Ibid paragraph 34.

[29] The validity of the seizures turns on the interpretation of the Act and its application to the facts in this case.

[30] The learned judge's finding on the validity of the seizures is at paragraph 89 of his judgment. The judge found that-

“This is a case in which a decision which was at the outset was (sic) based on stated reasons became unlawful because of the length of time permitted to pass before a decision was made to move the process forward as is normal in criminal or quasi criminal proceedings where citizens face the imposition of penalties for unlawful acts. Indeed not one single allegation was proceeded with even in the District Court of Saint Lucia.”

The judge was alluding to the evidence in the case and his earlier findings that the customs officers may have had reasonable grounds for suspecting that something was awry with the duties declared and paid on the containers, giving them justification for the seizures. However, he changed his position and decided that the seizure of Container 2 became unlawful because of the failure to move the process forward in a reasonable time. In other words, the judge found that the seizures, based on reasonable suspicion, may have been initially lawful but became unlawful because of the delay in commencing the forfeiture proceedings within a reasonable time as required by paragraph 6 of schedule 4 of the Act. This raises two issues;

- (a) whether reasonable suspicion by the officers of the Customs Department is sufficient to seize a person's property; and
- (b) what is a reasonable time to begin forfeiture proceedings after the goods have been seized.

Reasonable suspicion

[31] Section 130 of the Act gives the Comptroller of Customs the power to detain, seize and condemn goods that are liable to forfeiture. The difference between detaining and

seizing goods was explained by Smith J in **Econo Parts Ltd. v The Comptroller of Customs**¹¹ –

“(1) ...

- (2) Detention is an alternative to the seizure of the goods in question. It differs from seizure in that it is a temporary assertion of control over goods which does not necessarily involve any seizure with a view to forfeiture. It does not trigger the commencement of proceedings for the condemnation of goods.
- (3) The purpose of detaining goods without seizing them is to enable the goods to be examined or secured, pending investigations, which might lead to the seizure later. It is to enable the Comptroller to retain control over the goods temporarily until he has arrived at the conclusion as to the duty payable as to whether the goods are liable to forfeiture.
- (4) The right to seize or detain property under section 130 of the Act is dependent on that property actually being liable to forfeiture. This turns on the objectively ascertained facts and not on the beliefs or suspicions of the Comptroller, however reasonable.”

[32] I agree with the learned judge’s observations on the procedure for detaining and/or seizing property. If, as in this case, a comptroller has facts to create a reasonable suspicion that customs duties are being evaded, he has an option. If he thinks that the known facts are not sufficient to seize the goods and proceed to forfeiture, then he can detain the goods and carry out further investigations with a view to seizure and forfeiture. On the other hand, if he is satisfied that he has enough facts to seize the goods he can proceed to do so, initiate the forfeiture proceedings within a reasonable time and then justify his reasons for seizing the goods. If the seizure is challenged, the reasons for the forfeiture will be assessed on an objective basis. What he cannot do is to seize property if he does not have facts creating at least a reasonable suspicion.

[33] In this case the Comptroller took the position that there was sufficient evidence to seize both containers and he proceeded to issue seizure notices, forgoing the detention procedure. The facts that the customs officers relied on the ground their suspicion would have included:

¹¹ SLUHCV2014/0309 consolidated with SLUHCV2016/0187 (delivered 10th May 2017, unreported) at paragraph 21. The learned judge’s decision was reversed on appeal but not on this point.

- (a) information that they had received which caused them to look closely at imports from China;
- (b) discrepancies between the declared value and actual value of the goods imported;
- (c) information about the named Chinese exporter of some of the goods which turned out to be false; and
- (d) Mr. Xu's unsubstantiated claim that he was using the imports to send money to his ex-wife in China.

