

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

SAINT LUCIA

CLAIM NO: SLUHCV2014/0513

BETWEEN:

CHINA TOWN INC

Claimant

and

THE COMPTROLLER OF CUSTOMS & EXCISE

Defendants

APPEARANCES:

Mr. Van Dyke Jude and Mr. Clarence Rambally for the Claimant
Ms. Jan Drysdale for the Defendant

2016: April 20;
2017: November 28.

JUDGMENT

- [1] **BELLE J:** 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.
- [2] Secondly the court's main concern on 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.

- [3] Thirdly the court is concerned in this case with whether the manner in which the Customs Department's decision to seize the Claimant's containers in preparation for forfeiture was exercised was unconstitutional or whether the procedure was protected by a constitutional proviso.
- [4] The court would therefore be concerned with whether in the exercise of their powers, Customs Department can use any mechanism under the Act to inflict punishment on an importer absent of court proceedings, without running afoul of the Act and the Constitution.
- [5] Finally the Defendant has raised the issue that the Comptroller is not the person who decided to seize the Containers. Can this objection be sustained?
- [6] Certain factual issues also have to be decided. Firstly, there were two seizures of goods, Can the same remedy be applied to both seizures? How do we deal with the fact of a negotiated release of the first container?
- [7] It is apposite to note that the evidence in this case reveals certain prominent features that have some bearing on the outcome of the claim. I summarize these features as follows.
- [8] On 28th November 2013 the broker for the Claimant presented the valuation department of the Customs and Excise with documentation for the purpose of determining the value of goods imported. These imported goods were to arrive in Saint Lucia as container # BMOU45315, hereinafter referred to as container #1.
- [9] Upon review several anomalies were noted which caused the Customs agents to question the value presented. The agents requested that the declarant attend the unit for an interview.

- [10] Subsequent to a meeting between Mr. Xu of the Claimant's Company and a senior officer, a notice of seizure was given to Mr. Xu on 16th December, 2013. That notice was signed and returned to the Customs Department by Mr. Xu on 19th December, 2013.
- [11] On 20th December, 2013 Mr. Xu on behalf of the Claimant approached the Valuations Department and requested administrative settlement of the matter pursuant to number 2 of the notice.
- [12] A payment of settlement of the matter was issued by the Claimant on 6th January, 2014. The container was on 13th January examined and released to the Claimant.
- [13] On 6th February, 2014 the broker of the Claimant attended the Valuation Unit for an assessment of a container of goods of the Claimant. This was container #ZCSU7001360 hereinafter referred to as container #2. A meeting was convened with Mr. Xu on the 7th day of February, 2014 and upon rejection of the valuation of the goods a notice of seizure was issued to the Claimant that day in respect of the container of goods.
- [14] The Claimant was a relatively large importer of items from China. In 2012 the Defendant's office received credible information which caused it to look more closely at imports from China. The case before the court relates to the importation of two containers of goods which displayed certain features which ended in the decision being taken by the Defendant to seize the second container.
- [15] The process which was engaged at first appeared logical based on the anomalies which were found in the documentation submitted by the Claimant. The major anomalies involved a large discrepancy between the money paid for the goods involved in each of two consignments and the money actually paid for the goods in China. According to customs officers, the difference between the two was the sum

of \$200,000.00. Another anomaly was that the documents referred to a company of origin for some of the goods which on further scrutiny turned out to be false.

- [16] Thirdly, the Claimant's General Manager claimed that he used the consignment to send money secretly to his ex-wife in China. But he was unable to produce any evidence to support this claim and indeed none of the documents produced were in a form other than by email. In addition to this the Claimant used a third party who spoke very little English to handle some of the documentation in the importation process on the behalf of the Claimant's Company and saved documents in Chinese.
- [17] In these circumstances, it is fair to say that the containers and Mr. Xu's explanations sent up clear red flags for customs officers.
- [18] I note that in spite of the circumstances, the dealings between the Customs officers and Mr. Xu appeared quite cordial at first even after Mr. Xu according to customs officers appeared to be annoyed that his wife was handing over too much information to the customs officers.
- [19] Apart from the cordial atmosphere of the dealings as described by customs officers, which I have no reason to doubt, customs appeared to have been left with the understanding by Mr. Xu's lawyer at the time, Mr. Pierre, that Mr. Xu would settle the matter administratively. We have to conclude that this apparent inclination did not go beyond the first container, which was seized on 19th December, 2013.
- [20] But the hope of administrative settlement did not hold and instead the relationship went downhill and culminated in this claim being filed and along with many interlocutory hearings.
- [21] The Claim filed proceeded in the terms set out below.

[22] China Town Inc. (CT) Claimed as follows:

- a) Return of the deposit of \$33,007.68 for Container #1.
- b) Excess storage charges to SLASPA of \$4,173.75 for Container #1.
- c) Demurrage charges for Container #2 to be calculated.
- d) Port charges for Container #2 to be calculated.
- e) Loss of profits on the resale of goods in container #2 to be calculated.

