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[2013] JMSC CIV 93

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 05295

BETWEEN	**CHEVRON CARIBBEAN SRL**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL for JAMAICA**	**DEFENDANT**

Constitutional Law - Customs Act — whether Customs user fee a tax – whether Minister acted ultra vires the statute – whether wrongful deprivation of property – Restitution – Passing on Defence -Delay – National Interest – whether Defences to the claim

Richard Mahfood Q.C., Dr. Lloyd Barnett and Weiden Daley instructed by Hart Muirhead & Co. for Claimant.

Althea Jarrett instructed by the Director of State Proceedings for Defendant.

Heard: 7th and 8th May, 2013 & 19th July 2013

CORAM: JUSTICE DAVID BATTS Q.C.

[1] On the first morning of the hearing Dr. Lloyd Barnett indicated that there were areas of factual conflict and he required cross examination of the affiants. The Crown had made no arrangements for their witnesses to be present. Miss Jarrett for the Crown indicated that there had been no notice of intention to cross-examine and that at the Pre-trial review the Claimants then attorneys stated that there was no cross- examination required. The Crown also raised another preliminary issue. This being that they would wish the matter of liability and damages heard separately because it was their wish to rely on certain defences no notice of which had been given to the Claimants.

[2] Upon Counsel indicating that they had not discussed these issues with each other, the court rose to allow discussions to take place. Upon the resumption the

court was informed that the matter could proceed as there was an agreement on the facts and the defences to be relied upon.

[3] Notwithstanding that which is stated on affidavit the parties now agreed that:

> "The money collected as Customs User Fee goes into the government general revenue as part of the Consolidated Fund and is used to fund the operations of Government including the Customs Department."

[4] The Defences to be argued were:

i) A Limitation Defence which relied upon Statute
ii) The passing on or windfall defence
iii) Public Policy

The Crown promised to have a statement of the defence reduced to writing and served on the Claimant's attorney by the following day. An authority **Kleinworth Benson Ltd. v. Lincoln cc (1999) LGR** 1 was also handed out by the Crown. The hearing thereafter commenced.

[5] The Fixed Date Claim form was filed on the 24th August 2011 and claims the following relief:

i) A Declaration that the Customs User Fee under Part 11b of the Customs Regulations was and is ultra vires the Minister of Finance.

ii) A Declaration that the imposition of the Customs User Fee was and is unconstitutional.

iii) A Declaration that the Customs User Fee is unenforceable and invalid

iv) Restitution of the aggregate sum of J$548,777,578.78 which the Claimant has paid in Customs User Fee from May 7th 2011 and all of the sums the Claimant shall have paid up to date of judgment herein, together with interest at the prevailing commercial rate from the dates of payments by the Claimant of the Customs User fees aforesaid to the date of full restitution or at such rate of interest and for such period as the Honourable Court deems just.

[6] On the 21st January 2013 an Amended Fixed Date Claim Form was filed. This made 2 changes to the original.

a) The claim was corrected to reflect the fact that Chevron Caribbean SRL was a company incorporated under the laws of Barbados and registered in Jamaica as an overseas company, and

b) Paragraph 1 of the Declarations sought was amended and now reads,

> "A Declaration that the Customs User Fee under part 11B of the Customs Regulations was and is ultra vires the Minister of Finance and/or was and is irrational and an abuse of his statutory discretion or power."

[7] The claim is supported by an affidavit of David Sterling dated 23rd August 2011. He describes himself as the district manager of Chevron Caribbean SRL ("Chevron"). That company is a subsidiary of Chevron Corporation and is an overseas company. The statement that the company is registered in Jamaica was later corrected. In fact it is an overseas corporation. It carries on the business of importing petroleum and ethanol and processing and selling of petroleum products through service stations under the Texaco brand throughout Jamaica.

[8] He states further that petroleum is imported from various sources one of which is Trinidad and Tobago. In or about 2003 the Minister of Finance of Jamaica 'purporting' to act under section 257 of the Customs Act amended the Customs Regulations to introduce a Customs user Fee "CUF" of 2% of the value of goods. The fee was imposed on all goods imported to Jamaica including petroleum imported by Chevron. In April 2009 the Minister of Finance increased the CUF on imported finished petroleum products (but excluding that imported under the Petro Caribe Agreement), to 5%. The Customs Regulations were amended accordingly.

[9] Chevron does not import goods pursuant to the Petro Caribe Agreement. The regulations also exempted manufacturers who import capital goods and raw materials, certain players in the agricultural sector and manufacturers who were in operation for less than 3 years and certified by Jamaica Promotions.

