



[2020] JMSC Civ 216

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV02926

BETWEEN	CARRERAS LIMITED	CLAIMANT
AND	COMMISSIONER OF CUSTOMS	DEFENDANT

IN OPEN COURT

Mr Gavin Goff and Mr Adrian Cotterell instructed by Myers Fletcher & Gordon for the Claimant

Ms Christine McNeil and Ms Hazel Edwards instructed by the Director of State Proceedings for the Defendant

Heard: July 18, 2019 and November 13, 2020

Judicial Review – Minister’s approval for post and audit exercise – Whether audit process fair and reasonable – Natural Justice – Legitimate Expectation – Certiorari – Mandamus

LINDO, J.

The Parties

[1] The Claimant, Carreras Limited, (Carreras) is a limited liability company duly registered under the laws of Jamaica and having offices at 13A Ripon Road, Kingston 5, in the parish of Saint Andrew. Its main business is in the importation and sale of tobacco products.

- [2] The Defendant, the Commissioner of Customs, (The Commissioner) is the head of the Jamaica Customs Agency (Customs) which has offices at Myers' Wharf, Newport East, Kingston 15, in the parish of Kingston.

Background

- [3] As an importer of goods, Carreras interacts on a regular basis with Customs. By letter dated August 11, 2015, Nashwell Thomas, on behalf of the Commissioner, wrote to Carreras indicating, *inter alia*, that Carreras could import and store general merchandise in its new bonded facility #267 without the payment of the import duties on the warehouse entry and that before goods can be removed from the bonded warehouse "the relevant ex-warehouse entry must be submitted to Customs for processing and the duties paid".
- [4] A review conducted by Customs revealed that there was no ex-warehouse entries in respect of 374 cases of cigarettes and that the applicable duties were not paid. Customs advised Carreras by letter dated October 8, 2015, that the goods would be deemed to be overtime, as they are imported goods stored in a private bonded warehouse over one year without there being any ex-warehouse entries in relation to them, or any application to re-warehouse them for an additional period of a year. On November 6, 2015, Carreras wrote to Customs regarding the overtime goods in warehouse #267 and on February 1, 2016, the Commissioner responded. The Commissioner's letter states, in part:

"...As it relates to payment of duties at the rate applicable on May 30, 2013; approval will have to be sought from the Ministry of Finance and Planning. ...As it relates to goods delivered to your Customers, without the requisite documentation being completed; it must be noted that this is contrary to the following sections of the Customs Act: Section 106:-.... Section 109:-...Section 112 ...The unprocessed C33 (374 cases) that were submitted by Carreras Ltd., is null and void as the goods in question are deemed to be overtime and as such the transfers cannot be effected ...".

- [5] Carreras paid over the sum of \$58,382,779.87 being the full duties payable on the cigarettes and by letter dated April 4, 2016 to the Minister of Finance and Planning, sought a refund. Carreras pointed out that at the time the goods were

taken from the bonded warehouse, the requisite documentation was not completed, but that documentation was subsequently submitted confirming that the goods were sold to Duty Free Customers.

- [6] On May 17, 2016, June 15, 2016 and September 26, 2016, Carreras sent to the Ministry, copies of documentation previously submitted to Customs such as purchase orders, cheque requisition vouchers and invoices received from K. Chandiram in support of the sale of the cigarettes, and information indicating that the goods were delivered “with no corresponding C33s to support the movement”.
- [7] The Commissioner was advised by letter dated July 13, 2017 from the Ministry of Finance that approval had been given for a post audit exercise to be conducted to verify if the 374 cases of cigarettes were in fact transferred to an in-bond shop, K Chandiram Limited, and, if the information was verified, Jamaica Customs Agency was required to refund to Carreras the amount of \$58,382,779.87, “ ... or any other amount which appropriately represents the difference between the required 6% Additional Stamp Duty (ASD) payable for the goods sold to an in-bond shop and the full duties payable for the said goods if they were sold domestically”.
- [8] By letter dated August 25, 2017 Carreras wrote to the Commissioner with reference to the letter from the Ministry giving the approval for the audit, and enclosed documents which were previously provided to the Ministry. Carreras was informed of the date of the commencement of the audit by letter dated September 11, 2017 and was requested by Customs to provide certain documents for examination. No copies C33 forms were provided as Carreras indicated that it had internal challenges with its record management. The audit was commenced on September 14, 2017.
- [9] On March 13, 2018, Carreras wrote to the Commissioner indicating, *inter alia*, that information requested by the audit team had been provided and asked for

