

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 161 of 2002

BETWEEN:

VANCE CHITOLIE

Claimant

and

(1) THE ATTORNEY GENERAL OF SAINT LUCIA
(2) THE COMPTROLLER OF CUSTOMS

Defendant

Appearances:

Mr. Alvin St. Clair for the Claimant

Ms. Louise Blenman, Solicitor-General for the Defendant. With her are Ms. Vicki-Ann Ellis and Mr. Rene Williams

2002: November 19
2003: January 13, 14
2003: May 19

JUDICIAL REVIEW APPLICATION...WHETHER THE COMPTROLLER OF CUSTOMS ACTED PROPERLY IN REJECTING THE DECLARED VALUE OF THE VEHICLE IN QUESTION... WAS CUSTOMS VALUE OF THE VEHICLE THE TRANSACTION VALUE OF THE VEHICLE ADJUSTED TO TAKE ACCOUNT OF INCIDENTAL RELATED CHARGES AS SPECIFIED BY STATUTE...IS REASONABLE SUSPICION THAT VEHICLE IS UNDERVALUED A FACTOR TO BE CONSIDERED IN ASSESSING CUSTOMS DUTIES...IS IT A FACTOR TO BE CONSIDERED IN LIGHT OF THE LAW

JUDGMENT

1. **HARIPRASHAD-CHARLES J:** Mr. Vance Chitolie brought this action seeking, among other relief, an order for delivery of his 1996 used Suzuki Escudo 3-door vehicle which he imported from Japan and as he alleged, is unlawfully being detained by the Comptroller of Customs. He also alleged that he paid in full the duty chargeable on the vehicle in

accordance with section 78 and the Second Schedule of the Customs Control and Management Act, No. 223 of 1990 (the Customs Act) and therefore, he is entitled to an immediate release of the vehicle.

2. The case for the defendants is that upon a perusal of the documents as submitted by Mr. Chitolie, the Officer-in-Charge of its Valuation Department, reasonably suspected that the declared value of the vehicle was erroneous and under valued. Mr. Chitolie was so advised and he was requested to furnish further evidence to substantiate the accuracy of his declared value. He failed to do so. His vehicle was then re-assessed by Customs as valued at US\$7,000.00 based on other declared values of identical goods imported from Japan and a visual inspection of the vehicle. Mr. Chitolie was requested to pay the re-assessed duty. He refused to. Instead, he sought legal advice. His lawyer accompanied him to the Office of the Comptroller of Customs in an effort to amicably resolve the matter. Lengthy discussions ensued. Customs officials would not budge. They felt reasonably satisfied that Mr. Chitolie had not declared the actual price of the vehicle. The Department refused to release the vehicle unless and until the requisite duty on the assessed value is paid or upon the payment of a security deposit representing the difference in the assessed duties (based on the value of similar goods) and duties already paid. As a result, Mr. Chitolie instituted the present proceedings. The crux of the claimant's case is that the defendants have misinterpreted the legislation to mean that goods of a similar nature imported from the same destination ought to be valued at the same price regardless of their contract price.
3. Procedurally, the matter commenced badly. However, given the urgency of it, all irregularities were dispensed with. By consent of all parties, the matter was treated as an application for Judicial Review.
4. The facts as I found them are as follows. On or about September 2001, Mr. Chitolie was surfing the net. He visited the website of Japan Vehicle (www.japan-vehicle.co.jp). He saw a used red 1996 3 door Escudo, 1600 cc, manual transmission vehicle of grade 3 condition. Grade 3 meant that the vehicle may fetch a very reasonable price as it may well

require repairs after being cleared. No price was advertised on the web site so he telephoned the Company and negotiated a price. He tendered the offer of US\$2,050.00 C.I.F. The Company accepted the offer. The vehicle was subsequently shipped to St. Lucia and arrived here in October 2001. On 30th November 2001, Mr. Chitolie made a money transfer of US\$2,050.00 to the Company through the Royal Bank of Canada.

5. The next step was for Mr. Chitolie to clear his vehicle from Customs. In order to do so, he has to comply with the two-tier system of the Customs Department. The first step was to submit Customs Entry to the Entry Processing Unit for assessment of duty based on his declared value. He presented all documents and paid all duties and or charges levied on the vehicle. His vehicle was then marked off indicating that all necessary duties on the declared value were paid. He then proceeded to the Valuation Department for verification of the declared value and inspection of his vehicle. This is where the problem arose. At the Valuation Department, Mr. Gibling Joseph, Officer in Charge perused Mr. Chitolie's documents and suspected that the value declared was erroneous and under valued. At paragraph 16 of his affidavit sworn to on 15th May 2002, Mr. Joseph stated:

"On the said 10th day of December 2001, I compared other invoices for goods imported into St. Lucia from the same supplier and other suppliers in Japan for identical goods with similar ages to that imported by the claimant and the claimant's declared value was confirmed as being inordinately low. I advise the claimant accordingly."