[23] China Town also expanded on its claim in the following terms:

“The Failure to return the deposit of \$33,007.68 XCD for container #1 is a contravention of Section 136 of the Customs (Control and Management) Act of the Revised Laws of St Lucia 2008.

The improper seizure of Container #2 has deprived CT of its property and constitutes an unlawful taking of property by customs in violation of section 6 and 7 of the Saint Lucia Constitution Order Chapter 1.01 of the Laws of Saint Lucia 2006. The violation entitles CT to damages, including aggravated and exemplary damages.

Moreover part of the responsibility of and obligations of Customs is to facilitate trade and there is a public interest in preventing the misuse of powers which are arbitrary, oppressive and unconstitutional as is the behaviour of Customs in the instant case.

There is no alternative form of redress other than judicial review to compel Customs to act according to law and the established policies and procedures of that Department.”

[24] The Claimant continued,

“The Claimant is personally and directly affected by the matters set out below:

- a. On December 19, 2013 Customs improperly and prematurely issued a Notice of Seizure for Container # 1. The Notice of Seizure alleged untrue declarations, counterfeiting of documents and fraudulent invasion (claimant’s words) of duties. These serious criminal violations were levied without any or any proper evidence of wrongdoing by CT.
- b. Evidence that there was no proper basis for the seizing of Container #1 is that the very next day on December 20th, 2013 Container #1 was conditionally released by Customs upon the agreement of CT to pay an additional deposit of \$33,007.68.
- c. Container #2 was improperly seized by Customs in retaliation for CT refusing to sign an admission of guilt form for Container #1. There

was a complete failure by Customs to consider a less draconian measure than seizure.

d.

e.

f. Customs in violation of its obligation to facilitate trade, issued the seizure notices knowing that such draconian measure would adversely affect CT's business. The seizure notices were issued to coerce a financial settlement in which the Agents could derive personal bonuses of up to 30% of the extracted settlement. Customs should have considered taking other measures which would have been less catastrophic to the Claimant's business and which were more commensurate to trade facilitation and in accordance with established Customs policy and procedure.

g. The Customs (Control and Management) Act Cap 15.5 (hereinafter called The Act) provides a timeframe of up to five (5) years for the department to conduct their investigations. Customs uses this five (5) year framework to unlawfully deprive importers of their consignment in violation of established Customs policy and procedure.

h. Before issuing the notices of seizure, Customs failed to consider mitigating factors, including but not limited to the impeccable importation history of CT. Not considering mitigating factors in favour of the Claimant is in violation of established Customs policy and procedure.

i. The Claimant has a legitimate explanation (expectation) that it be treated uniformly and have the same procedures applied to its containers as all other importers. Here Customs unreasonably and unfairly targeted the Claimant's containers even before they were inspected. The inspection process was deliberately drawn out and conducted with intent to seize the container upon the finding of any anomaly. The agents conducted the inspection by behaving with intimidation and hostility towards the Claimant. The act of seizure was not based on reasonable facts.

j. Customs have breached their duty to communicate and investigate and the Claimant's complaints regarding misbehaviour by its agents and their failure to timely and properly execute clearing the containers to the public. Customs completely ignored communications written on behalf of the Applicant. In two letters dated March 4, 2014 (incorrectly dated March 4, 2013) the Claimant requested investigative action by Customs into the misconduct of its Agents and informed that CT was making a "CLAIM AGAINST THE SEIZURE." The letters requested

that Customs promptly initiate proceedings so that CT can claim against the seizures. Customs have not initiated the requested proceedings because they do not have any credible evidence to present to the court justifying the seizures.

- k. Customs have threatened to shut down the Claimant's business. Customs have no such power and no rational basis for the threat, and it is the Claimant's belief that without court intervention Customs will continue to issue unwarranted threats for the personal financial gain of its Agents.
- l. The actions of Customs are arbitrary, oppressive and unconstitutional in that they are contrary to Sections 6 and 7 of the St Lucia Constitution Order 1.01 of the Revised Laws of Saint Lucia 2006 and CT is entitled to damages, including aggravated and exemplary damages.
- m. No reasonable body possessing a similar statutory mandate as Customs would act so unreasonably and fail to consider, or adequately consider a broad range of important factors and relevant considerations before making the decision to seize CT's containers. Customs failed to have regard to policies and procedures governing their investigations. Customs failed to seek expert advice on matters beyond the expertise of their agents. Customs failed to consider exonerating evidence. Customs failed to consider its mandate to facilitate trade. Customs improperly used the documented under invoicing of others involved in the importation business from China as evidence in this case. Customs improperly relied upon the agents' immunity from suit to harass and embarrass the Claimant. Customs improperly used the threat of locking down CT's premises to coerce an illegal settlement from the Claimant. Customs improperly issued the notices of seizure knowing that it did not have sufficient evidence to issue the same. Customs improperly issued the notices of seizure as a tool to coerce settlement from the Claimant.
- n. Customs have unreasonably delayed and/or refuse to complete and submit its claims supporting the Notices of Seizure in the High Court."

