EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2017/0019

BETWEEN:

ECONO PARTS LTD

Appellant

and

THE COMPTROLLER OF CUSTOMS & EXCISE

Respondent

CONSOLDATED WITH

MR PARTS LTD.

Appellant

and

THE COMPTROLLER OF CUSTOMS & EXCISE

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. John Carrington	Justice of Appeal [Ag.]

Appearances:

Mr. Vandyke Jude with him, Mr. Mervyn Steele for the Appellants
Mr. George F. Charlemagne with him, Mr. Kareem Alleyne and Ms. Karen Bernard for the Respondent

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2019: April 12;
July 30.

Civil appeal – Customs (Control and Management) Act – Power of Comptroller of Customs and Excise to seize goods under section 130 of the Act – Failure to institute condemnation proceedings – Unlawful seizure – Section 6 of the Constitution of Saint Lucia – Protection

from deprivation of property – Statutory immunity conferred on Comptroller under section 133(2) of the Act – Whether learned judge erred in granting immunity in circumstances where there had been a most deplorable abuse of power – Whether appellants entitled to damages by way of vindication of constitutional rights based on abuse of power by customs officers – Special damages not proven –Whether appellants entitled to nominal damages

By notices of seizure dated 4th October and 10th December 2013, the Comptroller of Customs ("the Comptroller") seized three containers of automotive parts belonging to the appellants. The notices alleged statutory violations of improper importation, making untrue declarations, submitting counterfeit documents and attempting to evade the payment of chargeable duties on the items in the consignments.

Following the issuance of the notices of seizure, and as required by section 3 of schedule 4 (the "schedule") of the Customs (Control and Management) Act (the "Customs Act"), the appellants gave notice to the Comptroller of their intention to make a claim against the seizure. Under section 6 of the schedule, the Comptroller is mandated to take condemnation proceedings in respect of anything seized where notice of a claim is given. No condemnation proceedings were brought by the Comptroller.

The appellants instituted judicial review proceedings and challenged, amongst other things, the lawfulness of the decision to issue the notices of seizure. The learned judge found the custom officers' actions to be a most deplorable abuse of power by the Comptroller. He granted orders of certiorari quashing the notices of seizure on the ground that the notices were unlawfully issued. The learned judge, however, declined to award costs and damages on the basis that damages were not a relief claimed, special damages were not proven and on the basis of the statutory protection afforded by virtue of section 133(2) of the Customs Act as he was satisfied that the Comptroller had reasonable grounds for detaining the containers.

The main issue on appeal was whether the immunity conferred on the Comptroller in section 133(2) applies where, as the judge found, there had been a most deplorable abuse of power.

Held: allowing the appeal, awarding nominal damages in the sum of $20,000.00 and vindicatory damages in the sum of $75,000.00 to the appellant plus costs in the court below to be assessed if not agreed within 21 days, and on appeal, at two thirds of the assessed costs in the court below, that:

1. Section 133(2) of the Customs Act prescribes two instances in which the Comptroller and his officers are afforded immunity from payment of damages and costs where judgment is given against the Government or the Comptroller in any proceedings brought on account of a seizure or detention. Firstly, where a certificate relating to the seizure has been granted after condemnation proceedings have been instituted, and secondly, where the court is satisfied that there were reasonable grounds for either seizure or detention. The powers of seizure and detention are distinct in nature and purpose. Seizure is a more drastic

option leading to forfeiture. It puts in train the procedural provisions of schedule 3 which are wholly concerned with condemnation of property as forfeited. There is no corresponding statutory procedure relating to detention.

R (on the Application of Eastenders Cash and Carry plc and others) v The Commissioners for Her Majesty's Revenue and Customs; R (on the application of First Stop Wholesale Limited) v The Commissioners of Her Majesty's Revenue and Customs [2014] UKSC 34 applied.