the findings of the audit. By letter dated May 8, 2018, Carreras was informed that *"...The Post Audit exercise was completed and based on the findings the Jamaica Customs Agency was unable to recommend a refund for the amount stated ... as the auditors were unable to verify whether the 374 cases were transferred to K. Chandiram. This was as a result of insufficient information provided such as approved C33's and goods received notes"*. Carreras responded on May 11, 2018 requesting reconsideration, but got no response.

- [10] Carreras' dissatisfaction with the decision of the Commissioner led to an application for leave to apply for judicial review which was made on August 3, 2018. Leave was granted on December 13, 2018, and these proceedings instituted.

The Claim

- [11] By Fixed Date Claim Form filed on December 27, 2018, Carreras is seeking the following orders:

"1. An order of certiorari to quash the decision of the Defendant not to refund the Claimant the sum of \$58,382,779.87 ("the sum") or any other amount which appropriately represents the difference between the required 6% Additional Stamp Duty payable for the goods sold to an in bond shop and the full duties payable for the said goods if they were sold domestically

1.(sic) An order of mandamus to compel the Respondent to immediately pay over to the Respondent (sic) the sum of \$58,382,779.87 or any other amount which appropriately represents the difference between the required 6% Additional Stamp Duty payable for the goods sold to an in bond shop and the full duties payable for the said goods if they were sold domestically

2. Costs

3. Further or other relief as the court deems just."

- [12] Ten grounds on which Carreras is seeking the orders are set out in the Fixed Date Claim Form which is supported by the affidavit of Janene Shaw, Finance Director of Carreras, which was sworn to on December 21, 2018. To this affidavit is exhibited a number of letters showing correspondence between the Jamaica

Customs Agency and the Claimant, the Claimant and the Ministry of Finance and one letter from the Claimant's attorneys to Jamaica Customs Agency.

- [13] The Claimant's case emerging from the affidavit of Janene Shaw is as set out in part, in the background to the claim and will not be restated. Carreras is of the view that this decision is unreasonable and/or irrational because the purpose of the audit was to verify whether the cigarettes were in fact transferred and not to determine whether form C33 had been submitted.

The Response to the Claim

- [14] The affidavits of Nashwell Thomas, Manager for the Private Bonded Warehouse Unit, and Christine McLeod Laidlaw, acting in the capacity of Supervisor for the Post Clearance Audit Unit, both of the Jamaica Customs Agency, were filed on April 10, 2019.
- [15] Mr Thomas' evidence is that his duties entail overseeing the operation of private bonded warehouses and duty free shops and he is required to monitor goods imported, "*verify that those goods are either duty paid, transferred or exported in accordance with the customs laws*". He states that he is also responsible for ensuring that outstanding duties are paid.
- [16] He states further that Carreras advised Customs of its intention to relocate its offices and was granted approval to operate its new bonded warehouse number 267 by letter dated August 11, 2015. He adds that a review conducted revealed, among other things, that "*there were no ex-warehouse entries in respect of 374 cases of cigarettes. Further, the applicable duties were not paid in respect of the said goods.*"
- [17] Mr Thomas states that Carreras was advised by letter dated October 8, 2015 of its liability in relation to the goods which would be deemed to be overtime, and says, to the best of his knowledge, Carreras did not advise Customs of its intention to transfer the 374 cases of cigarettes to K. Chandiram Limited prior to

the removal of the goods from its Bonded Warehouse, and there is no evidence of the said goods having been transferred.

