



[2015] JMSC Civ. 28

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
CIVIL DIVISION  
CLAIM NO. 2013HCV04518**

<b>BETWEEN</b>	<b>OMAR GUYAH</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE COMMISSIONER OF CUSTOMS</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN OPEN COURT**

**Captain Paul Beswick and Miss Georgia Buckley instructed by Ballantyne, Beswick and Co. appeared for the Claimant**

**Ms. Althea Jarrett instructed by the Director of State Proceedings appeared for the First and Second Defendants**

**Heard: 22<sup>nd</sup> January and 27<sup>th</sup> February 2015**

**Judicial Review – Was the vehicle uncustomed goods – Locus Standi – Can the court make orders about the Claimant’s equitable rights in the absence of the legal owner – Was the vehicle unlawfully seized by the agents of the Jamaica Customs department – Abuse of Process – The Customs Act, s. 2, 19, 91, 210, 219 and 259**

**Costs – No Orders as to Costs – Civil Procedure Rules, 2002, Part 64**

**PUSEY J**

- [1] Omar Guyah (“Mr. Guyah”) is a very important Crown servant.
- [2] His own affidavit filed in August 2013 describes him as the Director of Customs in charge of enforcement. He indicates that his duties include the enforcement of Customs laws and the oversight of the daily operations of the Contraband Enforcement Team throughout Jamaica. He “functions in the capacity of prosecutor” in the courts and initiated proceedings against “perpetrators” for breaches of the customs laws.

[3] The Commissioner of Customs (“the Commissioner”) delegated authority to him for the mitigation of breaches of the Customs Act (“the Act”). He chaired the Breach Tribunal which apparently deals with the issues involving penalties, seizures and forfeiture of goods under the Act. In relation to the Proceeds of Crime Act, legislation created to stymie persons profiting from illegal activity, Mr. Guyah was the Senior Authorized Officer of the Customs Department and “prosecuted cases of Detention and forfeiture of seized cash” throughout Jamaica.

[4] In the course of his duties Mr. Guyah represented the Government (and people) of Jamaica nationally, regionally and internationally on issues of border protection and national security. He also implemented procedures and protocols for border protection. As a result of this experience, he asserts that he is:

*... quite aware of the Customs laws and procedure governing the clearance of goods and the identification of offences under the customs act specifically outlining breaches and uncustomed goods.*

[5] In January 2011, Kingston Logistics Centre acting as wharfinger sought the permission of the Commissioner for certain vehicles, subject of this claim, to be entered as belonging to them. This request was made pursuant to section 91 of the Act. Mr. Guyah indicates that this request was referred to him by the Commissioner mainly because these vehicles were subject to forfeiture proceedings under the Act for breaches of section 210. Forfeiture Orders were previously issued in relation to these vehicles and Mr. Guyah states that he had also seized them.

[6] Following his discussions with the Commissioner it was decided to grant the request of Kingston Logistics Centre. In a letter of March 7<sup>th</sup> 2011, the Commissioner wrote:

*I am in receipt of your request to enter fourteen (14) abandoned motor vehicles... under Section 91 of the Customs Act.*

*With regard to the fact that the importers have been given notice of these goods being stored at your warehouse and have taken no steps to clear same, in accordance with the said Section 91 approval is hereby granted for Kingston Logistics Centre to enter these vehicles and take custody of them when all Customs requirement as to duties and taxes are adhered to.*

[7] The letter went on to outline the procedure to be followed in the clearance process. The consequence of this decision appears to have been that these motor vehicles could be sold by the wharfinger to any person who could pay the amounts assessed in customs duty. The clearance process did not require that there be an auction.

[8] Mr. Guyah now seeks the following declarations from this court:

1. *A declaration that the 2007 Suzuki Swift Motor Car with Chassis number ZC71S404214 (hereinafter "the said vehicle") is not legally classifiable as uncustomed goods and as such not liable to seizure under s. 210 of the Customs Act;*
2. *A declaration that the vehicle was unlawfully seized by officers of the Jamaica Customs Department on 15<sup>th</sup> February 2012;*
3. *A declaration that the officer and agents of the Jamaica Customs Department who effected the seizure and abused the powers granted to them under the Customs Act in seizing the said vehicle;*

[9] In these proceedings he has abandoned claims for damages and for an order for the said vehicle to be registered in his name. He has in fact abandoned five of the original orders that he sought. In his affidavit, he boldly asserts that he is the "true owner" and "lawful owner" of the vehicle although the vehicle is registered to a third party. In support of this claim, he references the statements of the legal owner and exhibits copies of his credit card receipts to evidence his payment of the duties ascribed to the said vehicle.