2. This case involved a seizure and not detention. The judicial review proceedings did not concern whether the Comptroller had reasonable grounds for detaining the containers but concerned the failure of the Comptroller to bring condemnation proceedings, subsequent to the issuance of the notices of seizure. Therefore, to engage the immunity in section 133(2)(b), the learned judge ought to have been satisfied that there were reasonable grounds for the seizure. The finding that there were reasonable grounds for detention of the containers was not one which was open to him as detention was not in issue. Moreover, the learned judge, having found this was a most deplorable abuse of power, could not have found that the conduct of the Comptroller and his officers was based on reasonable grounds. This amounted to an error of law.

   Sheikh Adbullah Ali Alhamrani v Sheikh Mohamed Ali Alhamrani BVIHCVAP2013/0005 (delivered 18th September 2013, unreported) followed.

3. Where loss is undoubtedly suffered but unquantified, it is the duty of the court to recognise the loss by an award that is not out of scale. Though no lease was presented, it is common ground that the containers were stored at a warehouse that did not belong to the Customs Department. The commercial reality is that either rent would have accrued or some inconvenience would have been suffered because of the unavailability of the warehouse due to the goods being stored there. Additionally, auto parts purchased for resale and kept from the appellants for three and a half years would be substantially devalued. In the absence of proof of damages, this Court is justified in awarding nominal damages for loss undoubtedly suffered over the period of seizure.

   Charlton Greer v Alstons Engineering Sales and Services Limited [2003] UKPC 46 applied.

4. Section 6(6)(a)(vii) of the Constitution of Saint Lucia contemplates enactments such as the Customs Act, and allows for taking possession of or acquisition of property for 'as long as may be necessary for the purposes of examination, investigation, trial or enquiry'. In the instant case, there is no evidence of any investigation, trial or inquiry. The inaction by the Comptroller following the unlawful seizure for a period of three and a half years constituted a violation of the appellants' constitutional right to protection from deprivation of property for which an award of vindicatory damages ought to be made.

Attorney General of Trinidad and Tobago v Ramanoop 2005 UKPC 15 applied.

JUDGMENT

[1] **PEREIRA CJ**: This appeal arises from the decision of the learned judge made on 10th May 2017 in which he, pursuant to section 133(2) of the **Customs (Control and Management) Act**,[1] (the "Customs Act") made no award as to damages or costs despite granting orders of certiorari quashing notices of seizure that had been issued to the appellants. The appeal raises a single issue, that is, whether the Comptroller of Customs (the "Comptroller") should be immune from paying damages or costs under section 133(2) of the Customs Act in circumstances where, as the judge found, there has been a most deplorable abuse of power by the Comptroller in unlawfully seizing the appellants' property for a period of three and a half years.

[2] The issue will be considered against a brief background which will highlight, in particular, the sequence of events leading up to the appellants' claim for declarations and constitutional redress for the unlawful deprivation of their property for three and a half years.

Background

[3] The matter arose in this way:

(a) The appellants imported three containers of automotive parts ("the consignments") into Saint Lucia which were duty paid on Customs Entry C33447 of 24th September 2013; C30505 of 3rd September 2013 and C34940 of 4th October 2013.

(b) On 4th October 2013 and 10th December 2013, the consignments were seized by virtue of two notices of seizure (the "notices of seizure") which

[1] Cap 15.05, Revised Laws of Saint Lucia 2013.

alleged statutory violations of improper importation, making untrue declarations, submitting counterfeit documents and attempting to evade the payment of chargeable duties on the items in the consignments.

(c) Following the seizure of the goods, by letters dated 24th October 2013 and 6th January 2014, the appellants gave notice to the Comptroller of their intention to make a claim against the seizure in accordance with section 3 of schedule 4 (the "schedule") of the Customs Act.[2] It bears noting that the Comptroller is mandated, under section 6 of the schedule of the Customs Act to take condemnation proceedings, where notice of a claim in respect of anything seized is given. It is common ground that, at the time of filing this claim in the High Court, no steps were taken by the Comptroller to institute condemnation proceedings and that no steps have been taken to date. It is this failure on the part of the Comptroller that stirred the appellants into filing a claim for judicial review.