[10] The effect of the CUF, according to Mr. Sterling is that the cost of the end product supplied by private fuel importers is substantially higher than that sold by Petrojam which is exempt from the CUF. At paragraph 14 of his affidavit he states,

> "14. That the CUF is levied by the Jamaica customs department ("Customs") which falls under the portfolio of the Minister of Finance but is calculated based on the value of the goods imported rather than on the value of any service provided by Customs to the paying party. I also understand that the CUF is not allocated for use by Customs in its operations but forms part of the general revenue of Jamaica, that is, it is placed into the Consolidated Fund."

[11] Mr. Sterling alleged also that concerns were raised with the Minister of Finance regarding the levying of the CUF on private marketing entities but no response or explanation was received. No correspondence was exhibited in support of this assertion.

[12] Chevron, says Mr. Sterling has had to adjust the prices of product sold on the Jamaican market to cover the cost of CUF. Its product is therefore less competitive on the market. The affidavit details the payments of CUF made and attaches a spreadsheet in support.

[13] Acknowledgements of Service were filed on the 30th April 2011 and 8th September 2011. The first hearing date was the 13th March 2012 and Case Management Orders were made. Among them was that the Defendant file and serve Affidavits in response on or before the 30th April 2012. The Claimant was at liberty to file an affidavit in response by the 15th June 2012. There was an Order for Standard Disclosure and Inspection of Documents.

[14] The Defendant's affidavit was sworn to by Courtney Williams Senior Director of the Fiscal Policy Management unit in the Economic Management Division of the Ministry of Finance. At paragraph 4 of his Affidavit he states,

> "4. The customs user Fee (CUF) is a fee for the use of a broad range of services of customs collected by the Customs Department (Department). In order to ensure that the CUF is applied equitably, it is calculated on the value of the goods imported. As a consequence, an importer of goods of a low monetary value is not required to pay the same fee as an importer of goods of a high monetary value."

The affiant at paragraphs 5, 6 and 7 contends that although the CUF was deposited in the Consolidated Fund it was subsequently removed by Warrant to finance the Customs Department and that it was not true it was used for road rehabilitation. These assertions must now be read subject to the fact as stipulated and agreed by Counsel at commencement, that not all the CUF was used to finance the operations of the Customs Department.

[15] At paragraph 9 Mr. Williams explains the exception given to those who import under Petro Caribe in that it ensures the government continues to get maximum benefit under the Petro Caribe agreement. Other exemptions encouraged manufacturing and was an incentive to manufacturers.

[16] By affidavit dated 8th May 2012 Paula Folkes the Deputy Financial Secretary in charge of the Taxation Policy Division of the Ministry of Finance, also supported the case for the Defendant. She asserts that by letter dated the 14th May 2003 the Private Sector Organisation of Jamaica proposed that the Ministry of Finance impose a 2% customs processing fee on goods imported. It was intended to be an alternative to a 4% cess on imports which had been imposed in 2003. The imposition of the 2% Customs User Fee was a direct response to that proposal. She states also that on the 31st December 2008 2 new classes were added to the

list of entities exempt from paying the 2% Customs User Fee being manufacturers who import capital goods and raw materials and members of the agricultural sector which import capital equipment for use in agricultural activity. The Defendant denied that the Customs User Fee is unlawful or unconstitutional.

[17] By Order dated 4th December 2012 the time for discovery was extended to the 31st December 2012. Specific Disclosure Orders were also made and the time to file further Affidavits extended.

[18] In his Second Affidavit dated 31st December 2012 David Sterling stated that Chevron had been placed at a significant competitive disadvantage. He asserted that the Customs User Fee bears no relation to the cost of services rendered by Jamaica Customs Department. He attaches extracts from the budget of Jamaica over several years in an attempt to support that assertion. At paragraph 7 he stated,

> "Chevron has been paying the Customs User fee because it could not and cannot conduct business without paying it in order to procure the entry of the products into the island, and it did so without knowing that the imposition of the Customs User Fee was unlawful."

[19] In his Third Affidavit dated 7th January 2013 he exhibits data published by the Bank of Jamaica as to the relevant rates of interest. He also stated that since August 2011 Chevron has paid a further amount of J$183,847,250.16 in aggregate in Customs User fees.

[20] The Claimants skeleton submissions were filed on the 11 January 2013 and the Defendants filed theirs on the same date. Both submissions were anything but skeletal and each party also filed a bundle of authorities. These documents were supported by oral submissions of counsel before the court.