The judge had to assess this evidence and the credibility of the witnesses in deciding whether the officers had enough evidence to form a reasonable suspicion that the Company was attempting to evade payment of duty. The judge at first seemed to go along with the decision to proceed directly to seizure and I do not think he erred in doing so. It is not for the court to second-guess the Comptroller's decision to issue notices of seizure. The court's role on a judicial review application is to ensure that the decision maker (the Comptroller) followed the correct procedure. We were reminded of this in the 2nd paragraph of the learned judge's judgment where he said-

"Secondly the court's main concern in a claim for judicial review is not whether the decision to seize was right or wrong but whether the manner in which the seizure was imposed, was for reasons which were ultra vires the Customs Control and Management Act, irrational, applied irrelevant consideration and was in breach of natural justice rights of the Claimant."

[34] Following his own guidance the judge was satisfied that the Comptroller had reasonable grounds for suspecting that the Company was attempting to evade the proper payment of customs duties on the containers based at least on the facts outlined in paragraph 33 above. Examples of his findings are:

Paragraph 9: "Upon review several anomalies were noted which caused the customs agents to question the value presented."

Paragraph 17- "In the circumstances, it is fair to say that the containers and Mr. Xu's explanations sent up clear red flags for customs officers."

Paragraph 85 – "I have concluded that the Customs Department may have had a basis for suspicion that the Claimant was attempting to evade duty but

they went beyond what was reasonable in attempting to enforce the payment of duty.”

- [35] These are findings of fact by the learned trial judge based on his assessment of the written and oral evidence, and the demeanour of the witnesses, which do not appear to be plainly wrong. He concluded, initially, that the seizure of the containers was based on reasonable suspicion and was not unlawful or ultra vires the Act. This is a finding of mixed fact and law and on the well-known principles summarised above,¹² this Court will not lightly interfere.
- [36] However, this is not the end of the matter. The Company having given notice to the Comptroller on 4th March 2014 that the goods seized were not subject to seizure, the Comptroller was mandated by paragraph 6 of Schedule 4 of the Act, to initiate proceedings in either the Magistrates’ Court or the High Court for the forfeiture and condemnation of the goods seized. This applied to the goods in Container 2 because Container 1 had already been released to the Company.
- [37] The Comptroller did not commence the forfeiture and condemnation proceedings as required by paragraph 6.¹³ As a result the Company applied for leave to bring judicial review proceedings against the Comptroller on 24th July 2014. The filing and service of the judicial review claim in September 2014 did not prompt the Comptroller to start the condemnation proceedings, or to release Container 2 to the Company. This delay in the release of Container 2 is at the heart of the dispute between the parties in the judicial review and constitutional proceedings.
- [38] The learned judge’s findings on the issue of the delay are interesting. Having found that the Comptroller may have had a reasonable basis for suspecting that the Company was attempting to evade the payment of customs duties, the judge then went on to deal with the delay in commencing condemnation proceedings based on the apparently lawful seizure of Container 2. The judge made the following findings on delay:

¹² Paragraphs 19 and 20.

¹³ The relevant parts of schedule 4 are set out in paragraph 7 above.

Paragraph 74 – “In my view, it may be arguable that the Notice of Seizure can be issued on mere suspicion. But on issuing the notice of seizure as long as the complainant importer objects to the seizure and files a claim in the proper manner the Comptroller of Customs and no one else must initiate forfeiture proceedings. It is at this point based on a failure to act that the court is empowered to conclude that the defendant never had sufficient evidence to proceed to forfeiture and therefore should have released the container #2.”

Paragraph 25 - “If there is no indication of the next step being taken in a reasonable time the Claimant becomes entitled to demand that such a step be taken in order for the constitutional right to exercise the normal attributes of property ownership to be realized.”

Finally, and perhaps most significantly, the learned judge summed up the effect of the delay on the seizure in paragraph 89 of the judgment which is set out in paragraph 30 above. The effect of this finding is also set out in paragraph 30. To repeat, it is that even though the seizure may have been lawful initially based on reasonable suspicion, it became unlawful because of the Comptroller’s failure to commence condemnation proceedings in a reasonable time.

[39] The delay in this case can be measured in two ways. Time started to run as soon as the Comptroller received the Company’s challenge on 4th March 2014 and continued until 2nd September 2014 when the Company commenced the judicial review claim by filing its fixed date claim form. This is approximately six months. The other way of assessing the delay is to say that it continued until November 2017 when the trial judge ordered the release of Container 2, a period of 45 months.