Proceedings in the Court Below

[4] On 10th March 2016, the appellants obtained leave to file judicial review proceedings. The substantive judicial review claim came up for hearing before the learned judge on 31st March 2017. The appellants sought to impugn the notices of seizure on several bases including that: the Comptroller and his officers did not comply with the statutory requirements as to a summary of the facts supporting the charges; the Comptroller and his officers did not particularise the allegations of fraudulent evasion of payment of duties, and other procedural defects. Importantly, the appellants challenged the lawfulness of the decision to issue the notices of seizure in the absence of any evidence of under-invoicing.

[5] Having heard the claim, the learned judge granted orders of certiorari quashing the notices of seizure on the ground that the notices were unlawfully issued. The learned judge, referring to the case of **R (on the Application of Eastenders Cash**

[2] Schedule 4 must be read in conjunction with section 130 of the Act which deals with detention, seizure and condemnation of goods.

and Carry plc and others) v The Commissioners for Her Majesty's Revenue and Customs; R (on the application of First Stop Wholesale Limited) v The Commissioners of Her Majesty's Revenue and Customs,[3] examined the distinct powers of the Comptroller in relation to seizure and detention under the Customs Act. He accepted that it was not disputed that the containers were seized as opposed to detained and that even if they were only detained, detention for a period of three and a half years in order to complete an investigation to determine whether to seize can hardly be considered reasonable.

[6] Of relevance to the appeal is the learned judge's finding that the notices of seizure were unlawfully issued based on suspicion and not on having ascertained that the goods were in fact actually liable to forfeiture. The judge also noted that the failure to institute condemnation proceedings after three and a half years following the issuance of notices of seizure under section 130 of the Customs Act read together with schedule 5 of the Act constituted an unreasonable delay in the circumstances of the case. Though describing the case as a most deplorable abuse of power by the Comptroller, the judge declined to award costs and damages on the basis that damages were not a relief claimed, special damages were not proven and on the basis of the statutory protection afforded by virtue of section 133(2) of the Customs Act. At paragraph 26 of the judgment, the judge concluded:

> "Having read the affidavits of Grantley Promesse and Albert V Sandy filed on behalf of the Defendant, I am satisfied that the customs department **had reasonable grounds for detaining the goods**. Where in my view, the department went wrong was to have gone on to issue the notices of seizure, on the basis of its belief and before investigations were concluded, without ascertaining that the goods were actually liable to forfeiture. I therefore make no award as to damages or costs."

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[3] [2014] UKSC 34.

It is this finding of the judge which has spawned this appeal. There is not before this Court any challenge to the grant of the certiorari orders or to the judge's finding that the notices were unlawfully issued.

The Appeal

[7] The appellants have filed some eight grounds of appeal complaining of errors made by the learned judge. However, the primary issue in short, is whether the learned judge erred in granting the Comptroller the statutory immunity set out in section 133(2) of the Customs Act. It is only if he erred in so doing, that the Court will consider whether damages should be awarded, and if so the quantum. In summary, the fundamental theme of the appellants' argument is that the immunity ought not to apply based on the facts of the case. The appellants say that it was not legally or factually possible for the learned judge to, on one hand, find that the notices of seizure were issued based on suspicion and therefore unlawfully issued and, on the other hand, grant immunity on the basis that there were reasonable grounds for seizing or detaining. The simple fact is that the matter commenced by way of seizure and the immunity would only apply if the judge found that there were reasonable grounds for seizure. Detention was never in issue in the proceedings. As the learned judge acknowledged, Customs bypassed the detention process and moved straight to seizure. The appellants therefore submit that it was wrong for the judge to make a ruling on a fact which was not an issue in the case.