[21] The respective contentions, and I hope I do no violence to the carefully considered arguments, may be summarised thus:

For the Claimant it is submitted that our written Constitution has a fundamental premise that there should be no taxation without representation. The Minister was not therefore authorised to impose a tax without the imprimatur of Parliament. The purported User Fee was really a tax and was not a fee as there was no demonstrated correlation between the amount charged for the services and the cost of providing that service. The Customs User Fee was therefore ultra vires the power of the Minister.

The Crown on the other hand submitted that the CUF was not a tax as non payment did not result in criminal sanction.

In any event Section 257 of the Customs Act gave the Minister the power to impose the Customs User Fee. The section should be construed purposively so that as Customs had to do with the economy and as the User Fee was intended to regulate the economy, so Parliament authorised the Minister to do what he did. The purposes were therefore regulatory and it was intra vires the Act. The CUF in any event did not have the characteristics of a tax. The Crown further submitted that the CUF is a "due" under the exception to Section 18 of the Constitution and hence fell within the exception to the right to protection of property. The fee not being a tax but a "due" was saved by the Constitution. The Crown withdrew reliance on the Limitation Defence. As for the Defence of Passing on it was submitted that as the Defendant's prices had been increased to take account of the CUF they had not been eprived of their property. Public Policy was also relied on by the Crown. The submission being that the consequence of repayment was so grave for the economy of Jamaica that restitution would not be in the national interest. This court should therefore decline to give a remedy.

Finally the Crown submitted that as the remedy is discretionary the court should decline to award interest as there is no evidence the Claimants have suffered loss. The court should also have regard to the delay by the Claimants in bringing this claim and refuse relief accordingly.

[22] Mr. Mahfood QC in reply formulated the following submissions-

1. The pass on defence does not apply in Jamaica where tax or money has been extracted by the

government in breach of fundamental constitutional rights. Taxation is the prerogative of the legislature and property should not be taken without proper compensation.

2. The Pass on Defence is inapplicable where it has not been established that the Claimant suffered no loss.

3. The fact that Chevron increased price to cover the cost is not proof that no loss was suffered. In fact there is clear evidence that loss was suffered because even if the sale of the product eventually covered wrongfully collected CUF the recovery was only realised when the product was sold. There was loss by reason of delay and reduced profit margin.

4. Furthermore the product had to be sold at an increased price which made business non-competitive (or less so) resulting in a reduction in sale volume and therefore loss of profit.

5. The Canadian cases must be examined against the background of a Federal System in which the basic issue is whether the tax should be imposed by provincial rather than federal government.

6. In the New Zealand case there was a power to impose a charge but there was a statutory criterion involving equitable distribution of the burden.

7. The Public Policy/Immunity doctrine conflicts with the rule of law and is one of political expediency. Therefore it conflicts with a fundamental principle of the Jamaican Constitution and would deprive the individual of Constitutional relief on extra legal grounds. In the Canadian cases the judges expressed varied and conflicting views and did not establish any binding principle.

[23] I have carefully considered all the submissions as well as the authorities cited and I am grateful to Counsel for their obvious effort and industry. The Customs User Fee is imposed by Part 11(b) of the Customs Regulations. The material portion of which is as follows:

"6C(1) Subject to paragraph 2 a Customs User Fee of 2% of the value of the goods as determined under Section 19 of the Act shall be payable on all imported goods or goods taken out of bond.

(2) The Customs User Fee imposed under paragraph (1) shall not apply to goods imported by – [there follows a number of exceptions]"

These regulations are to be found in the Proclamation Rules and Regulations dated Friday 30th May 2003 No. 51. They are entitled –

"The Customs (Amendment) Regulations 2003" and commence with the following words:

"In exercise of the power conferred upon the Minister by section 257 of the Customs Act the following Regulations are hereby made"

[24] Section 257 (pursuant to which the CUF was levied) reads as follows:-

"257. The Minister may make regulations for the better carrying out of the provisions of the Customs laws and for the prevention of frauds on the revenue and may in such regulations prescribe fees, rents or charges to be paid in respect of any matter therein referred to, and all such regulations shall be published in the Gazette.

257A. The Minister may by order subject to an affirmative resolution of the Houses of Representatives, amend or vary any penalty or fine under this Act.

[25] It is common ground that the Customs User Fee imposed pursuant to Section 11(b) was not the subject of an affirmative resolution of Parliament. It was imposed directly by the Minister. The issue is whether when doing so the Minister acted *intra vires* his statutory power granted by Section 257.