[40] Mr. Theodore, QC argued that the initial period of six months was not an unreasonable time for the Comptroller to commence forfeiture proceedings and once the Company started the judicial review proceedings challenging the validity of the seizures the Comptroller was no longer in a position to commence parallel proceedings justifying the seizure, or it would not be reasonable for him to do so. To assess the effect of delay on the lawfulness of the seizure it does not matter which period is used. The trial judge made a clear finding of fact that there was unreasonable delay by the Comptroller after receiving the challenge to the seizures by the Company. While the judge did not state specifically

the period by which he found that there was an unreasonable delay, it is apparent from other findings that he made that the initial period of six months of total inaction by the Comptroller was enough to find unreasonably delay.¹⁴

[41] The finding of unreasonable delay led the trial judge to make another important finding. In paragraphs 25 and 74 of the decision, the judge found that the failure of the Comptroller to commence the forfeiture proceedings allowed the Court to conclude that the Comptroller never had sufficient evidence to proceed to forfeiture. This is a reasonable inference for the trial judge to have drawn based on the evidence.

[42] The result is that the seizure of Container 2, which may have started out lawfully based on the Comptroller's reasonable suspicion, became unlawful for two reasons (i) the unreasonable delay and inaction in not taking proceedings in court for the forfeiture and condemnation of the goods seized; and (ii) the finding that Comptroller did not in fact have sufficient evidence to have effected the seizure. Based on these two findings, which I adopt, I find that the learned judge did not err in concluding that the seizure of Container 2 was unlawful and ultra vires the provisions of section 130 and schedule 4 of the Act.

Container 1

[43] The facts concerning the seizure and release of Container 1 are set out in paragraphs 4 to 9 above. The Company challenged the seizure of Container 1 by challenging the fee of \$33,007.68 that was paid to secure the release of the Container. The fee is made up of \$13,007.60 (alleged) outstanding duties and a restoration fee of \$20,000. The learned judge treated the entire payment of \$33,007.68 as the "restoration fee" and I will do the same.

[44] The Company challenged the restoration fee by way of an appeal to the Comptroller under section 136 of the Act by letter dated 4th March 2014 from its counsel, Mr. Vandyke Jude. Section 136 of the Act reads –

¹⁴ See paragraphs 88 and 89 of the judgment.

“(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.”

[45] The grounds of appeal as set out in Mr. Jude’s letter are:

- “1. Pursuant to section 136 of the Customs Act I am formally appealing against the decision to take a deposit of \$33,007.16 as a precondition for the release of the seized container.
2. The basis of the deposit was not explained to Mr. Xu and appears to exceed the duty paid stipulation authorised under section 130(5)(a) of the Act.
3. The wrongful actions of your offices, the false imprisonment of my client, the unlawful pressure and intimidation, the illegal search and seizure of his offices and the absence of any evidence of wrongdoing to support allegations in the notice of seizure require explanation by you .”

Mr. Jude made a brief comment in the letter about the Comptroller’s habit of not responding to his (Mr. Jude’s) letters. The comment appears to be justified because the Comptroller did not respond to the letter nor take any action to deal with the Company’s appeal against the restoration fee.

[46] The trial judge took note of the Comptroller’s failure to return the restoration fee or to take notice of the appeal against the imposition of the fee. He found that the Company had established a basis for judicial review and constitutional relief in respect of the notice of seizure of Container 1. The judge decided the issue of Container 1 in part on the facts of the case. There was evidence presented by the witnesses for the Company that Mr. Xu was treated very badly by the customs officers and was forced to agree to the payment of the restoration fee to secure the release of Container 1. There is also evidence that Mr.

Xu refused to sign the “Request to Compound Offences and Restore Goods under section 125 and 130 of the Act” on the ground that he was not guilty of any offences under the Act mentioned in the Request. A copy of the Request is at page 315 of the Core Bundle. The judge accepted the Company’s evidence and found at paragraph 75 of the judgment that

—

“In my view the Claimant has demonstrated that the manner in which the goods was seized was procedurally wrong because it was used as a coercive measure to force a further payment of duty out of the claimant even before a valuation of the goods seized had been established.”