[25] One clear implication arising from the evidence is that at no time did the Comptroller of Customs or his officers contemplate any action post seizure. Or at least they never stated that they did. But seizure is not a stand-alone form of sanction. Seizure is a step taken in law to prevent the conversion of the goods seized into something else or to render the customs and excise process nugatory by selling the goods and in some way making it more difficult for Customs to

enforce accountability under the relevant legislation. But the seizure process in the legislation comes under the heading of forfeiture and in a very real way is a step towards forfeiture or condemnation. Consequently at the time of seizure and notice being given that the seizure is opposed there is no need to file a claim in detinue and conversion. It is the Defendant who has started a process which it should be prepared to finish. Consequently the Claimant becomes entitled to know where he stands in relation to this step of seizure. If there is no indication of a next step being taken in a reasonable time the Claimant becomes entitled to demand that such a step be taken in order for their constitutional right to exercise the normal attributes of property ownership to be realized.”

THE LAW

- [26] It is convenient at this juncture to review some relevant aspects of the statutory framework relevant to this case.

Section 136 of the Act reads 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.

- [27] Section 3 of Schedule 4 of the **Customs (control and Management) Act** dealing with forfeiture states as follows:

FORFEITURE

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; or
 - (c) in the case of anything seized in a vessel or aircraft, the master or commander of that vessel or aircraft.
- 2. Notice under paragraph (1) shall be given in writing and is considered to have been duly served on the person concerned—
 - (a) if delivered to him or her personally;
 - (b) if addressed to him or her and left or forwarded by post to him or her at his or her usual or last known place of abode or business, or in the case of a body corporate at its registered or principal office; or
 - (c) where he or she has no address in Saint Lucia, or his or her address is unknown, by publication of the notice of seizure in the Gazette and in a newspaper circulated in Saint Lucia.
- 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 authorized 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.
- 7. Where anything is in accordance with either paragraphs 5 or 6 deemed to have been condemned or condemned as forfeited, then without prejudice to any restoration or sale, the forfeiture is

considered to have had effect from the date when the liability to forfeiture arose.

8. Proceedings for the condemnation of anything shall be civil proceedings and may be instituted—
 - (a) in any magistrates court having jurisdiction in the place—
 - (i) where any offence in connection with that thing was committed or where any proceedings for such an offence have been instituted,
 - (ii) where the claimant resides or, if the claimant has specified a solicitor under paragraph 4, where that solicitor has his or her office, or
 - (iii) where that thing was found, detained or seized or to where the thing was first brought after being found, detained or seized; or
 - (b) in the High Court.
9.
 - (1) In any proceedings for condemnation, the claimant or his or her solicitor shall make oath that the thing was, or was to the best of his or her knowledge and belief, the property of the claimant at the time of the seizure.
 - (2) In any proceedings for condemnation before the High Court, the claimant shall give such security for the costs of the proceedings as may be determined by the court.
 - (3) If any requirement of this paragraph is not complied with, the court shall give judgement for the Comptroller.
10.
 - (1) Any party to condemnation proceedings in a magistrate's court may appeal to the High Court against the decision of that magistrate's court in those proceedings.

[28] There is ample evidence from both sides that the Claimant gave the required notice pursuant to Section 3 of Schedule 4 that it intended to challenge the intention to forfeit the goods seized. Customs never asked for time to file an action for that purpose to obviate the need for judicial proceedings. The Comptroller of Customs never responded to the Claimant's letter of March 4th 2014, (incorrectly dated March 4th 2013), complaining of Customs procedures and the impact on China Town and registering an appeal against the conditional payment of \$33,007.68 demanded by customs and paid on January 7, 2014 in relation to Container #1.

TIME LINE

- [29] An important aspect of the Claimant's case is the time line submitted by the Claimant. This is important because the issue of the time limitation of Customs arises pursuant to sections 102, which refers to importers keeping records for 5 years; and section 97(2) which prevents arrests for any offence more than 5 years after the date of the alleged offence, provided that an arrest can take place more than 5 years after the offence if it was not practicable to proceed at the time of the offence. Section 120 provides for proceedings to be commenced not more than 5 years after the date of the commission of the offence.
- [30] However customs does not act in a vacuum, in this case a period of some five months passed after the alleged offences were committed in relation to container #2 and before an application was filed requesting leave to file a claim for judicial review. Four months also passed without a reply from the Comptroller of Customs to the Claimant's letter of March 4th 2014 in which the Claimant registered an appeal against the conditional payment of \$33,007.68 for the release of container #1.
- [31] **The Customs (Control and Management) Act** contains the necessary provisions to enable the control of goods into and the export of goods from Saint Lucia. Like any other regulatory and excise provision it confers powers on the Customs Department and the Comptroller of Customs. Powers are enforced by way of court action for debt for duty owed, penalties for breaches of the law including fines or imprisonment and forfeiture or condemnation and sale of goods found to have been imported in breach of the legislation.
- [32] The legislation provides for appeals against decisions of the Comptroller of Customs or his customs officers going as far as the High Court and Court of Appeal.
- [33] The legislation also provides the Comptroller with the power to make compromises. An example of this appears in Section 130 (5) (a) and (b) of the

Act. However, the compromises do not include the use of coercive measures which are not provided for in the legislation. The legislation therefore does not provide for power to be exercised arbitrarily, even though the Comptroller and his officers are entitled to use their discretion. But such discretion must be used reasonably.