[10] The statements of the legal owner and the supporting affidavit of Mr. Guyah's sister revealed a tangled web. The legal owner originally states in a February 2012 statement that she heard of the availability of the vehicle from another friend. She was looking for a vehicle to buy for her brother so she asked Mr. Guyah to purchase the vehicle as her agent. Mr. Guyah was a family friend. She knows him and his parents and siblings. She said that Mr. Guyah purchased the vehicle and she licensed it in her name and then paid back Mr. Guyah for the purchase of the vehicle. The vehicle was bought in April 2011.

- [11] The legal owner claims that sometime in July or August 2011, Mr Guyah's mother asked her to lend the vehicle to one of Mr. Guyah's sisters. She loaned the car for an indefinite period for no monetary consideration, because her brother was abroad.
- [12] In a Question and Answer in April 2012, the legal owner admits that the vehicle was in fact owned by Mr. Guyah. This runs contrary to the statement of Mr. Guyah's sister who is also an employee of the Customs Department. In her statement, the sister states that the motor car was borrowed from the legal owner. The arrangement for the vehicle, she maintains, is for her to pay for its maintenance. She also contends in an Affidavit filed on August 12, 2013 that she was "compelled" to complete and sign this statement without specifically denying any of the assertions in it.
- [13] In March 2012, Mr. Guyah was arrested. Charges against him have been before the Resident Magistrates Court and were still unresolved at the hearing of this matter.
- [14] This action was filed in August 2012. In May 2014, McDonald J in this court ruled, inter alia, that the Commissioner and the Attorney General would not be allowed to file affidavits in response out of time. Therefore, Mr. Guyah and his supporting witnesses constitute the only evidence before the court.
- [15] The legal owner, although named in the suit, was never served. There was some issue raised as to whether Mr. Guyah had locus standi in this matter. He had claimed he was the equitable owner of the vehicle. I indicated that I cannot make any declarations to his equitable rights in the absence of the legal owner who was not served. However, it is my view that Mr. Guyah has locus standi because the vehicle is the subject matter of a charge (or charges) against him in the criminal court.
- [16] McDonald J also ordered that this matter be stayed pending the hearing of the criminal actions. This order was successfully challenged by Mr. Guyah's attorneys in the Court of Appeal and the case proceeded to hearing.

## Issues

- [17] Having abandoned some of the applications in this matter, it is my view that only two issues are left. Firstly, was the vehicle uncustomed goods? Secondly, was the vehicle unlawfully seized by the agents of the Jamaica Customs department?

## Uncustomed goods

- [18] Ms. Althea Jarret valiantly put forward the Defendants' position, even though she was not helped by the absence of evidence. Her argument is that the procedure under which the vehicle (and the others involved in this scheme) were entered was ultra vires the power of the Commissioner and consequently they were still uncustomed. She argues that vehicles having been seized and forfeited by virtue of section 210 of the Act become property of the Crown. Such seizures should be disposed of under the procedure set out in section 215 below:

*(1) Whenever any seizure shall be made, unless in the possession of or in the presence of the offender, Master or owner, as forfeited under the customs laws, or under any law by which officers are empowered to make seizures, the seizing officer shall give notice in writing of such seizure and of the grounds thereof to the Master or owner of the aircraft, ship, carriage, goods, animals or things seized, if known, either by delivering the same to him personally, or by letter addressed to him, and transmitted by post to, or delivered at his usual place of abode or business, if known; and all seizures made under the customs laws or under any law by which officers are empowered to make seizures shall be deemed and taken to be condemned, and may be sold or otherwise disposed of in such manner as the Minister may direct, unless the person from whom such seizure shall have been made or the Master or owner thereof, or some person authorized by him shall within one calendar month from the day of seizure give notice in writing to the Commission if it is that he claims the same, whereupon proceedings shall be taken for the forfeiture and condemnation thereof provided that if animals or perishable goods are seized, they may by direction of the Commissioner be sold forthwith by public auction, and the proceeds thereof retained to abide the result of any claim that may legally be made in respect thereof.*

*(2) Where the proceedings are taken as aforesaid for forfeiture and condemnation, the court may order delivery of the aircraft, ship,*

*carriage, good, animals or things seized to the claimant, on security being given for the payment to the Commissioner or the value thereof in the case of condemnation.*

[19] Ms. Jarrett argues that the requirements of section 215 of the Act means that claims would have to be made by the Master (of the vessel), the owner of the goods or someone authorized by him. In the absence of such claim the goods should be “sold or disposed of in such a manner as the Minister may direct.”