This is a finding of fact by the trial judge with which this Court will not lightly interfere. Customs officers should not use their powers in a coercive manner to force an additional payment of duty or a restoration fee to secure the release goods that have been seized.

[47] It is also clear from paragraph 91 of the judgment that the judge took into consideration that the Comptroller’s failure to deal with the Company’s appeal against the imposition of the restoration fee denied the Company the right to a hearing to argue its case against the seizure of both containers and the payment of the restoration fee of \$33,007.68.

[48] The judge ordered the return of the \$33,007.68 to the Company and there is no basis for this Court to interfere with that order.

Claim for breach of the Constitution

[49] The Company’s claim for relief under the Constitution is on the basis that the actions of the Comptroller and his offices were arbitrary, oppressive, unconstitutional and are contrary to sections 6 and 7 of the Constitution and the Company is entitled to damages, including aggravated and exemplary damages

[50] The starting point in the claim for constitutional relief is the finding by the trial judge that the containers were seized by the Comptroller based on reasonable suspicion that the Company was evading customs duties and the Comptroller failed to commence

proceedings for the forfeiture and condemnation of the seized goods within a reasonable time, or at all. The judge concluded that the Comptroller did not have sufficient facts to seize the containers and the seizures were unlawful and ultra vires section 130 of the Act. The result is that the Company was deprived of its property for six months in the first instance when the Comptroller did nothing to commence the forfeiture proceedings, and then for another 39 months when the Comptroller relied on the fact that judicial review proceedings had been launched by the Company concerning the validity of the seizures as the reason for not releasing the seized goods to the Company.

[51] The Company's right not to be deprived of its property is found in sections 6(1) of the Constitution which provides that:

"(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except for a public purpose and except where provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation."

However, the right to property is not absolute and is qualified by section 6(6) -

"(6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1)-
(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right-
(i) in satisfaction of any tax, rate or due;
(vii) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry..."

The Act is a law contemplated by section 6(6)(a) of the Constitution. It makes provision for seizing a person's property in satisfaction of customs duties owed and also to detain such property to investigate whether duties are in fact owed by the owner of the property. The detention or seizing of goods under the Act must be for only so long as is necessary to carry out the legitimate purposes of the Act. The learned judge observed at paragraph 37 of his judgment that –

"It cannot be fair to maintain the seizure of goods without any procedure being adopted for the compensation of the owner or the condemnation of goods where his claim can be heard."

This observation by the trial judge coupled with his finding that the Comptroller's delay in commencing condemnation proceedings was unreasonable is not only correct, but justified on the facts, whether measured by the initial delay of six months or the overall delay of 45 months.

- [52] I have no hesitation in affirming the judge's conclusion that the Comptroller's unreasonable delay in commencing condemnation proceedings of the goods in Container 2 and failing to deal with the Company's appeal against the restoration fee for Container 1, breached the Company's constitutional right not to be deprived of its property except in accordance with section 6 of the Constitution. This takes me to the issue of damages which, regrettably, the Court did not receive assistance from the judge's decision and the submissions of counsel.

Damages

- [53] The Company's claim for damages was made up of damages for breaches of the Constitution and special damages (including damages for loss of profits).

Damages for breach of the Constitution

- [54] The principles for assessing damages for breach of the Constitution in a case like this are set out in the recent judgment of the Court of Appeal in **Econo Parts Ltd v Comptroller of Customs and Excise; Mr Parts Ltd v Comptroller of Customs and Excise**.¹⁵ The facts in the **Econo Parts** case bear a striking resemblance to this appeal, including the names of the customs officers. The property of the appellants was seized by the Comptroller who did not commence condemnation proceedings for approximately three and a half years. In the absence of any action by the Comptroller to commence condemnation proceedings for the seized goods, the appellants brought proceedings for judicial review and breaches of the Constitution. The trial judge granted certiorari to quash the decision to seize the appellants' goods, but did not award damages because he decided that the Comptroller was entitled to immunity from damages and costs under section 133 of the Act.¹⁶ The appellants appealed on this point and the Court of Appeal

¹⁵ [2020] 1 LRC 275.