- [18] He then sets out the procedure to be taken if a transfer is requested and indicates that, in breach of the Customs Act, Carreras did not submit for processing, a C33 form, indicating that the goods were being transferred to K.Chandiram Limited.
- [19] Ms Laidlaw's evidence is that at the time of the events giving rise to the application, she was an auditor in the Post Clearance Unit of the Jamaica Customs Agency and she was required to *"examine the import records, and sales documents of the claimant with a view to verifying whether 374 cases of cigarettes were transferred to an in-bond shop, namely K. Chandiram Limited"*.
- [20] She states that on September 14, 2017, along with her supervisor Mr Perry Kent, the audit was commenced for the period January 1, 2013 to December 31, 2016, and during the audit, *"Customs specifically requested copies of the Application to Remove Goods for Re-Warehousing ... in relation to the alleged transfer of 374 cases of cigarettes from Ms Shaw and Ms McIntosh, however these documents were not forthcoming. The C33 form is the prescribed form required under the Customs Act to establish that goods are transferred between warehouses..."*.
- [21] Ms Laidlaw further states that she requested an explanation for the absence of the C33 and was informed that they were misplaced during the relocation of the Carreras' office. She says that at the end of the audit, a report was prepared and *"Customs would not ordinarily provide a copy ...to an importer..."*. She adds that Carreras was informed of the findings and reasons, by letter, and they acknowledged receipt and stated that the C33s were not completed due to internal challenges with their records management.
- [22] She also states that having reviewed all the documents presented, she noted that even though 374 cases of cigarettes were accounted for, there were variations of descriptions and she was not satisfied that the 374 cases of

cigarettes were in fact transferred to K. Chandiram Limited “in the manner claimed by the Claimant”. She concludes that the decision dated May 8, 2018 was not irrational as all the documents submitted by the Claimant were thoroughly reviewed and examined prior to the decision being taken.

The Submissions

[23] On July 10 and 17, 2019, the parties filed their submissions and lists of authorities and at the hearing on July 18, 2019, the written submissions were supplemented with oral submissions.

[24] The court took some time to evaluate the evidence and the submissions, as well as to consider the authorities cited by the parties in support of their respective positions. I will not restate the details of the submissions or make reference to all the cases cited save where I find it necessary to indicate my reason for decision.

The Hearing

[25] The factual circumstances giving rise to the claim form the background to the proceedings and are set out in the affidavits in support and in response to the claim. The material facts are not in dispute and there was no cross examination of the affiants at the hearing, therefore the court had no real basis to prefer one account over the other.

The Issues

[26] The claim raises issues such as whether the process by which the decision of the Jamaica Customs Agency not to refund the sum of \$58,382,779.87 was reached was fair and reasonable. This includes the issues of whether the failure to provide a copy of the audit report to, and give Carreras a chance to be heard amounted to a breach of natural justice and whether Carreras had a legitimate expectation that arising from the audit the sum would be refunded. The court also has to determine whether mandamus should issue to compel the Commissioner of Customs to refund the sum paid or any part of it.

The Law and Discussion

[27] Judicial review is concerned with the decision making process of a tribunal and not the decision itself. In **Chief Constable of the North Wales Police v Evans** [1982] 1 WLR 1155, the view was expressed that the purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the body which is authorised by law to decide for itself, makes a decision which is correct in the eyes of the court.

[28] In his time-honoured classification of the grounds on which administrative action is subject to control by judicial review, Lord Diplock, in **Counsel of Civil Service Unions v Minister for the Civil Service** [1985] AC 374, at page 410 F-H of the judgment, said:

“By ‘illegality’ as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By ‘irrationality’ I mean what can now be succinctly referred to as ‘Wednesbury unreasonableness (see Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that the judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system ... ‘Irrationality’ by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review..

I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision”

[29] Cognisant of the fact that this court can only examine the legality of the process adopted by Customs to arrive at its decision, I will consider the grounds for review to determine if the process followed was lawful, fair and reasonable and

whether the decision arrived at could have been reached by any reasonable tribunal in all the circumstances.

Whether the action of Customs was irrational and unreasonable

[30] Carreras is raising the issue that the decision of Customs is irrational as no reasonable person would have concluded that the cigarettes were not in fact transferred to K. Chandiram Limited.