6. The Department had compiled a list of different Japanese used cars exporters with declared values of identical vehicles imported from Japan into St. Lucia. This list is used to assess the transaction value of vehicles if and when the Department suspects that the importer has under valued the actual price paid for the vehicle. Mr. Joseph used this list in order to re-assess the duties to be paid on Mr. Chitolie's vehicle. He also carried out a visual inspection of the vehicle. He is not a mechanic but he alleged that his years of experience as a Customs Officer qualified him to make assessments. No professional mechanical assessment or valuation of the vehicle was undertaken even though there is evidence to suggest that the vehicle, categorized as Grade 3 may require repairs.

7. The main issue for determination is: whether the Comptroller of Customs acted properly in rejecting the value declared by Mr. Chitolie for the importation of the vehicle on the basis that the declared value was not the transaction value of the vehicle in accordance with paragraph 3(1) of the Second Schedule of the Customs Act.
8. The Learned Solicitor-General for the defendants argued that the Comptroller of Customs acted lawfully and properly in rejecting Mr. Chitolie's value of the goods since he admitted at Question 7(b) on the Declaration Of Particulars Relating To Customs Value Transaction Value Method Form (Form 61- Reg.2) that the transaction value of the imported goods does not CLOSELY APPROXIMATE to a value mentioned in paragraph 3 (1) of the Second Schedule. Mr. St. Clair submitted that the answer to the question was a genuine mistake and should be disregarded. His argument is simple. Mr. Chitolie ticked the wrong column. He should never have done so in the light of his answer to Question 7 (a). I agree with Mr. St. Clair. I consider the point to be too trivial to warrant any further consideration.
9. As far as her other submission goes, I understand the Learned Solicitor-General to be saying that the Comptroller of Customs is empowered to review and reassess values declared on imported goods regardless of their contract price if there is a reasonable suspicion of under-valuation. And where such reasonable suspicion exists, the transaction value of the goods then becomes undetermined, giving rise to the application of paragraph 2 (2) of the Second Schedule thereby rendering paragraph 2 (1) otiose. Ms. Blenman argued that it would be foolhardy to accept that the legislature makes it mandatory for the Customs Department to accept any value declared by an importer. I agree but where an importer produces an invoice substantiated by a bank draft, could that be regarded as 'any value declared by the importer'?
10. On the other hand, Mr. St. Clair for the claimant forcefully submitted that the method of calculating duty on the good in question is arbitrary and conflicts with the law. He next submitted that the Customs Department cannot interpret the legislation such that they can assess duty by looking at the duty of goods of a similar nature regardless of their contract price. To substantiate his point, he referred to the St. Lucian case of *Dal Agencies Limited*

v The Attorney General of St. Lucia et al (High Court Civil Suit No. 93 of 1989). Justice Dennis Byron (as he then was) succinctly stated at page 7:

“As far as I understand the contention of the defendant it is, that under the Customs Amendment Act, No. 9 of 1973, the system of valuation in Saint Lucia is the “open market price” which they have interpreted to require them to assess the value the goods would be likely to fetch on the open market. The Defendants have interpreted the legislation to mean that goods of a similar nature imported from the same destination ought to be valued at the same price for the purpose of duty regardless of their contract price, and that is the principle which the Plaintiff has challenged in this case.”

11. Mr. St. Clair urged the court to find that even though the Customs Amendment Act, No. 9 of 1973 had been repealed and replaced by the Customs Act, No. 223 of 1990, the law regarding duties is the same and therefore the principles laid down in *Dal Agencies* are still applicable. Ms. Blenman argued that *Dal Agencies* has no applicability to the present case. She agrees with the reasoning of Byron J. but states that *Dal Agencies* turned on its peculiar facts.
12. It is accepted by both parties that Section 78 of the Customs Act is the relevant piece of legislation to determine the duty to be paid on the vehicle in issue. This section provides that duty is chargeable on goods by reference to their value and that value shall in the case of imported goods be determined in accordance with the provisions of the Second Schedule.
13. Paragraph 2 (1) of the Second Schedule provides that the customs value of imported goods shall be determined under paragraph 3 whenever the conditions prescribed therein are fulfilled. Paragraph 3 spells out the factors to be considered in determining the customs value of imported goods. It states as follows:

“The customs value of imported goods...shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to Saint Lucia, adjusted in accordance with paragraph 8, and in appropriate cases paragraph 9...”
14. On my reading of this paragraph, the customs value of imported goods is the price actually paid or payable for the goods when sold for export to Saint Lucia, properly adjusted to take