¹⁶ Section 133 is set out in paragraph 63 below where I deal with the issue of immunity.

reversed the trial judge's decision and awarded damages for breach of the appellants' constitutional right to property. The unanimous decision of the Court of Appeal was delivered by the learned Chief Justice Dame Janice Pereira who addressed the issue of damages starting at paragraph 27 of the judgment. The Chief Justice referred firstly to the Privy Council decision of **Attorney General of Trinidad and Tobago v Ramanoop**¹⁷ and the speech of Lord Nichols when His Lordship opined-

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

Her Ladyship also referred to the dicta of Lord Hope in **Inniss v the Attorney General of Saint Christopher and Nevis**;¹⁸ where his Lordship opined-

"The purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right. It is not to punish the Executive. But vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest. Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard."

The Chief Justice also referred to the cases of **Romauld James v The Attorney General of Trinidad and Tobago**;¹⁹ **Sir Gerald Watt, KCN, QC v Prime Minister and another**;²⁰ and **Merson v Cartwright and another**²¹ on the issue of damages for breaches of the constitution.

¹⁷ [2005] UKPC 15.

¹⁸ [2008] UKPC 42.

¹⁹ [2010] UKPC 23.

²⁰ [2013] ECSCJ No. 142.

²¹ [2005] UKPC 38.

- [55] The principles that I extract from these cases are that the courts are concerned to uphold or vindicate the dignity of the constitutional right that has been infringed. This is sometimes achieved by a declaration acknowledging the breach without an award of damages. But sometimes this is not enough. Where the person affected has suffered damage the court may award compensation using, as a guide only, the common law measure that would have been awarded. Finally, in an appropriate case the circumstances and the nature of the breach may call for an award of substantial damages to reflect the sense of public outrage and to emphasise the importance of the constitutional right and the gravity of the breach (per Lord Nicholls in **Ramanoop**). Lord Nicholls was careful to point out that this level of damages is not exemplary or punitive damages (since constitutional damages are not designed to punish the Executive). What is clear from the authorities is that an award of damages at this level is more than compensatory and can be substantial depending on the nature of the breach and all the circumstances of the case.
- [56] The Court of Appeal in the **Econo Parts** case deprecated the conduct of the Comptroller as disregarding the clear provisions of the Act. The appellants' property was seized and nothing was done to progress the seizure by commencing the condemnation and forfeiture proceedings for three and a half years. The appellants were without their property all this time and they were forced to apply to the court for relief. The Court of Appeal had regard to the length of deprivation and the conduct of the customs officers and decided that "Based on the evidence, this Court is in as good a position to assess the quantum (of vindictory damages) to be awarded." The Court of Appeal awarded \$75,000.00 vindictory damages.
- [57] Turning to this case, as I have pointed out above the delay was in two stages. During the first period of six months following the challenge to the seizure of the containers there can be no excuse for the Comptroller's failure to initiate the condemnation proceedings in respect of Container 2 and hearing the appeal in respect of Container 1. The following period leading up to the delivery of the judge's decision in November 2017

is no less egregious on account of the Comptroller's belief, even if genuine, that he could not or should not release Container 2 while the judicial review claim was pending.

[58] Having found that the Comptroller was guilty of unreasonable delay in dealing with the Company's challenges to the seizures, the trial judge found that customs officers did not have proper evidence to support the seizure of the Containers and that the seizures were unlawful and ultra vires the Act. He ordered that Container 2 and the restoration fees should be returned to the Company forthwith.

[59] The trial judge also made several findings that are adverse to the Comptroller on the issue of damages. The judge found that a "grave injustice has been done";²² the officers used coercive measures to force a further payment of duty out of the Claimant;²³ the failure to commence condemnation proceedings having seized the goods was "harsh and unconscionable treatment which is arbitrary and unjustifiable";²⁴ and the breach of the Constitution is so grave that the Claimant should be awarded aggravated damages to be assessed."²⁵ The only mitigating circumstance is that the Comptroller, as opposed to the Comptroller in the **Econo Parts case**, claimed that he had the right to retain possession of the seized properties during the judicial review proceedings. However, this claimed right, even if the Comptroller truly believed that he had it, does not affect the continued unlawful holding of the seized goods and the outstanding claim for the return of the restoration fee.