[34] Evidence was led to the effect that Customs used threats and coercion without the statutory power to do so. If threats were used that act would be outside of the four corners of the legislation which empowers Customs to rely on their regulatory powers and not threats. If other things were done which were out with the authority conferred by the legislation such actions would be unlawful. If Customs exercised their discretion unreasonably that exercise of discretion would also be unlawful.

[35] The Forfeiture procedure pursuant to Schedule 4 of the Act was triggered by the Notice of Seizure. This meant that the Claimant's constitutional right to property was being infringed but for the proviso to section 6 of the **Constitution of Saint Lucia**. Section 6 (1) of the **Constitution of Saint Lucia** states:

- "6. Protection from deprivation of property
 - 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."

[36] Subsection (6) of Section 6 of the **Constitution** states inter alia:

- "(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,
 - ii) by way of penalty for breach of any law or forfeiture in consequence of breach of any law."

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

[38] If indeed Customs had already formed the view that the law was breached to such an extent that forfeiture was a fair remedy, it should be prepared to proceed to forfeiture or compromise for the return of the goods which is provided for in Section 130 of the **Act**.

“Section 130 (5) of the Act states:

- (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;”

[39] It should be noted that the Claimant had already made a payment towards the entry of the goods but refused to sign certain other documents or make further payments, because he did not think that the assessment of customs was fair and indeed there had been no full assessment of the value of the goods and declaration of duty based on the said value. This puts the basis for continuing the seizure in question.

[40] The evidence supporting this conclusion is as follows:
Mr. Xu of the Claimant company stated in para 21 of the Affidavit in support of his Claim the following:

“On February 7, 2014, I went to meet Customs in relation to Container #2 at the request of my broker. There I met Mr. Promesse, Mr. Charlery and Mr. Solomon. Mr. Charlery confirmed that after reviewing the invoice for Container #2, Customs were satisfied with the listed prices. However, he said that I deliberately omitted putting the freight charges on the invoice. I told them that the supplier paid the freight as the invoice was C&F. The agents insisted that they had proof that I paid freight. Mr. (Y) Charlery then accessed the Chinese company’s website and stated his belief that I had never dealt with that company. The Agents continued to question me in a hostile manner accusing me again of manufacturing false invoices. They then requested that I sign the admission of guilt form for the offences listed in the Notice of Seizure for Container #1. It was my impression that they were insinuating that Customs would release Container #2 if I signed the admission of guilt form for Container #1.”

- [41] Grantley Promisse who described himself as the officer in charge of the Valuations Department within the Customs and Excise Department had the following to say at paragraph 31 to 35 of and paragraphs 61 and 62 of his witness statement:

“Whereas the payment made by China Town Inc. to Best Trust in 2013 equaled the sum of US \$400,856.32 the total value of invoices declared by China Town Inc. in 2013 equaled the sum of US \$180,128. 41.

I and the other officers also noted that payments were also made via First Caribbean International Bank, payment transfers by a local company, OK Supermarket Ltd. In the sum of US \$59,000 to Best Trust.

Although Mr. Xu had declared himself as the director of OK Supermarket Ltd. in the year 2013 the Customs records revealed that there were no importations from Best Trust consigned to OK Supermarket Ltd.

The Total Payments made to Best Trust by Mr. Xu through his companies China Town Inc. and OK Supermarket Ltd, in the sum of US\$400,856 and US\$59,000 respectively in the year 2013, exceeded the total value of the consignments imported from Best Trust by any of the local companies directed or owned by Xu.

The total declared value of good imported by the Claimant equaled the sum of US \$180,128.41. The difference between monies paid to Best Trust by Mr. Xu’s local companies, and the total value of consignments imported from Best Trust by China Town Inc. is the sum of US \$280,327.91.”

[42] At paragraphs 61, 62 and 63 Mr. Promisse states:

“The Defendant contends that on February 6th 2014 at approximately 10:00am, a broker from Customs Brokerage Solutions presented Customs Entry # C4809 dated 06/02/2014 on behalf of the importer China Town Inc. to the Customs Valuation Unit for the purposes of undergoing a valuation review.

A review of the copies of the documents also revealed some anomalies. For instance company Guangdong Machinery Imp. & Exp. Co., Ltd (GMC) declared on the Customs Entry # C4809 dated 06/02/2014, as the seller of the consignment was found to not to be the seller or supplier of any of the goods imported. Further all contact information concerning that company was proved to be false and referable to another company which appeared to have no connection with that company. Additionally based on inter alia my experience with goods emanating from China and the practices there I also had cause to question whether freight was included in the price of the goods as indicated.

Save that Mr. Xu met with the Valuation Unit on 7th February, 2014 paragraph 21 of the Claimant's Affidavit is denied. The defendant contends that Mr. Xu was informed of concerns of the unit as it related to the issue of freight and Guangdong Machinery Imp. & Exp. Co. Mr. Xu was never threatened or treated on a hostile manner. The Defendant also contends that the Notice of Seizure is not an admission of guilt and never represented the same to Mr. Xu. ”

[43] The evidence of Edmund Charlery a Customs officer attached to the Valuations Department is contained in a witness statement in which he repeats most of the evidence of Grantley Promesse.

