

THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

CLAIM NO. SLUHCV2018/0106

BETWEEN:

COMPTROLLER OF CUSTOMS AND EXCISE

Claimant

and

R. G. INVESTMENTS INC.

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Rene Williams with Mr. Kurt Thomas for the Claimant

Mr. Leslie Prospere with Mr. Alberton Richelieu for the Defendant

2019: June 27, 29;
December 5.

JUDGMENT

[1] **CENAC-PHULGENCE J:** The claimant, the Comptroller of Customs and Excise (“the Comptroller”) filed a claim against the defendant, R. G. Investments Inc. (“RG Investments”) who is the importer of one (1) forty foot container identified by Number GESU 480661-6 seeking an order that the said container and its contents be deemed condemned as forfeited pursuant to section 130(4) of the **Customs (Control and Management) Act**¹ (“the Customs Act”).

The Claimant’s case

¹ Cap. 15.05 of the Revised Laws of Saint Lucia.

- [2] The short facts as alleged by the Comptroller are that RG Investments imported a forty foot container ("the first container") which was reported on the Bill of Lading to contain one used Scissor Lift, 16 pallets and one bundle of 87 pieces of building materials (collectively referred to as "the first consignment"). The Comptroller alleges that on 17th March 2017, RG Investments presented a customs entry C11769 ("the first customs entry") dated 3rd March 2017 and therein declared that the items in the consignment were purchased from the following suppliers: Automotive Export Enterprises Inc. of Hialeah, Florida, USA, Orgill of Memphis, Tennessee, USA and the Hillman Group of Chicago, Illinois, USA ("the suppliers") for a total of US\$38,728.38 and stated the transportation costs as being US\$2,415.00.
- [3] On the declared customs value of US\$41,143.38, RG Investments paid the sum of EC\$14,882.34 being the duties chargeable. It is further alleged that on 17th March 2017, Customs examined the first container in the presence of Mr. Anselm Clauzel ("Mr. Clauzel"), the agent of RG Investments and other employees of RG Investments and discovered seven hundred and eight (708) items of building materials, general hardware, clothing and electronics that had not been declared on the customs entry. The examination revealed that the undeclared items were purchased from the following suppliers: Rooms-to-Go, Amazon.com, Makita Latin America, Orgill of Memphis, Tennessee, USA, Macy's and the New York Company.
- [4] The Comptroller claims that the actions of RG Investments breached several sections of the Customs Act including sections 32(1)(e), 32(3)(b), 113(2), 114(6) and 116(2). On 13th April 2017, Customs served a notice of seizure on RG Investments and on 4th May 2017, RG Investments elected administrative proceedings to address the seizure and ultimately secure the release of the consignment. By letter dated 11th July 2017, RG Investments was notified by the Comptroller of its agreement to the condition of the administrative proceedings being payment of the outstanding chargeable duties of \$15,344.36 and a

restoration fee of \$30,000.00 for the release of the first consignment.

- [5] On 23rd August 2017, RG Investments presented the Comptroller with a cheque for the outstanding chargeable duties but refused to pay the restoration fee whereupon the Comptroller cancelled the administrative proceedings. On 17th November 2017, the Comptroller returned the cheque and informed RG Investments that condemnation proceedings would be instituted against the consignment. It is the Comptroller's contention that from the date of seizure, RG Investments has failed to contest or make any claim against the seizure pursuant to the provisions of Schedule 4 of the Customs Act.

The Defendant's case

- [6] RG Investments for its part admits the first consignment contained items which had not been declared on the bill of lading but allege that these items were inadvertently included in the container or had inadvertently been placed on the bill of lading but were really to have been part of another imported forty foot container ("the second container").
- [7] RG Investments disputes that the examination of the container took place on 17th March 2017 as alleged by the Comptroller and say the 17th March 2017 examination was aborted as full access to the items in the consignment had been impeded by a used scissor lift which had been parked in the entrance to the container. As a result, the examination was rescheduled to 18th March 2017.
- [8] RG Investments avers that the examination took place on 18th March 2018 at which time they say Customs aborted the examination when they discovered discrepancies between the consignment and the customs entry. RG Investments avers that on that occasion the Customs' representatives orally advised of their decision to seize the container and ordered its immediate return to Port Castries. It is the contention of RG Investments that the seizure of the first container at that time was premature and without legal authority. The Comptroller should have,

they say detained only the undeclared items pending the investigation into the discrepancies.