[31] The test of unreasonableness was enunciated by Lord Greene in the well known case of **Associated Provincial Picture Houses v Wednesbury Corporation** [1947] 2 All ER 680 at 682-683 as follows:

“ ... a person entrusted with a decision must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority...”

[32] Can it therefore be said that Custom’s decision, based on the post audit exercise which resulted in it indicating that it was not able to verify the transfer of goods, is irrational or unreasonable in the ‘Wednesbury’ sense?

[33] Counsel for Carreras in an effort to persuade the court that the decision was both irrational and unreasonable, indicated that although no C33 Forms were submitted, Carreras provided several documents including purchase orders, cheque requisitions and invoices, confirming that the goods were being sold to the duty free customers, K. Chandiram Ltd. These, he said, provided more information than would be in the C33 form. He pointed out, also, that there was a letter from K. Chandiram dated September 26, 2016 which outlined that the cigarettes were delivered without the C33 Form.

[34] The main basis advanced by Carreras in support of its assertion that Customs acted in a manner which was unreasonable and irrational is that the documents

submitted were sufficient to provide the information that 374 cases of cigarettes were transferred. The absence of the C33 form did not prevent the auditors from verifying the transfer and as such I agree with the submissions of Counsel for Carreras that the auditors were preoccupied with the absence of the form in arriving at their decision rather than being concerned with whether the information submitted was sufficient to verify that the transfer was in fact made.

[35] In the case of the **Jamaica Public Service Company Limited v The All Island Electricity Tribunal and Ors.** [2015] JMCA Civ 17, delivered March 13, 2018, the Court of Appeal stated at paragraph [57] that:

“... although judicial review is largely concerned with the manner in which a decision is reached, the complaint in relation to irrationality requires that there be some consideration of the evidence that was before the decision making body in question”

[36] On the evidence, it is clear that Customs’ auditors requested documents which were provided by Carreras and at the time they would have been aware that the C33 was not submitted, as the letter from K Chandiram Limited dated September 26, 2016, which formed part of the documents given to Customs, specifically states that it is a list of all goods delivered, without supporting C33 form.

[37] The evidence before the auditors comprised documents containing information which would be information stated on the C33 form. It therefore appears to me that the documents presented to the auditors would have provided sufficient information showing that the 374 cases of cigarettes were in fact transferred to K. Chandiram Ltd.

[38] The auditors in making a finding in the exercise of their investigative jurisdiction to consider the question of whether there was a transfer of the goods, in my view were required to base their decision on the evidence presented to them.

[39] Counsel for Customs indicated that the transfer of warehoused goods must be done in accordance with the prescribed statutory procedure and that the use of the statutorily required document “is not a mere formality”. She cited and relied

on **the Customs Act** and the Regulations made thereunder in pointing out that the form required is the C33 Form.

[40] **The Customs Act** (the Act) and the **Regulations** set out the parameters in which a person should act when seeking to transfer warehoused goods.

[41] **Section 115 of the Act** provides that *“the removal of warehoused goods from a warehouse to any other warehouse shall be subject to any regulations made under this Act and to such other conditions as the Commissioner may direct”*.

[42] The **Customs Regulations, 1955**, Regulation 2 states as follows:

“2. A person required or permitted by the customs laws to submit any form to the Collector General or other proper officer shall first complete it in the prescribed manner by inserting all the particulars indicated therein or required thereby ...”

[43] Regulations 91 and 93 states:

“91. When the owner of warehoused goods desires to transfer ownership to another person he and such other person shall execute a transfer in the prescribed form and present it to the proper officer.

92.

93. Before goods may be removed from one warehouse to another the owner shall apply to the proper officer in the prescribed form.”