[44] Based on the evidence it is not at all clear that Customs was in a position to prove that Mr. Xu had broken the law in relation to the imported goods in container #2. But they had evidence relating to anomalies in the paper work. However, the officers acted as if the paper work was conclusive on the alleged breaches of the law and they went ahead and seized both containers #1 and #2 based on this evidence. However, there were grounds for suspicion of breaches of the law which Customs may have acted upon.

[45] Counsel for the Claimant summarized his case in the following terms;

CT's notice in writing to the Comptroller under section 136(1) for a refund of the XCD \$33,007.68 paid to Customs was set out in the letter of March 4th, 2014 which detailed the background information to the claim.

[46] On March 4th 2014, (letter misdated March 4, 2013), made the following complaints:-

Xu was improperly interrogated for several hours by Customs. The interrogation was hostile and Xu was denied use of his cell phone and his car. He was not allowed to leave the premises and was effectively placed under false arrest.

There was an illegal search and seizure conducted at CT's place of business, resulting in the taking and confiscation of several categories of documents beyond the scope of the Section 102 powers of the Agency. No list of the seized documents has ever been provided to Xu.

Xu was accused of forging documents, misrepresenting the identity of the seller of the goods, avoiding freight charges and engaging in conduct aimed at under-invoicing of the goods in question, and money laundering . When Xu protested the accusations Sandy threatened him with imprisonment.

Xu was coerced into paying the agency \$33,000.00 XCD as a condition for the release of his goods. Xu was the required to sign off on a form which required him to admit wrongdoing and forfeit CT's statutory right to re-claim the deposit paid. This, Xu refused to do.

Xu had a second container seized as retaliation by the Agency for his refusal to sign the administrative release required by the Agency in retaliation to the first container.

The Agency threatened to lock down the CT's business premises which would effectively shut down its business operations.

[47] The letter warned the Comptroller that he should not follow his pattern of not responding to the letters written to him on behalf of importers. True to form the Comptroller ignored the letter.

[48] The Claimant's counsel submitted further:

His (CT's) goods costing USD \$66,000.00 are left to swelter in a 40ft metal container. He has already paid the government XCD 63,666.50 for duties on the container. The port and demurrage charges are being

incurred on a daily basis and rapidly approaching the XCD\$500,000.00 mark.

The response of the agency came in the form of 5 affidavits and 4 witness statements, none of which spoke to the real issue, that is, why was the agency not pursuing the claims for forfeiture and condemnation of the seized consignments? What they spoke about was a gross distortion of the events of November 29th, 2013 and its aftermath. The only disclosure of documents made to support their statements are the Defendant List of Exhibits.

The witness statements and affidavits of the Defendants are characterized by a poverty and paucity of substance. The Defendants submits the documents without explaining how or why such documents are connected to the seizures of containers #1 & 2. They explain that some of the documents came from CT's broker, but they give no explanation for the source or origin of the remainder of their exhibits, they leave that homework for the court. One would expect that the documents taken from CT would be mentioned by someone and their relevance to the seizure explained. The fact that this was not done is evidence that the agency had no reason for taking the documents in the first place and having done so no one bothered to look at them. The attempt to extort \$500,000.00 from CT had nothing to do with the documents. ...

The deposition evidence told a different story. The Comptroller knew nothing and did nothing. He admitted the following:

A container will be examined where the department has determined or is of the opinion that it poses a risk to revenue, restriction, prohibitions or other agency requirements.

The act of inspection is important in risk management and the timely and proper completion of the inspection is critical in the discharge of the agency's responsibilities both to the importer and to the department.

He conceded that there are no written guidelines that his agents are required to follow before a decision is made to seize a container and that written guidelines is something that is necessary as far as possible in the operation of the Department.

He was unable to list the reasons why the transaction value for container #1 was rejected, he did not know how the alternative value was placed on the consignment for container #1. He did not at any time discuss with the seizing agent the basis upon which the transaction value was revised.

He could not say how much duty was avoided by China Town for container #1

Customs ought to clearly identify and list the documents taken away as an important safeguard for both the importer and the department.

ARGUMENTS ON THE LAW

[53] Counsel for the Claimant argued that the approach taken by Customs Officer Sandy in imposing a restoration fee on Container #1 was contrary to law and void because in **J Astaphan & Co (1970) Ltd v Comptroller of Customs of Dominica and Others** the Eastern Caribbean Supreme Court of Appeal held that a provision which empowered a Customs officer to impose a “further sum” arbitrarily and without limit” should be struck down by the court.

[54] The Customs Department could not be imposing a punitive fee for the restoration of Container #1 and therefore the basis of the calculation of \$33,000.00 for the said restoration remains unsubstantiated.

[55] Counsel also argued that the making of a confiscation order must involve three stages:

The first stage is the identification of the benefit to be obtained by the Defendant.

The second stage is the valuation of the benefit, either at the time when it is obtained, or at the date of the confiscation order.