[9] RG Investments denies that it has breached any of the provisions of the Customs Act and avers that it only became aware of the alleged contraventions on 11th July 2017 after the seizure had taken place. RG Investments admits to having selected administrative proceedings in an effort to avoid unnecessary litigation but says that as part of that process it only agreed to pay the outstanding chargeable duties to secure the release of the consignment. RG Investments contends that it sought an explanation from Customs as to the basis for the \$30,000.00 restoration fee but Customs refused to provide a response. It is RG Investments further contention that the failure to pay the restoration fee did not cancel the administrative proceedings and that this action was taken because an explanation as to the basis for the levying of the restoration fee had been sought.

[10] RG Investments says that its ability to challenge the levy of the restoration fee was thwarted by the non-existence of the Customs Appeals Commissioners under the provisions of section 137 of the Customs Act. RG Investments says the claim ought to be dismissed and the consignment released to it subject only to the payment of the chargeable duties and not the restoration fee or port charges incurred to date.

Issues

- [11] The issues to be decided are as follows:
- (1) When did the seizure of the consignment take place and whether the consignment was liable to forfeiture at the time of seizure?
 - (2) Whether RG Investments agreed to pay the restoration fee of \$30,000.00 and whether the non-payment should have resulted in cancellation of the administrative processing?
 - (3) Whether the imposition of a restoration fee of \$30,000.00 is a proper exercise of the Comptroller's powers contemplated by section 130(5) of the Customs

Act and whether this is an issue which can be addressed in these proceedings?

(4) Whether the consignment should be condemned as forfeited?

- [12] At trial, Mr. Albert Sandy ("Mr. Sandy") at the time Assistant Comptroller with responsibility for the Enforcement Division of the Customs and Excise Department, Mr. Grantley Promesse ("Mr. Promesse"), Customs Inspector in the Investigations Unit, Mr. Junior Hippolyte ("Mr. Hippolyte"), Senior Customs Officer and Ms. Karen George ("Ms. George"), Senior Customs Officer gave evidence on behalf of the Comptroller. The evidence of RG Investments was given by Mr. Anselm Clauzel, Operations Manager and Mr. Peterlee David, its Customs Broker.

Issue 1-When did the seizure of the consignment take place and whether the consignment was liable to forfeiture at the time of seizure?

The Evidence

- [13] The evidence of Customs Officers, Mr. Hippolyte and Mr. Promesse is central to this issue as they were the ones who would have carried out the examination of the container and investigations in this matter.
- [14] Mr. Hippolyte in his evidence confirms the averments of RG Investments in its defence that the container was first examined on 17th March 2017 at about 5 p.m. at Pigeon Island, Gros Islet in the presence of Mr. Clauzel. The examination was however abandoned and rescheduled to 18th March 2017 because the contents of the container could not be fully accessed due to the presence of a large scissor lift at the front of the container which could not be removed due to lack of the proper equipment. The rescheduled examination took place at the RG Quarry site in Cul de Sac, Castries.
- [15] During the 18th March 2017 examination, Mr. Hippolyte says he observed that some of the items offloaded were not accounted for on the invoices which were attached to the first customs entry C11769. These items consisted of power tools, ladders and wind turbines. The power tools were found on a pallet shrink wrapped and sealed with Makita's tape. The marks and numbers on the package label

stated that goods were one of two pallets shipped directly from Makita Latin America and consigned to Rayneau C&I. He says with the assistance of Mr. Clauzel he was able to identify some of the Makita power tools found during the examination on the Automotive Export invoice but several other tools could not be identified on any of the invoices which had been presented. He said he asked Mr. Clauzel whether there was any invoice specifically from Makita and he said he had no knowledge of any and that the goods were purchased from the supplier Automotive Export.