[44] Customs auditors in seeking to follow the statute and regulations rigidly, decided that it could not verify that the 374 cases of cigarettes were transferred to K Chandiram Limited. It was also submitted on behalf of Customs that the 374 cases of cigarettes must be the said 374 cases which were warehoused goods and that during the audit exercise, Carreras submitted documents to establish the fact of the transfer. They however asserted that the information provided by Carreras “would tend to establish, at most, the transfer of ownership or sale of cases of cigarettes from it to K Chandiram Limited...”. Counsel for Customs also expressed the view that Carreras needed to establish that the cigarettes sold to K Chandiram Limited were previously warehoused and that no documents were

submitted by Carreras to establish that those goods were ever previously deposited in warehouse No 267 “under the warehousing regime”.

[45] The approval for the post audit exercise to be conducted to determine if the cigarettes were transferred to an in bond shop was given after Carreras sought a refund through the Ministry of Finance, and this was after information had already been provided that the goods were delivered without the C33 forms, which are the prescribed forms.

[46] **Section 11 of the Customs Act** provide as follows:

“It shall be competent for the Minister upon application by the importer or exporter to remit or refund in whole or in part any customs duty whenever he shall deem it expedient so to do and any such remission or refund may be subject to such special conditions as the Minister may see fit to impose”

[47] The letter dated July 13, 2017, from the Ministry of Finance and the Public Service to the Commissioner of Customs, states, in part:

Please be advised that the Honourable Minister of Finance and the Public Service has given approval for the following:

(1) A post audit exercise to be conducted to verify if the 374 cases of cigarettes mentioned in letter dated May 17, 2016, were in fact transferred to an in-bond shop; namely K Chandiram Limited.

(2) If the above information is verified, the Jamaica Customs Agency (JCA) is required to refund to Carreras Limited the amount of \$58,382,779.88, or any other amount....”

[48] The letter had, as attachments, the letters dated April 4, 2016 and May 17, 2016 addressed to the Minister. In the letter of April 4, Carreras indicated, among other things, that *“at the time the goods were taken from the bonded warehouse, the requisite documentation was not completed by the Company due to internal challenges with our records management...”*. The letter dated May 17, 2016, states, in part, that *“... we wish to note that the Company moved offices from Twickenham park, Spanish Town in early 2015. This, we believe is substantially linked to challenges experienced with our internal records management,*

specifically our inability to locate documents to support the movement of the goods.”

- [49] The purpose of the audit was to verify “*if the 374 cases of cigarettes mentioned in the letter dated May 17, 2016, were **in fact** transferred to an in-bond shop, namely K. Chandiram Limited*” (My emphasis). In that regard, the Audit Supervisor of Customs, by letter dated September 11, 2017, to Carreras, stated, *inter alia*,: “*Pursuant to sections 223, 223A and 224 of the Customs Act, kindly make available for our examination the documents and/or records, and instances, copies of items listed below, where requested:*

Import entries along with all supporting documents for the period

All documents used to transfer goods from your warehouse to Bijoux

Schedules an (sic) all documents related to this transaction...”

- [50] I agree with Counsel for Carreras that the audit exercise was not about whether the C33s were provided, or even whether the 374 cases of cigarettes originated from the bonded warehouse of Carreras, but whether the cigarettes were ‘in fact’ transferred to an in-bond shop. It is clear that the auditors were concerned with the absence of the C33 and why it was not provided and I bear in mind that in closing submissions, Counsel for Customs made specific reference to the reasons stated for the absence of the C33 form suggesting that Carreras “advanced two diametrically opposed reasons for the absence of the C33 Form”.
- [51] The failure of Customs to accept as proof of the fact of transfer to an in-bond shop, the documents presented in the absence of the C33, is a clear indication that they took into consideration irrelevant matters. Additionally, the manner in which the cigarettes were transferred and place from which they were transferred should not have been factors taken into consideration by them.