Discussion

[8] A useful starting point is the recital of section 133 of the Customs Act, which states:

> "(1) Where, in any proceedings for the condemnation of anything seized as liable to forfeiture under any customs enactment, judgment is given for the claimant, the court may, if it sees fit, certify that there were reasonable grounds for the seizure.
>
> (2) Where any proceedings are brought against the Government or the Comptroller on account of the seizure or detention of anything as

liable to forfeiture, and judgment is given for the plaintiff or prosecutor, then if either—

(a) a certificate relating to the seizure has been granted under subsection (1); or

(b) the court is satisfied that there were reasonable grounds for seizing or detaining that thing,

the plaintiff or prosecutor shall not be entitled to recover any damages or costs.

(3)...

(4)..."

[9] It is readily apparent that section 133(2) prescribes two instances in which the Comptroller and his officers are afforded immunity from payment of damages and costs notwithstanding an unlawful seizure and detention. Firstly, where a certificate relating to the seizure has been granted after condemnation proceedings have been brought under section 133(1) and secondly, where the court is satisfied that there were reasonable grounds for either seizure or detention. To engage section 133(2)(a), it is necessary for condemnation proceedings to have taken place and to have resulted in a certificate of seizure being issued. Given that no condemnation proceedings have been brought in accordance with section 6 of the schedule, the appellants contend that section 133(2)(b) was the only plank upon which the learned judge could have granted the immunity. I agree that this is the only potentially relevant subsection.

[10] The powers of seizure are distinct in nature and purpose to that of detention and wholly different considerations are engaged. The two powers ought not to be conflated. Seizure is a more drastic option. It is the first stage of the statutory process leading to forfeiture. It puts in train the procedural provisions of schedule 3 which is wholly concerned with condemnation of property as forfeited.[4] Where a notice of seizure is issued, and the importer of the goods seized intends to make a

[4] R (on the Application of Eastenders Cash and Carry plc and others) v The Commissioners for Her Majesty's Revenue and Customs; R (on the application of First Stop Wholesale Limited) v The Commissioners of Her Majesty's Revenue and Customs, [2014] UKSC 34.

claim that the goods are not liable to forfeiture, he/she is given one month from the date of service of the notice of seizure, to give notice of his claim in writing to the Comptroller. Upon receiving that notice, the Comptroller is obligated to take proceedings for condemnation of the goods. There is no corresponding statutory procedure relating to detention. Lord Sumption and Lord Reed in **R (on the Application of Eastenders Cash and Carry plc and others) v The Commissioners for Her Majesty's Revenue and Customs; R (on the application of First Stop Wholesale Limited) v The Commissioners of Her Majesty's Revenue and Customs**,[5] explained that detention is a temporary assertion of control over the goods, which does not necessarily involve any seizure with a view to ultimate forfeiture. The purpose of detention is to enable the Comptroller and his officers to undertake inquires and investigations to determine whether to seize the goods and take proceedings for their forfeiture or to restore them.

[11] I hasten to point out that this case involves seizure and not detention. The judicial review proceedings did not concern whether the Comptroller had reasonable grounds for detaining the containers but concerned the failure of the Comptroller to bring condemnation proceedings, subsequent to the issuance of the notices of seizure. In their fixed date claim forms filed on 5th December 2016 and 24th March 2016, the appellants aver that the improper seizure of the containers have deprived the companies of their property and constitutes an unlawful "taking" of property by the Customs Department in violation of sections 6 and 7 of the **Saint Lucia Constitution Order** (the "Constitution").[6] Further, at paragraph 2.6 of the respondent's written submissions, the allegations of the appellants are listed. They include: that the Comptroller had no reasonable grounds to seize; that the decision to seize failed to observe procedure and was illegal; the improper seizure of the containers deprived the appellants of their property; the improper seizure breached the Constitution; and the delay in commencing proceedings deprived the

[5] [2014] UKSC 34 at para. 19.
[6] Cap 1.01 Revised Laws of Saint Lucia 2013.

appellants of their goods resulting in significant loss of business and expense. The plenitude of letters sent by the appellants complain of procedural impropriety, unreasonable delay, malicious conduct and the Comptroller's failure to follow the statutory mandated procedures in failing to bring condemnation proceedings after the notices of seizure were issued.