The third stage is the valuation as at the confiscation date of all the defendant’s realizable assets and this value sets a cap on the amount.

[56] The Court in **R v Wya**¹ referring to a difficult issue of confiscation under the **Proceeds of Crime Act 2002** held that the confiscation order process must conform to the test of proportionality and a disproportionate order should not be sought. Counsel for the Claimant therefore argues that the seizure order was

¹ [2012] UKSC 541 (On appeal from: (2010 EWCA Crim412)

disproportionate to any benefit accrued to the Claimant. He had already paid \$63,000.00 in duty.

[57] In **Rattansingh v The Attorney General and Another**² the Privy Council held that:

- (a) Where an importer gives notice in writing to the Comptroller that he claims the thing seized, the Comptroller shall start proceedings for the forfeiture and condemnation of the goods.
- (b) After reasonable time has expired, the failure of the Comptroller to start the forfeiture proceedings gives the importer a cause of action for the immediate right to possession of his goods.

[58] Counsel relied on the case of *Vance Chitolie v the Comptroller of Customs* to argue that Customs could not value the goods in either container based on any legal provision other than Schedule 2 of the Act and would have to rely on the disclosed value unless they alleged fraud which they would have to particularize. Customs cannot vary the contract between the supplier and the applicant importer. See: **Henry v Desmond Robinson and The A.G of Jamaica**³.

COUNSEL FOR CUSTOMS SUBMISSIONS

[59] The Defendant submitted that the Claim could not be maintained in the name of the Comptroller of Customs.

- a) The Defendant did not act unreasonably, or procedurally improper.
- b) That judicial review is not the appropriate forum to resolve a dispute about duties.
- c) The Claimant is not entitled to loss and damages for alleged breach of natural justice.
- d) The Claimant has not established that there has been a contravention of sections 6 and 7 of Saint Lucia Constitution.

² UKPC 15 (2004)

³ [HCV1329 of 2006].

- [60] Counsel argued firstly that the Claimant has failed to identify the decision that he claims was improperly reached, and importantly who made the decision. Counsel argues that the Claimant had several encounters with various Customs Officers which clearly reveal that any decision complained of was not made by the Comptroller of Customs. Counsel cited **Quorum Island (BVI) Limited v Virgin Islands Environmental Council et al**⁴ page 3 para 1 Tab 1 in support of this submissions. Counsel further argued that the failure to establish that the Defendant was the decision maker in these proceedings renders the claim as improper.
- [61] The Claimant secondly submitted that the Claimant must establish that the decision it wants to quash was so outrageous in its defiance of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it. In support of this submission counsel cited **Council of Civil Service Unions v Minister for the Civil Service**⁵.
- [62] Counsel further submitted that the circumstances known at the time and the reasons provided by the Defendant for the decision to seize the goods imported by the Claimant provides a logical basis and therefore cannot support a complaint of unreasonableness to cause the Court to interfere with that decision.
- [63] Counsel also argued that there was no procedural impropriety, because there was no failure by customs officers to observe the rules of natural justice or a failure to act with procedural fairness. Counsel argued that Customs is guided by the provisions of the **Customs Control and Management Act**⁶ which sets out the basis for the determination of the value of goods. According to counsel based on an investigative exercise coupled with a consideration of the factors that determine how goods are valued that the value of the goods imported by the Claimant was

⁴ Court of Appeal 12th August 2011

⁵ [1984] 3 All ER 935 at 951 Tab 2

⁶ Cap 15.05 of the Revised Laws of Saint Lucia

rejected. Counsel submitted that the Claimant was determined to have made inter alia an untrue declaration and a notice of seizure was issued to the Claimant as a result. This according to counsel is in compliance with the Act.

[64] There is no obligation on the Defendant to revalue any goods whose value has been rejected by the department said counsel for the Defendant.

[65] On the issue of the right to be heard Counsel submitted that the right to be heard arises after the issuance of the notice of seizure. Counsel also was of the view that proceedings in court would provide the necessary right to be heard. However outside of this ambit the Defendant (Claimant) was afforded several opportunities at meetings for the Claimant to be heard.

[66] Counsel argues that there is an alternative remedy and therefore the route of Judicial Review is not appropriate. Counsel argued that the **Customs Act** provides the procedure for the Claimant to contest any duty which is demanded by Customs Department but which is disputed. This is an alternative remedy which the Claimant is mandated to follow. Where there are alternative remedies Judicial Review is not available.

[67] Counsel also argued that the Claimant is not entitled to damages for an improper, illegal or irrational conduct on the part of Customs. Damages counsel argued would only be awarded if there is an actionable tort committed by the authority for damages. Successfully arguing that the defendants have breached one or more of its statutory duties is not sufficient to show that that the tort of breach of statutory duty has been committed.

[68] Counsel also argued that there was not breach of section 6 of the **Saint Lucia Constitution** which was set out above. Counsel cites the proviso to Section 6 of the **Constitution** to argue that there is no contravention of this section which prohibits the deprivation of property, to the extent that the law in question makes

provision for the taking possession or acquisition of any property, interest or right, in satisfaction of any tax, ...