- account of incidental related charges as specified in paragraph 8 and where appropriate, paragraph 9. These incidental charges include commission and brokerage, except buying commission; the cost of containers which are treated as being one for customs purposes with the goods in question and the cost of packing, whether for labour or materials.
15. It is clear therefore that the legislation intended the duty to be based on the transaction value (the price actually paid or payable for the goods) in accordance with the principles governing such contracts as set out in the Second Schedule. The duty is prima facie based on the transaction or contract price with proper adjustments. The adjustments referred in the Act are not arbitrary or fictitious ones but are statutory ones as set out in paragraph 8.
 16. In *Dal Agencies*, the brief facts are that the plaintiff company imported tyres from a company in Canada. In December 1988, the plaintiff took in an invoice for 1350 used tyres with unit price of \$3.00 Canadian. With the necessary statutory adjustments, the price per tyre should have been increased by 0.88 dollars. One Miss Thomas, a Customs Officer revalued the price per tyre from \$3.00 Canadian to \$5.00 Canadian. The plaintiff argued with her on that issue but she insisted. She then assessed duty at the revalued price. The plaintiff paid the duty under protest in written form and subsequently brought an action against the Comptroller of Customs.
 17. Ms. Blenman contended that *Dal Agencies* was distinguishable because there was no evidence of the invoice being fraudulent or fictitious. It was a genuine invoice reflecting the contract price between vendor and purchaser. The contention of Customs, however, was that under the Customs Amendment Act, No. 9 of 1973, the system of valuation in Saint Lucia was based on an "open market price." I agree with Ms. Blenman that *Dal Agencies* is distinguishable from the present case but I am grateful for the judgment since the legal principles therein are very helpful to the present case.
 18. Mr. Chitolie presented his invoice, bill of lading and other documents evidencing payments that he actually made to the Japanese exporter. He was requested to provide further documentation to substantiate the declared value. Under Section 102 (1) of the Customs

Act, the Customs Officer may, at any time within 5 years of the importation require the importer to furnish him in such form and manner, as he may require, any information relating to the goods. But what other documents could Mr. Chitolie have reasonably provided in the circumstances. He was importing one car. In my opinion, the defendants have not advanced any acceptable reason authorized by the statute for finding that the invoice price of the vehicle, as properly adjusted to include all incidental related costs, charges and expenses, was not the transaction value of the vehicle in question.

19. I would say that the procedure undertaken by the Customs Department in order to re-value and re-assess the duty payable on Mr. Chitolie's vehicle is wrong as it is not authorized by statute. The Department is entitled to assess the costs, charges and expenses and add them to the C.I.F. price. But a revaluation of the transaction value of the vehicle itself was *ultra vires* the act. There must be evidence to prove that the invoice presented was fraudulent or fictitious. Reasonable suspicion is not enough. A comparable analysis of a research done by the Department cannot be the basis for the rejection of invoice and accompanying documents of the contract price of the vehicle. Nor can a visual inspection of the vehicle suffice. These considerations are not authorized by statute.
20. With due respect to the defendants, they have misconstrued the legislation. In arriving at the customs value of the vehicle, the customs officials are entitled to add all costs, charges and expenses incidental to the price actually paid or payable for the goods at the port of introduction in St. Lucia. But nothing in the legislation in the circumstances of this case gives the Customs Department the power to vary the contract to accord with an estimate price in a manner described by Mr. Joseph.
21. I do not propose to consider the argument raised by the Learned Solicitor-General on the jurisdiction of the court to deal with the matter as she later abandoned that issue. However, I make one observation. In *Padfield v Minister of Agriculture Fisheries and Food (1968) AC 997*, Lord Reid at *p. 1013* said:

"Parliament in conferring the power on the Customs and Excise intended that it should be used to promote the policy and objects of the Act, the policy and objects

of the Act must be determined by construing the Act as a whole and construction is always a matter of law in the court.”

22. I think that Mr. Chitolie has challenged the construction of the legislation as construed by the defendants. In my opinion, it is a matter of law for the court.
23. Reference was made to the GATT Agreement. Decision 6.1 of the Technical Committee on Customs Valuation of the World Trade Organization is a very interesting provision but as far as I am aware, it is not incorporated into the laws of St. Lucia.

Conclusion

24. For the reasons above, I would declare that the Comptroller of Customs employed a wrong principle in assessing the customs duty on Mr. Chitolie’s vehicle and that Mr. Chitolie is entitled to have the *ad valorem* duties assessed on the transaction value properly adjusted to include all costs, charges and expenses incidental to the sale and to the delivery of the goods at the port of introduction into St. Lucia.
25. On the question of relief, I would make the following orders:
 - (a) That the vehicle unlawfully being detained by the Comptroller of Customs be released forthwith.
 - (b) That the defendants do pay all rents due to the Saint Lucia Air & Sea Ports Authority with respect to Mr. Chitolie’s vehicle.
 - (c) That the defendants do pay a sum to be agreed upon by both parties representing loss of use of the vehicle from 10th December 2001 to the date of its release.
 - (d) No order is made as to costs as both parties agreed to forego this aspect of the case.
26. Lastly, by way of comment. The Learned Solicitor-General expressed concern in respect of an acute problem of under invoicing in St. Lucia. There is a concerted effort by the Customs Department to stamp out the racketeering of under-invoicing by merchants and in particular, used cars dealers. These unscrupulous businessmen deprive the State of much-needed revenue. But the law of the land must be reviewed and revised to reflect these concerns. The court cannot make laws.

Indra Hariprashad-Charles
High Court Judge