[60] In this case, the conduct of the Comptroller and his officers was such that a declaration that the Company's constitutional rights have been breached is not sufficient. This is a proper case for an award of vindictory damages.

[61] The trial judge left the assessment of damages to be done in separate proceedings.²⁶ There was no appeal against the judge's decision to order separate assessment

²² Para 72 of the Judgment.

²³ Para 75 of the Judgment.

²⁴ Para 79 of the Judgment.

²⁵ Para 93 of the Judgment.

²⁶ Para 93 of the Judgment.

proceedings and counsel for the parties did not address the Court on the quantum of vindicatory damages. In the circumstances, I would not disturb the judge's decision to order a separate assessment except to describe the damages to be assessed as vindicatory damages and not aggravated damages. The assessment should be done on submissions only using the evidence that was led before the lower court.

Special damages

- [62] The claim for special damages is for the return of the restoration fee of \$33,007.68, the \$4,173.75 excess storage fees, demurrage and port charges on Container 2, and loss of profits on the goods in Container 2.²⁷ The trial judge ordered the return of the restoration fee and that Container 2 be released to the Company free of any port charges. For the reasons stated in paragraphs 43-53 above I would dismiss the appeal against this part of the judge's order. The judge did not order the return of the \$4,173.75 excess port charges nor any amount for loss of profits. There is no cross appeal against his failure to do so and no further order is required for these items.

Section 133 of the Act - Immunity

- [63] Section 133 of the Act gives the Comptroller and his officers immunity from damages and costs in certain circumstances. The circumstances are set out in the section which reads -

“(1) Where, in any proceedings for the condemnation of anything seized as liable to forfeiture under any customs enactment, judgment is given for the claimant, the court may, if it sees fit, certify that there were reasonable grounds for the seizure.

(2) Where any proceedings are brought against the Government or the Comptroller on account of the seizure or detention of anything as liable to forfeiture, and judgment is given for the plaintiff or prosecutor, then if either-

- (a) a certificate relating to the seizure has been granted under subsection (1); or
- (b) the court is satisfied that there were reasonable grounds for seizing or detaining that thing,

the plaintiff or prosecutor shall not be entitled to recover any damages or costs.”

²⁷ Paragraph 25 of the fixed date claim form – page 232 of the Core Bundle.

In this case proceedings were brought against the Comptroller because he seized or caused the seizure of the Containers but the case does not fall into any of the two categories creating exemptions in section 133. There were no condemnation proceedings and a certificate could not have been issued under subsection 1. Therefore paragraph (a) does not apply. The trial judge found and this Court has confirmed that there were no reasonable grounds for seizing the containers and therefore paragraph (b) does not apply. Section 133 of the Act does not assist the Comptroller.

Conclusion

- [64] The Comptroller's decision to seize and retain the Company's property for an excessively long time was unreasonable in the **Wednesbury**²⁸ sense and the learned trial judge was correct to quash the notices of seizure. The conduct of the Comptroller and his officers was so unprofessional as to warrant an award of damages for breaches of the Constitution including an award of vindicatory damages.
- [65] I would dismiss the appeal, affirm the trial judge's orders, and order the appellant to pay the respondent vindicatory damages to be assessed and the Company's costs of the appeal at the rate of two-thirds of the costs assessed in the court below.
- [66] The assistance of counsel is gratefully acknowledged and I apologise for the delay in the delivery of this judgment due mainly to the pressures of work.

Order

- (1) The appeal is dismissed.

²⁸ See: Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 K.B. 223.

- (2) The case is remitted to the High Court to assess the quantum of vindicatory damages.
- (3) Costs of the appeal to be paid by the appellant at the rate of two-thirds of the amount assessed for the proceedings in the lower court.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Humphrey Stollmeyer
Justice of Appeal [Ag.]

By the Court

Chief Registrar