

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**Suit No. CV2140 of 2012**

**BETWEEN:**

**FURNITURE LIMITED**

**APPLICANT**

**AND**

**COMPTROLLER OF CUSTOMS**

**RESPONDENT**

*Before The Honourable Justice Cecil N. McCarthy, Judge of the High Court*

**Last Date of Hearing: 2019 July 22**

**Date of Decision: 2020 July 30**

**Mr. Ezra E. Alleyne for the Applicant**

**Ms. Alison J. Burke and Ms. Cherisse Whitehall-Small for the Respondent**

## **DECISION**

### **INTRODUCTION**

[1] This matter is concerned mainly with the interpretation of sections 108, 237 and 250A of the Customs Act, Chapter 66 (“the Customs Act”).

[2] The issue arose as a result of the decision of the Comptroller of Customs

(“the Comptroller”) to impose a penalty of \$3,382.37 in addition to the duties of \$1,985.25 following the reclassification of goods imported by the applicant.

- [3] The applicant contends that the Comptroller has no power to impose the penalty. The respondent argues that the duties are properly charged pursuant to the statutory provisions.

### **FACTUAL BACKGROUND**

- [4] The facts in this matter are not in dispute. I have therefore, taken them substantially from the written submissions of the applicant filed herein on January 11, 2019.
- [5] On or around July 31, 2012, the customs document regarding certain imported goods claimed by the applicant was examined by a customs officer in execution of his duties.
- [6] Following the completion of the examination, the officer determined that one of the items had been incorrectly classified by the applicant and re-classified the said item.
- [7] The officer then informed the applicant that the said item had been incorrectly classified and re-classified it.
- [8] Following the notice of the incorrect classification, a ‘post entry’ was

prepared by the applicant with the re-classification, and the correct duties owed in respect of the re-classified item assessed by Customs.

- [9] This resulted in the applicant being liable to pay duties in the sum of \$1,985.25. The applicant was also informed that as a result of the incorrect classification and valuation, a penalty in the sum of \$3,382.37 was due and owing on the imported goods.
- [10] The applicant paid the sum of \$1,985.25 on August 2, 2012, in satisfaction of the duties as assessed by the officer, but failed to pay the penalty of \$3,382.37.
- [11] By letter dated November 13, 2012, the respondent informed the applicant of the penalty which was due and owing to the Crown, and made a demand for the payment of the sum on or before November 23, 2012.
- [12] The applicant refused and/or neglected to pay the penalty.
- [13] On or around December 5, 2012, the applicant's access to the Automated System for Customs Data (hereinafter referred to as the "ASYCUDA system") was barred.
- [14] By application filed December 10, 2012 the applicant filed a 'without notice' application for a mandatory injunction against the decision of the respondent to bar the applicant's access to the ASYCUDA system.

- [15] Injunctive relief was granted by the Court and the respondent complied with the order.
- [16] Following the granting of injunctive relief to the applicant, an application for judicial review was filed on 28 December 2012.
- [17] By a defence and counterclaim filed 11 February 2013 the defendant responded to the application for judicial review.
- [18] In that response the defendant annexed a letter dated 3 November 2012 which explained the basis on which the penalty was imposed on the applicant.
- [19] That letter reads:

*"The Director  
Furniture Limited  
Cumberland Street  
**ST. MICHAEL***

*Dear Sir,*

**Re: Unpaid Penalty on Entry #C54867 of 23/07/2012**

*Container# CRXU 309483 0, consigned to Furniture Ltd was examined on Tuesday July 31, 2012. Flasks were found to be incorrectly classified. The relevant post entry for additional duties totaling \$1,985.25 was prepared and paid as per receipt # R41789 on 02/08/2012. In accordance with Sec.237 the Customs Act, Cap 66, a penalty of \$3,382.87 which is the standard 10% of the value of the goods was imposed on Friday August 03, 2012.*

*To date the penalty imposed remains outstanding.*

*I am therefore directed to inform you that, in accordance with Sec.108 of the Customs Act, said penalty becomes due and payable to the Comptroller of Customs on or before Friday November 23, 2012.*

*Yours faithfully,*

.....  
*ANGELINA LOVELL-JOHNSON (MRS.)”  
for Comptroller of Customs*

[20] On the 30 May 2016, the matter came on for hearing before Chandler J., the applicant having made an application under **Part 11, Rule 11.3 of the Supreme Court (Civil Procedure) Rules, 2008** to have the matter heard on a preliminary point. An order by consent was made by the Court that the parties file and serve written submissions regarding **sections 108 and 237 of the Customs Act** and the imposition of the penalty by the respondent. Since the respondent has sought to justify its imposition of a penalty on the provisions of **section 250A of the Customs Act**, counsel for both parties have addressed this section of the Act. The court will therefore consider this section along with those forming part of the order of Chandler J.