- [52]** When the court considers the issue of the impact of the action of Customs Auditors, where irrelevant matters were taken into consideration the issue of the materiality of the irrelevant matter has to be addressed.
- [53]** In examining the evidence, I am satisfied that Customs made it clear what information they took into account, which is the fact of the absence of the C33 Form, as well as other documents, and I find that that would be largely irrelevant. I note that at the time the Minister gave the approval for audit to be conducted, it was already known that the C33 Form was not submitted. Ms Laidlaw, however, in her affidavit, indicated that during the audit Customs specifically requested copies of the C33 form and “these documents were not forthcoming”. I therefore find favour with the submissions of Counsel for Carreras that “there would be no need to carry out a post audit exercise if the failure to submit the C33 form resulted in an automatic conclusion that transfers cannot be verified”.
- [54]** I find also that Customs, having failed to accord weight to those matters which would have been relevant, such as the information contained in the documents submitted, which included the same information which would be in the C33, they acted unreasonably and their decision was irrational. The evidence presented to the auditors was reasonably capable of supporting a finding that the cigarettes were in fact transferred and as such I find that Customs made an error of fact that the transfer could not be verified by failing to correctly identify and treat with the issue it had to address.
- [55]** It is my view that the words of the letter from the Ministry of Finance are clear. It is clear that the approval for the audit was not to determine if the transfer was in keeping with the Customs Act as it was already known by Customs, and the information was also provided to the Minister that the C33 forms were not available. A reasonable person with knowledge of the background leading up to issuing of the letter granting approval for the post audit exercise and having directed his mind to, and considering the relevant information provided, could not

reasonably reach the conclusion that the fact of the transfer of the 374 cases of cigarettes could not be verified.

- [56]** It follows that I find that the process by which the decision was arrived at was flawed and the decision arrived at was irrational in that no reasonable person taking into account relevant considerations, excluding all irrelevant considerations and ensuring that there was procedural fairness in the process, would have concluded that the cigarettes were not transferred based on the overwhelming documentary evidence presented as proof of the transfer. The decision not to refund the sum therefore cannot stand and has to be quashed.

Natural justice

- [57]** Among Carreras' grouses are issues surrounding the fact that it was not given a copy of the audit report and it was not given an opportunity to be heard by responding to the findings of the audit or to submit further information, if necessary.
- [58]** The Minister having given approval for the post audit exercise, Carreras provided relevant documents requested. After the audit exercise was completed, Customs did not provide any information to Carreras until Carreras wrote to them in March 2018, requesting an update on the matter. Customs responded in May, 2018. Customs did not provide a copy of the audit report to Carreras and neither did they give Carreras an opportunity to respond to the findings of the audit.
- [59]** I cannot agree with the submissions of Counsel for the Defendant that "the Claimant was fully apprised of the issues to be resolved and was given an opportunity to be heard". As I understand it, any "opportunity" given by Customs to Carreras would have been prior to the payment of the custom duties and the approval for the audit exercise to be undertaken. There is, however, evidence that Carreras was requested to provide documents for the purposes of the audit, which it did.

[60] In the case of **Wood and Thompson v The DPP** [2012] JMCA Misc 1, Harris JA at paras.17- 20, said:

The modern doctrine of fairness has been eminently pronounced by Lord Mustill in R v Secretary of State for the Home Department ex parte Doody [1993] 3 WLR 154, at page 168, where he said : "... Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer... ,

[61] In my view, the words of Lord Mustill are apt in elucidating the meaning of fairness and in order to determine this matter, I must adhere to the required standard of fairness to be applied to the particular facts of this case, bearing in mind that in the case of **R v Secretary for Home Department ex parte Doody [1993] 3 WLR 154**, it was noted that regard must be had to the mutability of the standard of fairness.

[62] The function of the auditors was purely administrative and one which required the principles of fairness and natural justice to be observed. Carreras was entitled to be treated fairly and this required at least that it be requested to, if necessary, provide further documents before the decision was taken, or that the audit report be given to it so that it would have an opportunity to make representations before the decision was taken, or even after it was taken, to possibly procure a modification.

[63] In my estimation, standards of fairness and natural justice dictate that genuine efforts be made on the part of Customs to satisfy themselves that the cigarettes were in fact transferred notwithstanding the absence of the C33 form. Carreras should have been given a chance to be heard, as it was discovered that 374 boxes of cigarettes were in fact transferred to the named warehouse. Ms Laidlaw, by her own admission, indicated that 374 cases of cigarettes were

accounted for, but said she was not satisfied that they were transferred in the manner claimed by Carreras.