[69] Also counsel argues that there is no breach of Section 6 of the **Constitution** so long as it may be necessary for the purposes of any examination, investigation, trial or inquiry etc.

[70] Remarkably counsel argued that in the case at bar the goods of the Claimant have not been acquired by the Crown. Counsel submitted that the process to deem the goods as forfeited was commenced with the issuance of the Notice of seizure to which the Claimant has objected. It is trite law counsel argued that only the court of law can declare goods to be forfeited. The detention of the goods clearly falls within the exception laid down in section 6(6) of the **Constitution**. The Claimant's argument for redress for breach of Section 6 of the **Constitution** therefore must fail.

[71] With regard to the claim that the Claimant was subjected to arbitrary search, counsel argued that this is not an absolute right and the right can be abrogated by consent or for other stated reasons.

ANALYSIS

[72] I must say that I prefer the arguments of the Claimant in this case. This is a case in which grave injustice has been done. It has been done by the joint action of officers of a department of government responsible for collecting revenue in the form of duty on imported goods and for protecting the borders of the country from the importation of prohibited goods or using unlawful methods to import goods which should be declared to customs. This department of government is headed by a Comptroller of Customs who has the 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. How then can the Comptroller be permitted to hide behind the action of his officers who enjoy immunity to suit pursuant to Section 129 of the **Act** as long as they are acting pursuant to the **Act**.

[73] The Comptroller of Customs has the power under the legislation to settle matters administratively or by way of a decision to commence forfeiture proceedings. In my view the Defendant's submission that the Comptroller of Customs made no decision which can be subject to Judicial Review must be rejected and the authority cited deemed distinguishable since it deals with a claim being made against the Attorney General in a case where the decision cited for review was not taken by anyone in the Attorney General's office.

[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 the 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. In relation to Container #1 the failure to proceed to forfeiture is not relevant but the Notice of seizure is put in doubt because of Customs subsequent behaviour in failing to return the deposit for conditional release of the container and indeed failing to take notice of an appeal against the said act, and therefore the Notice of Seizure which triggered the administrative settlement could still be challenged on the basis that it was the wrong procedure to adopt in the circumstances and not that the valuation of the goods was incorrect.

[75] In my view, the Claimant has well established the basis for the using Judicial Review to challenge the Notice of Seizure which initiates Forfeiture proceedings. The Claimant would have to show why this procedure is appropriate. 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. Had the Claimant filed a claim in detinue and conversion it would have been met by the defense that Section 130 provides the method by which the Seizure must be challenged. The Claimant was therefore correct to demand that the Notice of seizure be reviewed as long as the Defendant has not demonstrated its ability to proceed to forfeiture in a reasonable time, making the seizure procedurally improper and unfair and in breach of section 6 of the **Constitution**.

[76] Perhaps I can draw on the assistance of Professor Albert Fiadjoe which explains the connection between the possible action in tort, judicial review of legislative action and an alleged breach of the constitution in his treatise Commonwealth Caribbean Public Law where he opines;

“State power ultimately translates into primary legislation by Parliament, delegated legislation by designated public officials, the grant or withdrawal of licences, the award of contracts, sometimes the exercise of prerogative power and the implementation of various government policies. The court’s control of the exercise of State power is through the power of judicial review. Ultimately, when a public body is found to have exercised power improperly, the court would invoke a remedy such a s certiorari, mandamus or declaration, just as it would do if a breach of the constitution was alleged and proven...”

[77] Professor Fiadjoe went on;

“Of course, there are those who would argue that there is really no distinction between constitutional and administrative law and point to modern textbooks which treat the subjects together in support. Proponents of this view argue that these two subjects are ‘prized apart’ for purposes of academic management and convenience rather than for fundamental distinctions between them. But as we have noted earlier, while constitutional law embodies the basic framework of rules and

fundamental values of a State, administrative law deals with the actual operation of government, focusing on the organization, composition, functions and procedures of public authorities. While it remains a hotly contested question whether there is any distinction between constitutional law and administrative law, the evidence so far suggests that Caribbean courts have shown a tendency to use administrative law remedies to give effect to constitutional rights.”

[78] The fact is that the use of an action in tort would be taken to redress a possible breach of the right to enjoyment of property and in the case of a seizure of goods pursuant to section 130 of the **Act** parliament has created an option to a suit in detinue and conversion or breach of statutory duty so that the issue before the court can be focused on whether there is sufficient evidence to order forfeiture of the goods seized rather than whether Customs has a right to possession of goods to be forfeited. The statutory provisions which guide the process of forfeiture in turn provide the Constitutional right to a fair hearing in that regard. Failure to provide the right to a hearing in a reasonable time constitutes a breach of the constitutional right to enjoy property and not have it taken away by the state without just cause or due process of law. Consequently, damages would follow any decision that the constitutional rights of the subject have been breached.

[79] In my view in cases such as this, the court has to be conscious of the justice of the case. There has been no claim in trespass or in the tort of breach of statutory duty. However it is more than clear that the seizure of a container of goods is affected by the infliction of loss on the importer. The loss is a result of unconstitutional acts pursuant to which goods were seized and no opportunity was afforded to the Claimant to challenge the seizure pursuant to the procedure set out in the **Act**. This failure to act after having seized the goods constitutes harsh and unconscionable treatment which is arbitrary and unjustifiable.