## **ISSUES**

[21] The following issues must be considered by the Court:

- (a) Whether the Comptroller of Customs properly interpreted and applied sections **108** and **237 of the Customs Act** with respect to the imposition of the penalty;
- (b) Can the imposition of the penalty be justified under any other provisions of the Customs Act?

### **THE STATUTORY PROVISIONS**

[22] Section 108 of the Customs Act reads:

- “(1) Where by entry, bond, removal of goods or otherwise any obligation has been incurred by any person for the payment of duties of customs, such obligation shall be deemed to be an obligation on that person to pay all duties of customs which may become legally payable or which are made payable or recoverable under the customs laws and to pay the said duties of customs as the same become payable.*
- (2) Where any duty of customs has been short-levied or erroneously refunded, the person who should have paid the amount short-levied or to whom the refund has been erroneously been made shall pay the amount erroneously refunded, on demand being made by the Comptroller.”*

[23] Section 237 of the Customs Act reads:

*“Notwithstanding any other provisions of this Act, the Comptroller may, in any case he deems proper and in substitution for any civil proceedings in a court of summary jurisdiction, accept on behalf of the Crown a sum of money by way of compensation from any person.”*

[24] The respondent also relied on **Sections 104(1), Section 104(2), Section 236, 239 and 250A of the Customs Act**. Those sections are set out below:

[25] **Section 104(1) and 104(2) of the Customs Act** provide:

*“(1) Save as permitted by or under this Act or any other enactment relating to customs, no imported goods shall be delivered or removed on importation and no goods for exportation shall be delivered or removed on exportation until the importer, or, as the case may be, the exporter has paid to the proper officer any duty chargeable thereon.*

*(2) Any person who unships or lands or ships or puts aboard from any port or other place or unloads from or loads into any aircraft in the Island or removes from their place of importation or exportation or from any approved wharf, examination station, transit shed or customs area any goods chargeable with a duty which has not been paid or assists or is otherwise concerned in such unshipping, or landing, shipping or putting aboard, unloading or loading or removal, and who does so with intent to defraud the Crown of any such duty, shall be liable to a penalty of five hundred dollars or three times the value of the goods, whichever is the greater, or to imprisonment for one year or to both, and may be detained, and all goods in respect of which such offence is committed shall be liable to forfeiture.*

*(3) Every person who –*

*(a) harbours, keeps or conceals or permits or suffers or causes or procures to be harboured, kept or concealed any goods with*

*intent to defraud the Crown of any duties; or*

*(b) acquires possession of, or is in any way concerned in carrying, removing, depositing, concealing or in any manner dealing with, any goods with intent to defraud the Crown of any duties; or*

*(c) is in any way concerned in any fraudulent evasion or attempt at evasion of any import or export duties of customs, shall for each offence be liable to a penalty of five hundred dollars or three times the value of the goods, whichever is the greater or to imprisonment for a term not exceeding one year or to both, and may be detained and all goods in respect of which such offence shall be committed shall be liable to forfeiture.”*

[26] **Section 236** of the **Customs Act** reads:

*“Subject to the approval of the Governor-General acting in his discretion (which approval may be signified by general directions to the Comptroller), the Comptroller may mitigate or remit any penalty or restore anything seized under the customs laws at any time prior to the commencement of proceedings in any court against any person for an offence against the customs laws or for the condemnation of any seizure.”*

[27] The applicant mentions section 239 as a charging section. That section enacts:

*“Notwithstanding anything in this Act with regard to the enforcement of any fine or penalty, the Comptroller is hereby authorised, in breaches of*

*the customs laws which in his opinion are of a trivial nature, instead of having recourse to the courts of law to impose a penalty not exceeding \$500 and to order the same to be paid into the Consolidated Fund forthwith, and in default of the amount imposed being paid, proceedings may be taken against the offender in a court of law for the offence committed.”*

[28] **Sections 250(A) of the Customs Act** reads:

- “(1) Every importer who submits a document to the Comptroller pursuant to section 250 shall ensure that the information given on that document is correct.*
- (2) An importer who requests an alteration to the First Customs Procedure Code on an assessed declaration is liable to a penalty of \$200.*
- (3) An importer who requests an alteration to an assessed declaration other than the First Customs Procedure Code is liable to a penalty of \$100.*
- (4) Where a proper officer examines imported goods and discovers that an error has been made by the importer on the document*
- (a) in the classification of the goods; or*
- (b) in the value of the goods,*
- and this error results in the collection of additional duties and taxes which do not exceed \$1500, the importer is liable to pay a penalty of \$400.”*

[29] In the response submitted by the Acting Comptroller of Customs (the

respondent) **Section 250 of the Customs Act** was cited as the basis for the imposition of the penalty.