- [64]** The evidence does not disclose that the auditors informed Carreras of the nature of any matters weighing against their decision that the fact of the transfer could not be verified and hence there could be no grant of the refund, and neither was Carreras afforded an opportunity in addressing any such matters. In fact, it is Carreras that sought to determine the outcome of the audit by writing to Customs when no information was forthcoming, and it was only then that Customs responded with the letter of May 8, 2018.
- [65]** The decision making process was therefore unfair. The principles of natural justice were disregarded. Fairness in this case dictated that Customs, having identified 374 cases of cigarettes as having been transferred to an in-bond shop, namely K. Chandiram Limited, should have given Carreras an opportunity to put forward a response to the 'findings' of the audit on which the refusal to refund the sum was based, prior to the decision being taken.
- [66]** Customs therefore acted in breach of the principles of natural justice by its failure to provide Carreras with a copy of the audit report to inform them of the basis of the decision that the fact of the transfer could not be verified, and by failing to give Carreras an opportunity to make representations. I do not find that the claim of procedural impropriety on the part of Customs can be properly refuted as their decision was arrived at by a process which was carried out in breach of the rules of natural justice.
- [67]** In the circumstances the court finds that Carreras, not having been given an opportunity to be heard after the post audit exercise was conducted, and not having been given the reasons why there would be no refund, has shown sufficient ground for judicial review of the action of Customs.

Whether the Claimant had a Legitimate Expectation that it would be refunded

[68] The Claimant also grounds its claim on the basis that it had a legitimate expectation that the audit would be to verify whether 374 cases of cigarettes were transferred to K. Chandiram Limited and of being refunded, once the fact of the transfer was verified. This legitimate expectation Carreras claims, was created by the letter from the Ministry of Finance dated July 13, 2017, in which it claims, the wording, “makes it clear that the issue of the submission of the C33 was not determinative of the matter”.

[69] An applicant claiming to have a legitimate expectation may argue that he is entitled to the actual benefit which the public authority is bound by and cannot change, or that he expects a particular procedure to be followed such as being given a right to be heard before a decision adverse to his interest is made or he is deprived of a benefit. On this point, I note that the doctrine of legitimate expectation has been described as being inextricably bound up with the rules of natural justice. (See **The Attorney General v K C Confectionery (1985)** 34 WIR 387 at 409b, per Persaud JA).

[70] In the Privy Council decision of **Francis Paponette & Others v The Attorney General of Trinidad and Tobago** [2010] UKPC, 32 (delivered December 13, 2010) Lord Dyson, on behalf of the majority of the Board, in dealing with the burden of establishing the existence of legitimate expectation, at paragraph 37 of the judgment, said:

“The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification...”

[71] Counsel on behalf of Carreras stated that the Minister of Finance, having represented that the audit was to determine the question of “the fact of transfer”, Carreras had a legitimate expectation that the audit would be focussed on the

question of fact of the transfer, but that by their own admission, Customs became preoccupied with the absence of the C33 form.

[72] It was contended on behalf of Customs that there was no breach of legitimate expectation as the transfer referred to by the Minister must necessarily be a transfer which complies with the custom laws. The Minister is expected to have knowledge of the law and it is clear that the Minister has the authority to give approval for a post audit exercise to be conducted and for sums paid to be refunded in certain circumstances. There was information before the Minister, prior to the approval for the audit, that the required C33 forms were not provided. Additionally, the **Customs Act, Section 11**, empowers the Minister to refund “...*in whole or in part any customs duty whenever he shall deem it expedient so to do...*” and in this case the sums paid were to be refunded upon the verification of the transfer of the cigarettes.

[73] In examining what constitutes legitimate expectation, I find that in the instant case, the letter from the Ministry of Finance dated July 13, 2017, was a sufficient representation that if the transfer was verified the Jamaica Customs Agency was required to refund “the amount of \$58,382,779.87, or any other amount which appropriately represents the difference between the required 6% Additional Stamp Duty...” Carreras would therefore have had reason to believe that Customs having carried out the audit exercise and found that the transfer of the cigarettes was made, would have refunded the sum initially paid.