[16] Mr. Hippolyte says at that point he asked Mr. Clauzel for an explanation as to the undeclared items found and he could not provide one. He then informed Mr. Clauzel that due to the undeclared goods in the first container the consignment was liable to seizure and that a detailed examination of the contents of the first container would have had to have been conducted and requested that the container be returned to Port Castries. All the items which had previously been offloaded were requested to be repacked except for some items which were bulky and would prove difficult to re-pack. Mr. Hippolyte says he advised Mr. Clauzel that these items were part of the consignment and should not be used without Customs authorization. The first container was subsequently returned to Port Castries that same evening.

[17] Mr. Hippolyte gives evidence that on 20th March 2017, he contacted Makita Latin America with assistance from the supervisor of the Audit Unit using a contact number affixed to the package label. He says they got confirmation from a customer service representative that the numbers affixed to the package label were Makita Latin America's order numbers for a shipment consigned to Rayneau C&I. He gives the details of the seven documents which he says were obtained from Makita Latin America by email from the customer service representative.

[18] Mr. Hippolyte says that according to the documents received, the goods were purchased from Makita Latin America by the supplier Orgill on behalf of RG

Investments to be shipped to the freight forwarders, Automotive Exports. Mr. Hippolyte says he undertook an examination of the prices on the Makita invoices and those on the Automotive Export invoices which had been supplied and this revealed that most of the items were lower on the Automotive Export invoice with the exception of one item which was equivalent. The total value of the items was lower by US\$1,385.00 on the Automotive Export invoice.

[19] Mr. Hippolyte's evidence is that on 11th and 12th April 2017, a detailed examination of the container was undertaken by himself, Mr. Promesse, Mr. Edmund Charley, Mr. Marcus Thomas and Ms. Mahanda Antoine in the presence of Mr. Clauzel. Mr. Hippolyte details the findings of his examination at paragraphs 14 to 17 of his witness statement which I will attempt to summarize:

- (i) An additional 705 items were found which had not been declared on the Customs Entry C1179; The shipping labels on some indicated who they were purchased from and invoice numbers. The additional items consisted of clothing, household furniture, television, transmission equipment, car stereo equipment, ladders, cleaning supplies, power tools, caulk guns, wind turbines, construction paper and glass sheets. Some of the undeclared items, such as a television set, auto parts and artificial florist supplies were from unknown suppliers.
- (ii) A total of 2 seal skids of Makita tools were found with Rayneau Contr & Industrial on the label;
- (iii) Item Number 7 on the Automotive Export invoice dated 23rd February 2017 described as Bedroom Furniture Set was found bearing the customer name Louis, Malessa. He says this indicated that the goods were purchased by Malessa Louis from Rooms to Go;
- (iv) Two Orgill compact discs ("the Orgill CDs) and an Orgill trade show document bearing the name of RG Investments and identified RG Investments as an Orgill value 2Plus dealer;

[20] Mr. Hippolyte says on 13th April 2017, he verified the information on the Orgill CDs

and was able to identify most of the undeclared hardware items and their prices. Mr. Hippolyte states that all items listed as shipped on the Makita Latin America invoices obtained from Makita were found and the examination also confirmed that a total of ninety-two Makita items were not declared on the Automotive Export invoice.

[21] Mr. Hippolyte says he also observed that the items itemized on the Makita invoices which he obtained from Makita Latin America with individual prices had been grouped on the Automotive Export invoice and falsely described. By way of example, he says (1) the Makita invoice listed items as Thin Cut-off 4-1/2"x1.2x2.2 and Thin Cut-off 4-1/2"x1x22 Fast with a total price of US\$600.00 and US\$800.00 respectively but on the Automotive Export invoice, it was listed as Cutting Blade Assortment with a total price of US\$500.00 and (2) what is listed on Makita invoice as SDS Plus Bit 5/32"x6-1/4" for US\$43.00, Bull Point SDS-Max 12" for US\$7.40 and Flat Chisel SDS-Max 1"x12" for \$US\$79.00 is grouped on the Automotive Export invoice as Drill Bit Assortment with a price of \$485.00.

[22] On 13th April 2017, Mr. Hippolyte says he served Mr. Clauzel with a Notice of Seizure in respect of the first consignment and informed him of the breaches of the Act that had been committed. He says he also requested invoices from him for the undeclared goods to ascertain its chargeable duties and informed him that most of the suppliers' names were indicated on most of the undeclared items.