[12] There is no conflict regarding the relevant facts. The Comptroller issued a notice of seizure pursuant to section 1 of the schedule of the Customs Act which states:

> "The Comptroller shall, except as provided by sub-paragraph (2), give notice of the seizure of anything seized as liable to forfeiture and of the grounds of that seizure to any person who to his or her knowledge was the owner of, or one of the owners of, that thing at the time of its seizure."

In compliance with section 3 of the schedule, the appellants gave notice of their claim within the time stipulated. Section 3 provides:

> "Where any person, who was at the time of the seizure of anything the owner or one of the owners of it, claims that it was not liable to forfeiture, he or she shall, within one month of the date of service of the notice of seizure or, where no such notice was served, within one month of the date of seizure, give notice of his or her claim in writing to the Comptroller at any customs office."

The complaint of the appellants is that the Comptroller failed to act in accordance with section 6 which states that:

> "Where notice of claim in respect of anything seized is duly given in accordance with paragraphs 3 and 4, the Comptroller shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of its seizure liable to forfeiture, that court shall condemn that thing as forfeited."

[13] Interestingly, in the face of the foregoing, the respondent's submissions seek to address the power of detention, which as I have previously stated does not arise on the facts. As the learned judge found, the Comptroller and his officers did not seek to detain in order to investigate so as to determine whether their suspicions could be borne out. Rather, they proceeded straight to seizure without any reasonable basis for so doing, and furthermore, as appears from all the evidence

and the statements attributed to the officers, simply because they had the power to do so. It is enough that the learned judge found that the fact that the Comptroller voluntarily stated that it could not bring condemnation proceedings because it was researching the "true value" and because of limited resources to facilitate the investigation demonstrates that the decision to issue the notices of seizure was based on suspicion and not on having ascertained that the goods were in fact actually liable to forfeiture, thus making the seizure unlawful.

[14] On an evaluation of the facts before him, the learned judge found that there was no basis for the seizure and that the Comptroller, and his officers had committed a most deplorable abuse of their power. These findings are, however, at odds with his conclusion that the immunity in section 133(2)(b) applied, as the Comptroller had reasonable grounds to detain. For the immunity to have applied, the learned judge ought to have been satisfied that notwithstanding the unlawful seizure, the Comptroller and his officers had reasonable grounds to seize. A finding of **a most deplorable abuse of power** by the Comptroller and his officers, on any view, is inconsistent with the notion of a reasonable course of conduct whereupon immunity can be conferred. Put another way, it would be most surprising for a most deplorable abuse of power, as found by the judge, to be clothed with an immunity.

Appellate court – Evaluation of facts

[15] It is not open to an appellate court to simply reverse a trial judge's evaluation of facts and substitute its own for that of the trial judge. This principle is now trite. In **Biogen Inc v Medeva PLC**,[7] Lord Hoffmann observed that:

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la vérité est dans une

[7] [1996] UKHL 18 at para. 54.

nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

[16] As to a Court of Appeal being slow to reverse a trial judge's evaluation of facts, the statement of Mitchell JA in **Sheikh Adbullah Ali Alhamrani v Sheikh Mohamed Ali Alhamrani**[8] is apposite. At paragraph 70, he said:

> "A decision which was not properly open to the judge below on the evidence amounts to an error of law in respect of which an appeal court should intervene unless it can be shown that the judge's decision was plainly and unarguably right notwithstanding his misdirection of himself. Where the correctness of a finding of primary fact or inference is in issue the role of the appellate court is to determine whether the finding or inference is wrong, giving full weight to the advantages of the trial judge."