[20] The First and Second Defendants further argue that although section 219 of the Act permits the Commissioner to mitigate any penalty under the Act it does not provide the Commissioner with the authority to revoke any forfeiture. They submit that in any case any restoration of forfeiture should be to those persons to whom the goods were taken in the first place.

[21] Since these goods have not been disposed of according to the Minister’s directions or returned to the owners, that action of the Commissioner was ultra vires the Act and without effect. Ms. Jarrett also contends that Kingston Logistics Centre could not properly make an application to the Commissioner under section 91 of the Act in that it was not the owner. Section 91 of the Act states:

*Where the owner of any goods imported in any ship (not being a steamship as defined in section 2) into the Island fails to make entry thereof, or having made entry, fails to and the same or to take delivery thereof by the times severally hereinafter mentioned, the ship owner or Master or the agent of either, may make entry of the said goods at the times, in the manner, and subject to the conditions following, that is to say: -*

- a. if a time for the delivery of the goods is expressed in the charter party, bill of lading or agreement, then at any time after the time so expressed; and*
- b. if no time for delivery of the goods is expressed in the charter party, bill of lading or agreement, then at any time after the expiration of seventy-two hours, exclusive of a Sunday or public holiday, after the report of the ship;*

*provided that if at any time before the goods are landed or unshipped, the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed to be entered and his entry shall, in such case, be preferred to any entry which may have been made by the ship owner or Master, or the agent of either.*

[22] Ms. Jarrett also relied on **Anisminic Ltd. v The Foreign Compensation Commission and Another** [1969] 1 All ER 208 to indicate that an unlawful act was a nullity. By way of comment, **Anisminic** dealt with the question of a tribunal assuming a jurisdiction they did not have and making a decision based on that wrongfully assumed jurisdiction. In this case, we are dealing with the administrative act of the Commissioner who may have made a mistake in law but not one in jurisdiction.

[23] Finally, she dismissed the reliance on section 259 of the Act which states:

*The Commissioner may permit the entry, unloading, power removal and loading of goods, and the report and clearance of aircraft and ships in such form and manner as he may direct to meet the exigencies of any case to which the customs laws may circumstances not be conveniently applicable as there were other areas of the act better to the Commissioner.*

[24] The shortest answer to Ms. Jarrett's arguments is that even if the Commissioner (who she represents) erred that error would need to be set aside by the Court or reversed by the Commissioner. The Defendants are in the unenviable position of saying that they acted wrongfully in law and therefore their own actions are of no legal effect.

[25] Capt. Beswick had argued that Kingston Logistics Centre, as the wharfinger, fell under the definition of owner in section 2 of the Act and therefore could make the application. In summary, the legal foundation of this scheme was that the Commissioner had the power to mitigate penalties under section 219 of the Act. The goods are then entered into the island by virtue of Commissioner's wide discretion under section 259 of the Act. The wharfinger as owner then arranges for the Customs duties which were assessed by the Customs department to be paid.

[26] He further relies on Lord Denning in **Allgemeine Gold-un Silberscheideanstalt v Customs and Exercise Commissioner** [1980] QB 390 to assert that the Commissioner has a wide discretion for forfeiture and restoration of goods. Lord Denning stated at p. 402:

*... that in any event the customs authorities have a discretion in the matter. It happens sometimes that goods are forfeited and then afterwards the true owner comes up and says that he was defrauded of them. If the customs authorities are satisfied of his claim, they may waive the forfeiture and hand them to him. There is a very wide discretion given to the commissioner under section 288 of the Act of 1952 under which they can forfeit the goods or release them, or pay compensation and so forth.*

Capt. Beswick argues that it was in exercise of these powers that the Commissioner acted. He interprets section 215 to give the Commissioner the power to sell the goods or alternatively dispose of them in a manner directed by the Minister. Consequently, the Commissioner did not need to have the Minister's approval or direction to act.

[27] It is clear from the Act that the Commissioner has a wide discretion to deal with items on the port to empower him to prevent congestion on the ports and to assess the true value of the goods. For example, section 19 of the Act gives him power to reduce the amount of freight to be added to the value of goods or to seek additional penalties if it has been discovered after clearance that the goods were undervalued or overvalued. I have no doubt that the powers exercised by the Commissioner were within his legal remit. The issue of Mr. Guyah's inferred use of this knowledge to his financial advantage is not within my remit to determine. I am further constrained that there are criminal charges which may still be before another court and therefore this Court must be limited in its comments.

