

Judgment Book

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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M 083/96

BEFORE: THE HON. MR. JUSTICE WALKER
THE HON. MR. JUSTICE CLARKE
THE HON. MR. JUSTICE W. JAMES

R. V. COMMISSIONER OF CUSTOMS EX PARTE VONS
JAPANESE IMPORTS LIMITED

Garth McBean instructed by Dunn, Cox & Orrett and
Ashenheim for the Applicant

Neville Fraser, Mrs. Lyle Armstrong and Delroy Beckford
instructed by the Director of State Proceedings for the Respondent

February 17, 18 and July 17 1997

CLARKE, J

On February 18, 1997 we ordered that certiorari should go to quash the Commissioner of Customs' written decision of August 29, 1996 to revoke as of January 2, 1997 permission granted by her to Vons Japanese Imports Limited (the applicant) to operate bonded warehouse No. 256 at 99 Hagley Park Road, Kingston 10 as storage for motor vehicles imported by the applicant. We now keep our promise to put our reasons in writing.

Since about March 1994 the applicant whose registered office is located at 20 Ballater Avenue, Kingston 10 has been carrying on business as an importer and distributor of motor vehicles. On several occasions since that date backlogs developed in the clearance of imported motor vehicles from the wharf. So in about June 1995 the applicant applied to the Commissioner of Customs (the Commissioner) for permission to operate a bonded warehouse. The application was successful, for the Commissioner granted the applicant verbal permission to operate bonded warehouse No. 256 at premises 99 Hagley Park Road, Kingston 10 to store imported motor vehicles. In early October 1995 the applicant began using 99 Hagley Park Road as a bonded warehouse and on October 19, 1995 it gave a bond as warehouse keeper, the surety being the Bank of Nova Scotia Jamaica Ltd. The bond, given in the sum of \$10 million and duly approved by the Commissioner, recited that the Minister of Finance by virtue of the authority vested in him by the Customs Act appointed the said premises as a private bonded warehouse. It was by letter dated August 29, 1996 that the

Commissioner revoked her permission for the applicant to operate the said premises as a bonded warehouse. The letter is in the following terms:

"Mr. Von Strolley
 Manager
 Von's Japanese Imports
 20-22 Ballater Avenue
 Kingston

Dear Sir:

RE: BONDED WAREHOUSE 256

Please recall that you have been granted verbal permission to operate bonded warehouse #256 to store imported motor vehicles. It is with regret that I inform you that the Commissioner has advised that the decision that had been taken although offered in good faith was ill advised.

Exporters operating under the Export Industry Encouragement Act (EIEA) are mandated to operate bonded warehouses. As a result of this the Department has found itself granting more warehouses than the staff can adequately control. The Government has therefore put a hold on the applications from distributors in order to facilitate Exporters.

The Commissioner has observed that your application falls at the top of a pile from other motor vehicle Dealers. These applications have all been put on hold for the reasons stated above.

The Commissioner is however mindful of the Expenses incurred and the commitments that you made as a result of our decision and wishes to apologise for the inconveniences you suffered.

Taking all factors into consideration you are hereby advised that effective January 2, 1997, your warehouse will effectively be closed. You will be permitted to prepare final entries for the warehoused goods within one (1) year but will not be able to warehouse new importation after the 2nd January, 1997.

Sincerely

.....
 Sgd. Viris Page-Gardner (Mrs.)
 for Commissioner of Customs "

Mr. Fraser submitted that there was no decision for the court to quash because the Commissioner had no authority to grant permission in the first place and that as a consequence she had authority to revoke the ostensible permission she gave to the applicant. He urged us to hold that in any case the Commissioner acted illegally in permitting the applicant to operate a private bonded warehouse because by virtue of section 2(2)(iv) of the Customs Act it is the Minister, and only the Minister, who can lawfully give permission for premises to be operated as a bonded warehouse. We

reject those submissions. The short answer is that while it is the Minister who is empowered by the Customs Act to appoint premises as a private bonded warehouse, it is the Commissioner who is competent to give permission for the user of such premises as a private bonded warehouse: see section 2(2) (iv) and 98(1) of the Customs Act. On the evidence before us we find that the Minister duly appointed private warehouse situate at 99 Hagley Park Road a bonded warehouse. We further find that on that basis the Commissioner lawfully granted the applicant verbal permission to use the said bonded warehouse to store imported vehicles. Such action on the Commissioner's part accords with section 98(1) of the Customs Act which requires the Commissioner's written permission only where the building or place is to be used as a customs area. The subsection provides:

"No building or place may be used as a private warehouse, or, save with the written permission of the Commissioner, as a Customs area, until a bond, in such sum as may from time to time in each case be required by the Commissioner, is given by the warehouse-keeper, or the owner or occupier of the Customs area, as the case may be, with one or more sufficient sureties, conditioned on due payment of all duties and the due observation of the provisions of the Customs laws."

Two grounds upon which the applicant sought relief are concerned with the question of procedural impropriety: see Lord Diplock's classification in C.C.S.U. v. Minister for the Civil Service [1983] A.C. 394 at page 410. Those grounds are:

- (1) "The said decision of the Commissioner of Customs was in breach of the rules of natural justice in that the decision was taken without giving the applicant a hearing at all although the decision affected the applicant's rights and its legitimate expectation that the said permission to operate the said premises as a bonded warehouse would continue for a reasonable time."
- (2) "The said decision ... was unfair having regard to:
 - (i) the reasons for the said decision contained in a letter dated 29th August 1996 from the Commissioner of Customs ...
 - (ii) the fact that the granting of permission by the Commissioner of Customs for the applicant to use the said premises as a warehouse created a legitimate expectation by the applicant that the said permission would continue for a reasonable time."

Can the charge of procedural impropriety, in the sense that the decision breached the rules of natural justice, be properly refuted in this case? We think not. In our opinion, the Commissioner's power of revocation of permission was properly exercisable only

after scrupulous observance of the audi alteram partem rule. Indeed, the rule is expressly recognised in section 98(2) and (3) of the Customs Act as to matters affecting the administration and control of a private bonded warehouse. The statutory recognition of the rule in that connection clearly implies, we think, an obligation on the Commissioner's part to give the warehouse keeper an opportunity to be heard, even if limited to the making of written representations prior to taking a decision to revoke permission.

The evidence clearly shows that the applicant was afforded no opportunity to be heard before the decision to revoke was taken by the Commissioner. We find that this decision was taken even though the applicant had a legitimate expectation that the permission to use the premises as a bonded warehouse would continue for a reasonable time. After permission had been granted, the applicant incurred expenses in installing facilities to make the premises suitable to be used as a bonded warehouse. It entered into a \$10 million bond with the Commissioner and so had to deposit \$10 million with the Bank of Nova Scotia Jamaica Ltd. Consequently on the grant of permission it also leased the premises, 99 Hagley Park Road, for a period of three years.

Then in July 1996 Von Strolley, the managing director of the applicant company, was summoned to a meeting at Customs House and advised by an agent of the Commissioner that the Commissioner had decided to revoke the permission to operate the bonded warehouse. At that meeting the applicant was presented with what was in fact a fait accompli. The Commissioner had put the proverbial cart before the horse. As far as she was concerned her decision which was subsequently reduced into writing was irrevocable. Von Strolley was called to the meeting only so that the decision which had already been made could be communicated to him. It is our view that that decision should not have been reached prior to that meeting which should have been used to provide the opportunity for the applicant to be heard.

It is for the foregoing reasons that we ordered certiorari with costs to the applicant to be taxed, if not agreed.

WALKER, J.A.

I agree.

WESLEY JAMES, J.

I also agree.