[23] Mr. Hippolyte says that in the absence of the correct supplier's invoices, he was able to compute an estimated value for the remainder of the undeclared items based on the prices obtained from the information on the Orgill CDs and estimated that to be a total of US\$16,195.58.

[24] On 19th April 2017, Mr. Hippolyte says he convened another meeting with Mr. Clauzel where he gave further details about the examination of the undeclared items in particular the Makita items. He says Mr. Clauzel was unable to provide any details on the suppliers' invoices with respect to the Makita items and stated

categorically that the Makita items stated on the Automotive Export invoice were all purchased from their supplier Automotive Export.

- [25] At another meeting held on 21st April 2017 with Mr. Clauzel, Mr. David, Mr. Marlon Alcee, RG Investments' purchasing manager, Mr. Promesse, Mr. Charlery and himself, Mr. Hippolyte says a full disclosure of the findings of the examination was made. In that meeting, Mr. Hippolyte says Mr. David explained that Automotive Export generates invoices for goods which are not purchased from them and that this would happen where Automotive Exports cannot ship the entire consignment, they would create a new invoice for the part shipment with Automotive Export as the seller.
- [26] On 23rd April 2017, Mr. Hippolyte says assisted by Mr. Promesse and Mr. Charlery, Ms. Malessa Louis was interviewed. That interview confirmed that the bedroom furniture set had been purchased by Ms. Louis with her credit card and that the purchasing manager for RG Investments had arranged for her to put the items in the container.
- [27] On 24th April 2017, Mr. Hippolyte says Mr. Clauzel informed him that the undeclared goods were short shipped from a consignment declared on 23rd March 2017 on Customs Entry C14182 ("the second customs entry") examined by Ms. Karen George. That examination report revealed that several items declared in the consignment and declared on the second customs entry C14182 were not found. After verifying, Mr. Hippolyte says he made the following observations: (i) that the items listed as short shipped on second customs entry of 23rd March 2017 were identical with that which was not declared in relation to the first container; (ii) that the Automotive Export invoice also featured Makita tools; (iii) the second customs entry was created five (5) days after the examination of the first container; (iv) that the Bill of Lading for the second container was generated fourteen (14) days after that attached to the first container; (v) that there was no indication during his prior documentary verification that the undeclared goods were short

shipped or declared on a previous shipment. According to Customs procedures short shipped goods must be declared/entered as such. And further Mr. Hippolyte says there was no indication which suggested that the second container examined by Ms. George was shipped, arrived or declared prior to the first container which he had examined.

[28] Mr. Hippolyte says the evidence available shows that RG Investments imported items upon which it failed to make the appropriate declaration and presented to the Comptroller a declaration where the goods were falsely described and undervalued. Mr. Hippolyte's further evidence is that at a meeting on 30th May 2017 in relation to the administrative proceedings requested by RG Investments, Mr. Sandy disclosed the particulars of the seizure report to Mr. Clauzel and Mr. Lee and advised of the breaches of the Customs Act that were committed. He specifically mentions sections 32(1)(a)(iii), 32(1)(e), 113(2)(a), 116(2)(a) and 114(b) in his witness statement.

[29] Mr. Promesse in his witness statements says Mr. Hippolyte had sought his assistance in this matter and he reviewed the first customs entry C11769 and made certain observations. His observations are in the main consistent with those of Mr. Hippolyte. On 11th and 12th April 2017, Mr. Promesse joined Mr. Hippolyte and a team of officers to conduct a physical examination of the contents of the first container. He says during the investigation a number of observations were made and Mr. Clauzel who was present was immediately and consistently apprised of the findings by Mr. Hippolyte and himself throughout the examination process. He details the observations and notifications made which are in the main consistent with Mr. Hippolyte's evidence.