[26] Manifestly the Minister acted outside the statutory power. Section 257 allows the imposition of "fees, rent or charges", in respect of "the better carrying out of the provisions of the Customs laws" and, "the prevention of frauds on the revenue". It allows the Minister to recoup expenses incurred in that regard or

some part thereof. The Customs User Fee is charged as a percentage of the value of goods imported and is calculated in the same manner as other customs duties insofar as the method of valuation is concerned. (See the reference to Section 19 of the Customs Act). No evidence has been provided as to the particular administrative costs or fraud prevention mechanism to which the CUF relates or, as to the amount of CUF collected and its relation in terms of quantum to the administrative costs of the Customs Department. In this regard see ***Marie Evrig (Executor of Estate Donald Evrig) v. The Registrar of Ontario Court et al (1998) 2 SCR 565*** per McClachin and Binne JJ @ Paras. 68 and 69.

[27] The Minister does not have the power to impose duties (calculated as a percent of the value of goods imported) by the device of calling it a "fee". If so he could thereby avoid the requirement of parliamentary supervision expressly provided for in Sections 5, 6 and 7 of the Customs Act. These sections implement the well known constitutional adage of "no taxation without representation", by requiring resolutions of Parliament to endorse changes to the Customs duties.

[28] I therefore hold that the Customs User Fee was not lawfully imposed by the Minister. Its imposition was ultra vires Section 257. It did not have the sanction of Parliament and was not therefore a lawfully imposed tax rate or due. This conclusion is inevitable from a reading of the statutory provisions. Support for my conclusion can also be gleaned from the following decisions: ***Oriental Bank Corporation v. Wright (1879 – 80) AC LR 842; The Dock Company at Kingston Upon Hull v. William Browne (1831) 109 ER 1059 @1065; I RC v. Lilleyman (1964) 7 WIR 469 @ 511; Trinidad Island-Wide Cane Farmer's Association Inc. v. Prakash Seereeram (1975) 27 WIR 329 @339 (b) – (d); J. Astaphan & Co. (1970) Ltd. v. Comptroller of Customs of Dominica (1996) 54 WIR 153 @ 157 h and 158 d; Attorney-General v. Wilts United Dairies [1922] All E Rep 845; Woolwich Building Society v. Inland Revenue Commissioners (No. 2) [1992] 3 AER 737.***

[29] The Crown submits that the claimant ought to be denied a remedy because of the windfall or passing on defence. Reliance is placed on the authorities of ***Waikato Regional Airport Ltd. V AG of New Zealand [2003] UKPC 50 and Woolwich Building Society v Inland Revenue Commissioners (No 2) [1992] 3 All ER 737.***

The submission is that as the CUF was passed on to the consumer the Claimant suffered no loss. Ordering its refund would in effect give the Claimant a double recovery or gain.

[30] The submission is not really supported by the evidence. The Claimant has demonstrated that although they increased the price of product to compensate for the CUF, this resulted in a competitive disadvantage. Their product was more expensive on the market than the product of Petrojam, the state owned competitor, which enjoyed an exemption. Furthermore it is impossible to say what or how the market might have reacted had they not been forced to sell product at that higher price. There also was no equivalent recovery in terms of time or quantum even though over time the amounts paid may have been recouped.

[31] It is for the above stated reasons therefore that I reject the windfall Defence. In a market economy the price is all important. If because of an unlawful imposition a person is forced to increase his prices, it would be odd indeed if upon a claim for a refund, the fact of the increase in price were to be a defence. There are also significant evidential hurdles to overcome in order to maintain such a defence and, as I have indicated they have not been satisfied in this case. I am supported in this position by the following authorities: ***Waikato Regional Airport Ltd. v A-G of New Zealand [2003] UKPC 50*** at para 77 and 78 of the judgment and ***King Street Investments Ltd. v New Brunswick (Finance) [2007] SCC 1 @ 15 [para 48 of his judgment].***

[32] The Crown submits also that this Court should as a matter of public policy refuse relief. Essentially as a Jamaican judge who is well aware of the economic constraints within which the Jamaican Government operates; and being well aware of the limited resources available to pay for salaries, public health and public education; and, although this was not expressly articulated, perhaps having regard to the fact that the Claimant is an overseas corporation, I should in the national interest, refuse the relief claimed. The crown relies on the Canadian Supreme Court decision of ***Air Canada and Pacific Western Airlines Ltd v British Columbia et al (1989) 1 RCS 1161*** in support of the submission.