[74] I therefore find that Carreras could reasonably have a legitimate expectation created by the fact of the approval given by the Minister for the audit and that there would be a refund of the sum paid on the verification that the cigarettes were transferred.

Certiorari

[75] Certiorari is a discretionary remedy which is ordinarily available to a claimant where there is an error of law on the face of the record or where a public

authority has acted ultra vires its powers. (See **R. v Licensing Authority ex parte Panton** (1970) 15 WIR 380). The court is being asked to investigate whether the procedure adopted by the Defendant was in accordance with law and not whether the decision arrived at was correct.

[76] The learned authors of **Judicial Review of Administrative Action**, 5th Edition, Ch.16, at para. 16-017 state, *inter alia*:

'...certiorari will not lie unless something has been done that can be quashed by the court...'

[77] The process by which Customs arrived at the decision that it cannot verify the transfer of the cigarettes was procedurally unfair, and in breach of natural justice and in my estimation, would undoubtedly render the decision null and void.

[78] I therefore find that Carreras has made out a case for certiorari to be granted to quash the decision of Customs.

Mandamus

[79] An order of mandamus is discretionary and is of a most extensive remedial nature directed to compel a body to do a particular act.

[80] There are authorities which indicate that for mandamus to issue there must be a demand and a refusal. However, in **The King v The Revising Barrister for the Borough of Hanley** [1912] 3 KB 518 at 531, Channel J had this to say:

the requirement that before the court will issue a mandamus there must be a demand to perform the act sought to be enforced and a refusal to perform it is a very useful one, but it cannot be applicable in all possible cases

[81] Customs has indicated that Carreras does not satisfy the criteria for a court to issue mandamus indicating that while Carreras may have previously demanded payment, it has an alternative remedy, in that Carreras could sue Customs to recover the sum as a debt and further that to issue mandamus would be tantamount to 'endorsing the unlawful conduct of the Claimant'. Carreras on the

other hand has submitted that the Commissioner of Customs would have a public duty to refund revenue improperly collected, or collected subject to the establishment of certain facts, as in this case, the transfer of the cigarettes.

[82] There is no doubt that Customs has a duty, provided the conditions are met, to refund, in whole or in part, duties paid on certain goods, or duties which have been overpaid. In my view, the conditions for a refund to be made have been met. I have found that the auditors erred in finding that they could not verify that the cigarettes were transferred and the audit was undertaken with a view to determine whether the cigarettes were in fact transferred and for a refund of duties that had been paid.

[83] Having considered the legal requirements for a grant of mandamus, I find that although there is no concrete evidence of a demand or refusal, it is clear on the evidence that Customs had full knowledge of Carreras' request for a refund having taken steps preparatory to determining whether the sum should in fact be refunded.

[84] I therefore find that in the circumstances there is no other remedy by which Customs can be made to refund the sum paid by Carreras but by an order of mandamus.

Conclusion

[85] Customs acted unreasonably and unfairly in the process of carrying out the post audit exercise. It took into consideration irrelevant matters and did not give Carreras an opportunity to be heard prior to coming to the decision that the fact of the transfer could not be verified and that as such there would be no refund of the duties paid. Additionally, Customs did not give Carreras an opportunity to make any representations after it came to the decision.

[86] I hasten to note that in granting the orders sought the court ought not to be seen as lending aid to a contravention of the Customs Act and Regulations in the

failure of Carreras to use the prescribed form. The Minister is expected to have knowledge of the law and it is clear that the Minister has the authority to give approval for a post audit exercise to be conducted and for sums paid to be refunded, "whenever he shall deem it expedient".

Disposition

[87] An order of certiorari is hereby made to quash the decision of the Defendant that the fact of the transfer of the cases of cigarettes cannot be verified.

An order of mandamus is hereby made to compel the Defendant to refund to the Claimant the sum of \$58,382,779.87 "or any other amount which appropriately represents the difference between the required 6% Additional Stamp Duty..."

Costs to the Claimant to be agreed or taxed.