[30] Paragraph 15 of the defence is set out in its entirety. It reads:

*“There was an error made by the claimant on the document for certain imported goods. This was discovered when those goods were inspected on the 2<sup>nd</sup> August, 2012. The Claimant accepted that there was incorrect classification for those goods which resulted in additional duties to be paid. The claimant paid the additional duties and therefore was also liable to pay a penalty. The claimant paid the additional duties and has failed to pay the penalty owed to the Crown in accordance with section 250A of the Act. The claimant has been notified by a letter from the Customs and Excise Department dated 13<sup>th</sup> November, 2012 of the debt, in the sum of \$3,382.87, to the Crown and has refused to pay this debt and continues in this refusal to honour the debt to the Crown.”*

[31] In paragraph 16, the respondent says the applicant has paid penalties in the past for incorrect classification of goods. Three examples were exhibited in which the applicant was charged and paid a penalty of \$400.00 for incorrect classification on each occasion.

[32] In explaining the basis for imposing the penalty, the respondent at paragraph 20 of the defence, says:

*“20 Section 250A of the Customs Act stipulates the penalty if during inspection there is an error in the documentation and additional duties and taxes are to*

*be collected. This penalty is restricted to a stipulated monetary value. Where the penalty if it does not fall within the limits of section 250A, the Comptroller can exercise his discretion under sections 236 and 237 of the Customs Act to allow for mitigation of the penalty and thereby accept compensation of a sum of money on behalf of the Crown.”*

[33] In the defence, the respondent now cites additional provisions of the Customs Act, and in the respondent’s written submissions Section 104(1) and (2) of the Customs Act have been invoked.

## **THE SUBMISSIONS**

### **The Respondent’s Submissions**

[34] The submissions of counsel for the respondent can be summarized as follows:-

- i. To interpret section 108(1) of the Customs Act, section 104 which is headed: **Duties and Drawbacks** must also be examined:  
  
The word “shall” in sections 108 and 104 operates as a mandatory action and therefore, there was an obligation on the applicant to pay all duties and taxes and penalties as directed by the Customs Officer.
- ii. The respondent in charging a 10% penalty was acting within his power as provided for in section 104(2) of the Act.
- iii. The respondent pursuant to section 104 had the power to impose a

penalty of three times the value of the duties paid but sought to charge only 10% of the total value of the imported goods.

- iv. The Customs Act permits the respondent to impose a penalty of up to \$400.00 where the additional duties charged do not exceed \$1500.00. It does not provide for what should happen where the duties are in excess of \$1500.00. The Customs Act could not have intended that importers whose duties exceed \$1500.00 pay no penalty at all. This interpretation would produce an absurd result.
- v. In order to avoid an absurdity section 19(3) of the Interpretation Act must be applied. That provision reads:  
  
*“Where an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as one reasonably necessary to enable that person or authority to that thing or are incidental to the doing thereof”.*
- vi. Accordingly, the respondent in imposing the 10% penalty was acting reasonably incidental to his powers and general duties as stated under section 3(1) of the Customs Act and in accordance with the mandatory powers prescribed under section 19(3) of the Interpretation Act.
- vii. The respondent is permitted under the Customs Act pursuant to section 236 to mitigate any penalties which would have been imposed

under the Customs Act and collect any such monies on behalf of the Crown.

- [35] Counsel for the respondent also relies on the golden rule of statutory interpretation. She submits that a literal interpretation of section 250A would lead to the absurd conclusion that a person who is charged additional duties in the sum of less than \$1500.00 can face a penalty of \$400.00 while a person who incurs additional taxes of over \$1500.00 would incur no penalty.
- [36] She cites the case of **Adler v George [1964] 2 QB7** where under the Official Secrets Act, 1920 it was an offence to obstruct a member of the armed forces in the vicinity of a prohibited place.
- [37] The defendant was actually in the prohibited place rather than in the vicinity of it at the time of the obstruction. The Court in applying the ‘golden rule’ held that it would be absurd for a person to be liable if he was near to a prohibited place and not if he was actually in it. His conviction was upheld.
- [38] Ms. Burke is, therefore, submitting that since a person who is charged duties of under \$1500.00 is subject to a penalty of \$400.00 a person who incurs duties of over \$1500.00 must be subjected to a penalty of over \$400.00.