[17] This statement is apt in the present case. It is also notable that this was a case where the trial took place on the basis of affidavit evidence only and without cross examination of witnesses. Based on the learned judge's overall assessment of the facts and evidence, the decision to grant the appellants the section 133(2)(b) immunity because there were reasonable grounds to detain, was not properly open to him and amounts to an error of law in respect of which an appeal court should intervene. I agree with the learned judge that this was a most deplorable abuse of their powers but such conduct in my view does not and ought not to attract the immunity provided under section 133(2)(b). Were this to be the case then there would be no constraint which would deter the Customs Department from abusing their powers when acting under the Customs Act save in circumstances which may amount to a breach of constitutional rights. The section 133(2) immunity is clearly predicated upon the concept of reasonableness. There can be nothing reasonable about an abuse of power and less so a most deplorable abuse of power.

Damages

[8] BVICHCVAP2013/0005 (delivered 18th September 2013, unreported).

[18] Having concluded that the Customs Department's actions are not covered by the section 133 immunity, I now come to the question of whether damages should be awarded and, if so, the quantum. The learned judge found that damages were not a relief pleaded and that special damages were not proven. It is not clear why the judge found that damages were not a relief pleaded when at paragraph 57 of Econo Parts' fixed date claim filed on 24th March 2016, it sought declarations and/or damages and Mr. Parts, at paragraph 170 of its fixed date claim filed on 5th December 2016, likewise sought the same relief.

[19] On the issue of special damages, the respondent submits that the learned judge was correct in refusing the claim for special damages. Relying on **Ilkiv v Samuel**,[9] the respondent contends that as a general rule any claim for special damages must not only be pleaded but must be proven and in this case the appellants failed to prove their damages. The appellants have quite rightly conceded that the court was unable to make an award for special damages as the appellants had failed to prove their loss. This, however, is not the end of the matter. The appellants say that notwithstanding the failure to prove their loss, the court ought to have made an award of damages to them in recognition of the undoubtable loss suffered for three and a half years.

[20] Where loss is undoubtedly suffered but unquantified, it is the duty of the court to recognise the loss by an award that is not out of scale. Reference need be made only to **Charlton Greer v Alstons Engineering Sales and Services Limited**,[10] a decision of the Privy Council, for the authoritative pronouncement on the approach to be adopted by the Court where there is an unquantified but undoubtable loss. In **Greer**, Sir Andrew Leggatt, who delivered the opinion of the Court, quoted with approval from **McGregor on Damages**:[11]

> "Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a

[9] [1963] 2 All ER 879.
[10] [2003] UKPC 46.
[11] 13th Edn., at para. 295.

> subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss. In the present case the problem is simply one of proof, not of absence of loss, but of absence of evidence of the amount of loss."

[21] The appellants' primary argument under this head of damages is that the learned judge ought to have awarded damages for the rental of the warehouse where the containers were stored. Although no lease was presented, the appellants say that the commercial reality is that a warehouse, not owned and controlled by the Customs Department, could not be occupied for three and a half years without there being a loss.

[22] It is noteworthy that by letter dated 2nd March 2016, the appellants informed the Comptroller of rent owed in the sum of $145,000.00 and requested that the goods be removed. On 17th March 2016, the Comptroller responded, "consequent to your removal of the parts from the premises, the department is making the necessary arrangements to accommodate the removal of the items and for their appropriate storage". The response of the Comptroller seems to me to be an implicit recognition that either rent was being accrued or that some inconvenience was being suffered because of the unavailability of the warehouse due to the goods being stored there.

[23] The appellants state that the parts were purchased for resale and have been substantially devalued. Invariably, the appellants would have suffered some loss, having injected capital for the importation of three forty-foot containers of auto parts for resale and having been deprived of that property for a period of three and a half years. Following the approach in **Greer**, in the exercise of my discretion, I consider an award of nominal damages in the sum of $20,000.00 not to be out of scale.

[24] The appellants also urge the Court to award damages for the breach of their constitutional right to protection from deprivation of property guaranteed under section 6 of the Constitution. The appellants state that an additional award of

damages ought to be made to reflect the Court's abhorrence of the blatant violation of the appellants' constitutional rights. In response, the respondent's brief submission is that no constitutional damages can arise in this case.