[80] It is apparent that customs is of the erroneous view that it can carry on an investigation for 5 years before taking any steps to forfeit the goods. This is clearly wrong and flies in the face of the maxim that a party should not be allowed to profit from their own wrong. In this case Customs, per the Comptroller appears to be

saying that its delay in proceeding to forfeiture is wrong but they should be able to benefit from provisions which state that Customs may not take action to enforce its powers to collect duties beyond 5 years. In so doing Customs is trying to turn a provision which protects the importer, on its head, and call upon it in aid of its error. In any event, to argue this in this case is to reduce the matter to nonsense since Customs implied in its seizure of the Containers and the goods contained therein that the evidence was available to establish a right to forfeiture. This is different to a case in which the breach of the Act is not discovered for years and no investigation can be completed until the time limit is about to expire. Obviously in such a case customs could rely on the 5 year limitation and even seek further time.

- [81] Customs should not be seen to be pursuing an investigation of a broader issue concerning the generic “all imports from China” which should be carefully assessed, while penalizing one importer.
- [82] For these reasons in this case it is just for the Court to award damages for breach of the Constitution by a government authority which has the facility of many options under the relevant Act to enforce the law but incorrectly chose and applied such an option to the detriment of an importer causing that importer loss and damages. Section 133 of the **Act** provides for the award of such damages against the Defendant in cases where there are proceedings against customs arising from a seizure.
- [83] Finally, I am of the view that there was an element of voluntary action in the manner in which container #1 was handled. This voluntary action enabled Customs to carry out its investigation. I do not believe that there was an unlawful search or arrest in that regard. It was understandable that customs officers would not want the Claimant’s officers to send messages to the persons at the location which was going to be searched before they could have their opportunity to search the premises, hence the directive not to use the cell phone.

[84] Subsequently, though they seemed to have collected no evidence to support the seizure which was issued in relation to Container #1. This puts the seizure of container #1 into question. But this seizure cannot be quashed since it was dealt with administratively. There can only be a declaration of improper behaviour where such behaviour is proven.

CONCLUSION

[85] Based on the aforesaid facts and analysis of the law I have concluded that the Customs Officers involved in this matter went about their tasks in an unprofessional manner with regard to the requests made of the Claimant during the alleged investigation of the imported goods and subsequent decision to seize the containers. 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 necessary in attempting to enforce the payment of duty.

[86] The Court does not accept that imposing certain restrictions on Mr. Xu such as the use of his cell phone, was unlawful in the circumstances. But having failed to find further evidence which would provide a basis for seizure the Defendant's officers acted improperly in seizing the Containers #1 & 2 and compounded it by imposing a "restoration fee" for the release of Container #1 and secondly by failing to institute forfeiture proceedings in a reasonable time. The Comptroller through his officers acted ultra vires the law in the interpretation of section 130 of the **Act** and the requirements of the various procedures available to Customs to secure what they considered to be full payment of duty for the imports based on a proper valuation of the goods.

[87] It is not fair and the legislation could not have intended that the decision to seize goods is employed and then not advanced to the next logical step of forfeiture in an expeditious manner while valuation continues and no full assessment of the good is declared by customs.

- [88] While it is understandable that the process would take time it is not fair that the time span of the process remains undefined where a person is being deprived of the constitutional right to possession of his property. Indeed existing law of Forfeiture under other provisions imposes clear time limits on the seizure phase. See Section 39 of the **Proceeds of Crime Act**⁷ which restricts the lifetime of a restraining order.
- [89] This is a case in which a decision which was at the outset was 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.
- [90] It is also true that in light of the payment of duties on both containers the decision to impose seizure was disproportionate to the circumstances and possible losses to the revenue of the state in light of the said payments.
- [91] I therefore hold and declare that the Defendant is liable in damages for the losses caused to the Claimant due to the unlawful seizure of the Claimant's goods in Container #2 and that those damages are aggravated by Customs failure to seize opportunities given by the court to correct their error by either starting the forfeiture proceedings and affording the Claimant its rightful due process and natural justice right to a hearing to argue its case against the seizure of the Containers #1 & 2 and against the payment of a deposit of \$33, 007.68.
- [92] I therefore declare that the seizure of the containers was both ultra vires Section 130 of the **Act** and an unconstitutional breach of the Claimant's right to its property.

⁷ Cap 3.04 of the Laws of Saint Lucia

[93] I declare that the breach of the Constitution is so grave that the Claimant should be awarded aggravated damages to be assessed

[94] The Defendant should also pay the Claimant's costs of this action to be assessed if not agreed.

[95] To put the matter beyond doubt the Court orders the return of the deposit of \$33,007.68 for container #1 to the Claimant and the immediate release, free of any port charges on Container #2 for storage, of Container #2. This order is to be complied with forthwith!

**FRANCIS H.V. BELLE
HIGH COURT JUDGE**

BY THE COURT

REGISTRAR