### **The Applicant’s Submissions**

- [39] Mr. Ezra Alleyne in his written submissions very succinctly stated the case

for the applicant. His submissions are set out below:

- “i. There is a lacuna in the Customs Act in that there is no provision made for a penalty where an error results in additional duties and taxes which exceed \$1500.00.*
- ii. In respect of the facts of the instant case where the additional duties exceed \$1500.00 there is no power under section 250A to impose a penalty over and above the increased duties.*
- iii. Section 104 of the Customs Act cannot apply to the circumstances of the instant case. That section speaks to situations of fraudulent intent to “defraud the Crown of any such duty” not to “errors” non-fraudulently made by an importer.*
- iv. The error in not providing a penalty for cases where the additional duties exceed \$1500.00 was an oversight in the drafting of the legislation and none of sections 108, 236 or 237 of the Customs Act deal with the matter.*
- v. Neither the Interpretation Act nor the golden rule of statutory interpretation can apply to this case. There are no words to be interpreted since the language of section 250A are clear, and they do not apply to the situation that has arisen here.*
- vi. The Comptroller of Customs is not authorised in the circumstances of this case to exact a penalty of 1 % of the value of the goods and to impose that penalty on the applicant.”*

## THE LEGAL PRINCIPLES

[40] It is common ground between the parties that there is no express provision in the Customs Act authorizing the Comptroller to impose a penalty in cases where the additional duties on a re-classification amount to more than \$1500.00.

[41] In **Jones v Wrotham Park Settled Estates [1980] A.C. 74** Lord Diplock acknowledged that the court as part of a purposive construction of legislation may read words into an Act provided the court did not cross the boundary from ‘construction’ to ‘legislation’. I find Lord Diplock’s analysis compelling, and I am persuaded that it is appropriate to the facts and circumstances of this case.

[42] Lord Diplock expressed the view that three conditions must be fulfilled before a court might read words into a statute.

Those conditions are:

- i. the court must know “precisely what the mischief was that it was the purpose of the Act to remedy”;*
- ii. it must be apparent that the draftsman and Parliament had by inadvertence overlooked and, therefore, omitted to deal with an eventuality that was necessary for the purpose of the Act to be achieved;*
- iii. it must be possible “to state with certainty what were the additional words*

*that would have been inserted by the draftsman and approved by Parliament if their attention was drawn to the omission prior to the passage of the Bill.”*  
*(see [1980] A.C. 74, 105)”*

[43] The test enunciated by Lord Diplock was reformulated by Lord Nicholls and unanimously adopted by the House of Lords in **Inco Europe Ltd v First Distribution (A Firm) and Others [2000] 1 WLR 586**.

[44] Lord Nicholls, in delivering the judgment of the House of Lords, discussed the role of the courts in correcting drafting mistakes and he said:

*“This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see Lord Diplock in Jones v. Wrotham Park Settled Estates [1980] A.C. 74, 105.”*

[45] Lord Nicholls emphasised the importance of the third condition mentioned above. He continued:

*“The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation.”*

[46] Applying the three conditions to the facts of this case, it is evident that while conditions 1 and 2 can be established, condition 3 cannot.

[47] The first condition requires the court to identify the mischief that the Act was seeking to remedy. This can readily be identified as ensuring that goods are correctly classified and providing a penalty in the case of incorrect classification to encourage compliance with the Act.

[48] The second condition is intended to ensure that the omission was as a result of inadvertence on the part of the draftsman and Parliament. On the facts, it is reasonable to conclude that it was intended to provide a greater penalty where the additional duty was in excess of \$1500.00. Having provided a penalty of \$400.00 for incorrect classification of goods up to a taxable value of \$1500.00, it is reasonable to conclude that a greater penalty would have been provided in case of goods exceeding \$1500.00.

[49] For condition 3 to be fulfilled it must be possible to state with certainty what words the draftsman and Parliament would have employed to cure the defect

if the omission was drawn to their attention.

[50] Since it is impossible to say with certainty how the draftsman and Parliament would have rectified the omission to the Customs Act, I consider that any attempt to read words into the statute would effectively be to cross the boundary between interpretation and judicial law making. I therefore, hold that there is no specific provisions of the Customs Act justifying the imposition by the Comptroller of the penalty of \$3,325.87.

## **DISPOSAL**

[51] With respect to the issues raised herein, I therefore, hold that the Comptroller of Customs incorrectly interpreted sections 108, 237 and 250A of the Customs Act. I also hold that the penalty imposed on the applicant cannot be justified under the provisions of the Act.

[52] As a consequence, I declare that the applicant was justified in refusing to pay the penalty imposed by the Comptroller of Customs.

[53] My decision with respect to the preliminary issue has certain implications for the substantive matter before the Court.

[54] I invite counsel for the parties to consult with respect to that matter and the issue of costs.

[55] The matter is adjourned until 24<sup>th</sup> September, 2020 for further consideration.

**Cecil N. McCarthy**  
**Judge of the High Court**