[25] Sections 6(1) and 6(6)(a)(vii) of the Constitution provide:

> "(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except for a public purpose and except where provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.
>
> ...
>
> (6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1)—
>
> (a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right—
>
> ...
>
> (vii) **for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry** or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to such development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out)." (emphasis mine)

[26] Section 6(6)(a)(vii) contemplates enactments such as the Customs Act and allows for taking possession of or acquisition of property for 'as long as may be necessary for the purposes of examination, investigation, trial or enquiry'. As recognised by Baptiste JA in **Kent Andrews et al v The Attorney General of St. Vincent and the Grenadines**,[12] another enactment of that nature is the **Proceeds of Crime Act** which falls within the ambit of section 6(6). An important feature of the section 6(6)(vii) is that the taking of property **must be for as long as**

[12] SVGHCVAP2010/0019 (delivered 7th November 2011, unreported).

necessary for the purposes of examination, investigation etc. Indeed, in the instant case, there is no evidence that any investigations were carried out and any trial or inquiry commenced. I am of the view that the unlawful seizure constituted a violation of the appellants' constitutional right to protection from deprivation of property. On the persuasive authority of **Maya Leaders Alliance and others v Attorney General of Belize**,[13] the Comptroller's failure to bring condemnation proceedings for such a prolonged period[14] may also be viewed as a denial of procedural fairness upon which a breach of protection of the law may be grounded. The Caribbean Court of Justice, at pages 203 and 204 of the judgment, noted:

> "the right to protection of the law... encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However, the concept goes beyond such questions of access and includes the right of the citizen to be afforded, 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power'. The right to protection of the law may, in appropriate cases, require the relevant organs of the State to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the State may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy."

[27] The principles on which the question of damages is to be considered in cases of breach of constitutional rights have been usefully analysed by the Privy Council in the case of **Attorney General of Trinidad and Tobago v Ramanoop**.[15] Lord Nicholls stated that:

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[13] (2015) 87 WIR 178.
[14] The Customs Act does not prescribe any time within which the Comptroller, following the issuance of notices of seizure, must institute condemnation proceedings. However, section 32(10) of the Interpretation Act authorises such proceedings to be done with all convenient speed and not otherwise.
[15] 2005 UKPC 15.

"When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

The purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right. It is not to punish the Executive. But vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest. Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard."

[28] Similarly, in **Romauld James v The Attorney General of Trinidad and Tobago**[16] Lord Kerr at paragraph 24 stated:

"Enforcement of the protective provisions may require more than mere recognition that a violation of those provisions has occurred. As Lord Nicholls said in Ramanoop, 'when exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened' (para 18).

The constitutional dimension adds an extra ingredient. The violated right requires emphatic vindication. For that reason, careful consideration is required of the nature of the breach, of the circumstances in which it occurred and of the need to send a clear message that it should not be repeated. Frequently, this will lead to the conclusion that something beyond a mere declaration that there has been a violation will be necessary. This is not inevitably so, however. Nor is it even the case that it will be required in all but exceptional circumstances. Close attention to the facts of each individual case is required in order to decide on what is required to meet the need for vindication of the constitutional right which is at stake."

[29] At paragraph 41, he considered the circumstances in which such an award will be appropriate as outlined by Lord Nicholls in paragraph 19 of **Ramanoop**:

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[16] [2010] UKPC 23.

> "An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in s 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award."

[30] I am guided by the pronouncements made by Privy Council in **Inniss v the Attorney General of Saint Christopher and Nevis**[17] and by this Court in **The Prime Minister et al v Sir Gerald Watt, KCN, QC**[18] that vindication asserts that the right infringed is a valuable one. What sum then is appropriate for the vindication of a person's constitutional rights? The answer can be found in the opinion of the Board in **Merson v Cartwright and Another.**[19] Lord Scott noted that:

> "The sum appropriate to be awarded to achieve that purpose would depend upon the nature of the particular infringement and the circumstances relating to that infringement. It would be a sum at the discretion of the trial judge. In some cases, a suitable declaration might suffice to vindicate the right; in other cases an award of damages, including substantial damages, might seem to be necessary."