[28] It is my view, having considered the Act, that the vehicle cannot be said to be uncustomed goods. It was entered under the direction of the Commissioner and the properly assessed duties were paid. The phrase "uncustomed goods" means that the goods evaded customs or that the customs duties had not yet been paid. That is not the situation with this vehicle.



### **Abuse of Process?**

[29] It follows therefore that whether the action of taking possession of the vehicle was a seizure or a detention, this action was in law under the Customs Act, if it was based on the vehicle being uncustomed goods. I am however, reluctant to say that the detention was an abuse of the process because I do not know exactly what charges were laid against Mr. Guyah. In his Affidavit, he indicates that the charges include corruption but no specific legislation was mentioned.

[30] In summary, the court is of the view that the vehicle was not uncustomed goods and that it was not properly seized or detained under the Customs Act. With this in mind, the court makes the following declarations:

1. The 2007 Suzuki Swift Motor Car with Chassis number ZC71S40213 (“the said vehicle”) is not legally classifiable as uncustomed goods and such is not liable for seizure under section 210 of the Customs Act.
2. The seizure of the said vehicle by the officers or agents of the Customs Department was wrong I law to the extent that it was a seizure of uncustomed goods.

[31] The court will not declare the detention by Customs of the vehicle as an abuse of power. Firstly, these officers were investigating an impropriety that had occurred. They received conflicting statements from the parties. It may have been reasonable for the vehicle to be detained while the explanations and stories shifted and were sifted. In light of that, it cannot be said that the original seizure or detention was an abuse of powers. However, the length of time that the vehicle was held after the stories coalesced may have to be considered. This Court cannot opine on that because it has no indication of the criminal proceedings and the timeline there.

[32] I will say in passing that although some of the criminal proceedings have been put before the court by Mr. Guyah, it is clear that all has not been revealed by him. For example, a Question and Answer of the legal owner dated April 26<sup>th</sup> 2012 is exhibited,

but that document indicates that it is a continuation of questions asked on April 11<sup>th</sup> 2012. The laxity of the Crown which deprived them of the opportunity to submit evidence, contributes to the dearth of evidence to determine the abuse of process area.

[33] The other reason for not granting the declaration of abuse of process is as previously stated, the seizure although not proper under the Customs Act may have been allowable under the common law or under some other legislation. Mr. Guyah spoke of the powers of customs officers under the Proceeds of Crime Act. The Court would be speculating to determine that the seizure was entirely a Customs Act seizure or something else, especially since he was charged under other laws.

[34] It is clear that Mr. Guyah acted in a manner which indicates that he is without ruth. Whether he acted contrary to law or the rules of his employer is for other tribunals. I will merely say that although Mr. Guyah is a very important Crown Servant, this court is of the view that he did not act in the best tradition of the Civil Service. Rather than being a servant of the people he attempted to obtain financial gain from knowledge that came to him because of his position.

### **Costs**

[35] The claimant has raised the issue of costs and submitted written arguments in support of this application. The First and Second Defendants were also invited to provide written submissions which they did.

[36] CPR 64 deals with costs and indicates that the general rule is that the unsuccessful party pays the costs. It gives the Court a discretion and indicates that in exercising this discretion, the Court must take into account factors including the conduct of the parties before and during the proceedings, whether a party has succeeded on particular issues and the manner in which the party pursued the case, an allegation or an issue.

[37] It is clear that the First and Second Defendants could not get an award in their favour for costs. They have not been diligent in the pursuit of this matter and have had costs awarded against them at preliminary stages of this matter.

[38] In relation to the Claimant, I have reminded myself (as Capt. Beswick has urged me to do) that the case is not decided on the basis of the moral worth or the Claimant. However, I have considered that the Claimant abandoned five orders that he sought. He did not serve the legal owner of the vehicle who was listed as one of the parties to this action. This unexplained lack of service constrained him from asserting his right of equitable ownership of the subject vehicle. When these factors are added to the clear inference derived from evidence that he put before the court that he attempted to profit from information that came to him by way of his job, this Court will not make an order for costs in his favour.

[39] Therefore, in addition to the declarations in paragraph 30, the Court makes no Order as to costs. The interlocutory orders for costs against the Defendants still stand.