[33] However the Supreme Court of Canada retreated from the so called public interest Defence in ***King Street Investments Ltd. v. New Brunswick Finance [2007] SCC1***. Justice Bastarache stated at paragraph 25 of the judgment:

> ***"Another policy reason given by La Forest J for the immunity rule was a concern for fiscal inefficiency and fiscal chaos. My view is that concerns regarding potential fiscal chaos are best left to Parliament and the legislatures to address, should they choose to do so. Where the state leads evidence before the court establishing a real concern about fiscal chaos, it is open to the court to suspend the declaration of invalidity to enable government to address the issue. In Evrig Major J, suspended a declaration of invalidity for 6 months. Because in that case, unconstitutionally levied probate fees were used to defray the costs of court administration in the Province, he expressed concern that an immediate deprivation of this source of revenue might have harmful consequences for the administration of justice. Moreover this court's decision in Air Canada demonstrates that it will be open to Parliament and to the legislatures to enact valid taxes and apply them retroactively so as to limit or deny recovery of ultra vires taxes. Obviously such legislation must be constitutionally sound."***

And at Para [29] of his judgment:

"concerns about fiscal chaos and inefficiency should not be incorporated into the applicable rule. I agree with Professor Birks, that,

> ***'[s]o far as concerns the fear of wholesale reopening of past transactions and the danger of fiscal disruption the principle of legality [including legislative authorization and within its constitutional limitations] outweighs these dangers and requires that judges leave it to legislatures to impose what restrictions they think necessary, wise and proper. At all events, a merely hypothetical danger of disruption certainly does not warrant an undiscriminating denial of restitution."***

[34] It is my judgment that a judicial decision to refuse a remedy because of "national interest" considerations would reflect the beginning of the end of the rule of law in Jamaica. Where I ask, would the "national interest" begin and where would it end? The constitutional right to freedom of movement could therefore, without legislative intervention, be curtailed by a judge determining that it was in the national interest for the police to arbitrarily stop and search individuals, similarly the state may be allowed to build highways or an airport and not pay for the land because they had not the funds, if it were in the "national interest." Such an approach is tainted with arbitrariness, the antithesis of the rule of law. I politely decline to follow such an approach. I respectfully prefer the approach of the lone dissenter who in war time, while the majority of his colleagues abandoned fundamental principle for the national interest, maintained,

> ***"In this country amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecter of persons and stand between the subject and any attempted encroachments on his***

liberty by the executive, alert to see that any coercive action is justified in law."

Per Lord Atkin ***Liversidge v. John Anderson [1942] AC 206 @ 244***

[35] The Crown thought better of its Limitation of Actions defence, no doubt because there is no provision in the Limitation of Actions Act providing a Defence to this sort of claim. The Crown did not seek to argue laches in spite of my invitation that this be done. This court however does consider that excessive delay in the pursuit of a remedy, can result in a refusal of the remedy. Equity has long recognised the effect of laches. The remedies sought in this claim are restitutionary and quasi contractual and therefore equitable. It means that there is scope, even in a claim for Constitutional relief to refuse relief because of delay.

[36] Where a wronged party sits on his rights and does not pursue them, it lulls the party in the wrong into a false sense of security. It impacts their ability to prove their case; it means they may have taken decisions which impact their ability to account for the wrong done, in financial terms. I may add to this an overriding public interest in having cases, and in particular cases involving public administration, determined speedily. However where breach of fundamental constitutional rights are involved the relevant delay must be substantial. In this case I hold that even had it been argued, laches as a Defence would not have availed the Crown. 8 years is not so substantial a period as to allow for the application of laches in this case.

[37] Therefore I grant the following Declarations and make the following orders:

1. The Customs User Fee under Part 11B of the Customs Regulations was and is ultra vires the power of the Minister of Finance.
2. The Imposition of the said Customs User Fee was and is unconstitutional.

3. The said Customs User Fee is unenforceable, null and void.

4. Restitution of all sums which the Claimant has paid in Customs User Fee for the period May 2003 to the date of this judgment.

5. I direct that the Registrar take and consider an account of the amounts so paid in the said period and that the amount be certified accordingly.

6. The amount once certified is to be forthwith paid to the Claimant by the Defendant.

7. Costs to the Claimant to be agreed or taxed. Cohlate Pr 2 counsel stated.

[38] The award of interest is discretionary. I decline to award interest from the date of payment of the CUF. My reason for refusing an award of interest is because I bear in mind the admission that there was recovery over time by way of an increase in prices. Further the Claimant has not quantified its losses in the period. I therefore hold that an award of interest, as compensation for being out of money wrongfully taken, would not be appropriate on the facts of this case. The Claimant is therefore entitled to recover the amount paid in the period and no more. Interest will run in the ordinary way on a judgment from the date the amount is certified by the Registrar until payment of the amount so certified.

David Batts, Q.C.

Puisne Judge