[31] Being mindful of the foregoing, I am of the view that this case calls for an award of vindicatory damages. Based on the evidence, this Court is in as good a position to assess the quantum to be awarded.

[32] Much like the learned judge, I consider this case to be a "most deplorable abuse of power."[20] A period of three and a half years of complete inaction is far from what the framers of the Constitution intended when they allowed the taking of

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[17] [2008] UKPC 42.
[18] ANUHCVAP2012/0005 (delivered 27th May 2013, unreported).
[19] 2005 UKPC 38.
[20] See para. 14 of judgment below.

someone's property for so long as may be necessary for investigation, examination etc. Despite the numerous requests for disclosure of evidence of under-invoicing by the appellants, no evidence was forthcoming. Further, no evidence was before the court of the investigations of the Comptroller, which of itself is cause for concern. Webster JA in **Attorney General v Kenny Anthony**[21] commented on the duty of the public authority to make full disclosure in judicial review proceedings. At paragraph 16 of the judgment, he stated:

> "That is the nature of judicial review proceedings and the courts have traditionally placed a duty on the public authority to co-operate and make full disclosure. In R v Lancaster County Council ex parte Huddleston, Sir John Donaldson, MR described the disclosure obligation in this way:
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> > 'First, she says that it is for the applicant to make out his case for judicial review and that it is not for the respondent authority to do it for him. This, in my judgment, is only partially correct. Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards faced upwards on the table and the vast majority of the cards will start in the authority's hands'."

[33] In the circumstances, an award of vindicatory damages of a substantial size is necessary. In the exercise of my discretion, I would award the sum of $75,000.00 to vindicate the appellants' constitutional right which has been contravened.

[34] At this juncture, I pause to comment on the lack of promptitude by the Comptroller to initiate condemnation proceedings although the proper disposal of this appeal did not require the Court to descend deeply into the manner in which the Comptroller and his officers exercised their statutory powers. It is true that the Customs Act endows the Comptroller and his officers with very wide and intrusive powers of detention and seizure which can potentially impinge on the constitutional right to protection from deprivation of property. It is incumbent on the Comptroller to ensure that such powers are not misused but are exercised within the bounds of the law so that the constitutional rights of citizens, which are

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[21] SLUHCVAP2009/0031 (delivered 14th June 2010, unreported).

to be jealously guarded, are not trampled on. There appears to be a continued failing by the Comptroller and his officers to follow the statutory procedures prescribed by the Customs legislation, not because they are unaware of the provisions, but simply because a plenitude of powers reside in their hands. When the powers are invoked it must be on the basis that to do so is reasonable, proportionate and for a proper purpose. They are not given for allowing or licensing abuse. The Court deprecates the seemingly deliberate disregard for the procedure set out in the Customs Act despite the obvious consequences. The laxity with which this matter was treated coupled with the overall tenor of the officers' expressions and actions can only be considered as a most deplorable abuse of power. It was left up to the Comptroller to initiate condemnation proceedings with all convenient speed and not otherwise. The Comptroller simply cannot opt to sit idly by in what I think is a rather complacent manner. Such complacency can have dire consequences, as here, for a legitimate business enterprise. The Customs Department must always be mindful of their dual role of ensuring the proper collection of revenues balanced against the facilitation of legitimate business enterprises.

Conclusion

[35] For the reasons given above, I would allow the appeal and award nominal damages in the sum of $20,000.00 together with vindicatory damages in the sum of $75,000.00. The appellants having prevailed on the appeal are entitled to their costs in the court below, such costs to be assessed if not agreed within 21 days, and on appeal, to two-thirds of the assessed costs in the court below.

[36] I am grateful to counsel for their assistance.

I concur.
Gertel Thom
Justice of Appeal

I concur.
John Carrington
Justice of Appeal [Ag.]

By the Court

Chief Registrar