[30] Mr. Promesse says he was advised by Mr. Hippolyte on 13th April 2017 that a notice of seizure had been served on RG Investments earlier that same day. He says he along with Mr. Hippolyte and Mr. Charlery attended a meeting on 21st April 2017 with representatives of RG Investments to discuss findings of the

examination of the first container and the representatives were apprised of the discrepancies discovered during the examination. At that meeting Mr. Promesse says Mr. David, the customs broker provided an explanation as to why the supplier Automotive Export commercial invoice which was attached to the first entry listed items that appeared to be purchased from another seller. Mr. David he says, explained that the supplier, Automotive Export would receive and consolidate goods on behalf of RG Investments. The goods Mr. David said would include but was not limited to items purchased by RG Investments from other suppliers and also goods purchased by other persons, staff and other affiliates of RG Investments from suppliers other than Automotive Export which was then placed in the care of Automotive Export for export to Saint Lucia. Automotive Export would then prepare an invoice which included items not purchased from them along with those which may have been. The invoice would reflect Automotive Export as the seller for all the goods stated thereon and this was the document which was used to make a declaration to Customs. That evidence was slightly different to what Mr. Hippolyte said Mr. David explained detailed at paragraph 25.

[31] During that meeting Mr. Clauzel said he believed the undeclared goods found in the first container were recorded as short shipped in the second container imported by RG Investments. Mr. Hippolyte's evidence does not include this detail. In fact, Mr. Hippolyte says in his evidence that at no time during the examination and up to the issuance of the notice of seizure did Mr. Clauzel or any agent or servant of RG Investments inform that the undeclared goods were overlanded or short shipped goods.

[32] Mr. Promesse provided other evidence relating to the investigation which took place after the meeting on 21st April 2017. He speaks of research of the Customs Investigation Unit revealing that the supplier, Automotive Export engaged in the import and export business. He says he made several calls to the company to inquire about the items which they sold, in particular whether they sold household furniture, power tools and accessories and it was explained that the company was

primarily involved in the sale of auto parts and some heavy equipment. He also speaks of the investigation into the company Freight Masters Overseas Inc. which confirmed that this company is a freight forwarding organization.

[33] Mr. Promesse says that Mr. Hippolyte informed him that on 24th April 2017, Mr. Clauzel informed him via telephone that he was able to confirm that the undeclared goods in the first container were recorded as short shipped in the second container examined by Ms. George. Mr. Promesse says that notwithstanding that the second entry in relation to the second container coincidentally accounted for the undeclared items found in the first container and that that entry had been prepared after the first entry, an untrue declaration had been made to Customs.

[34] Ms. George is the officer who inspected the second container where it was alleged that goods had been short shipped. Her evidence confirms that on 23rd March 2017 when she examined the second container there were items listed on the suppliers' invoices on the second entry which were not found in the container. She says she discussed the findings of the examination with Mr. Clauzel who informed her that he would inform the suppliers of the shortages and inquire of them about the items that were unaccounted for in the second container.

[35] Mr. Clauzel's evidence does not in any way contradict that of the claimant in relation to the examination dates and what was found. Where there is a divergence is that he says that the goods were seized on 18th March 2017, the date the first container was examined at Cul de Sac. His evidence is that Mr. Hippolyte told him that the goods were being seized and instructed that the container be repacked and taken to Port Castries. He does acknowledge that he received a notice of seizure on 13th April 2019.

Analysis

[36] The facts are not in dispute as to the date of the examination and the findings as

relates to the overlanded goods in the first container. It is accepted that the first examination of the goods took place on 18th March 2017 and based on the fact that there were undeclared goods in the container which did not appear on any of the invoices or on the first entry, instructions were given to return the container to Port Castries. It is not disputed that a notice of seizure in relation to the entire contents of the first container was issued to RG Investments on 13th April 2017. The notice of seizure issued on 13th April 2017 stated that the goods had been seized for breach of section 113(1)(a).

- [37] Counsel for RG Investments, Mr. Leslie Prospere (“Mr. Prospere”) submitted in closing submissions that the Court should accept the evidence of Mr. Clauzel that the seizure of the goods took place on 18th March 2017 and not 13th April 2017. This he says is because Mr. Clauzel’s evidence that Mr. Hippolyte told him on 18th March 2017 that he would be seizing the good was uncontroverted. In fact, he says the letter dated 11th July 2017 from the Comptroller at paragraph 2 states:

“On March 18 2017, the above container of building materials ...was seized by the Customs and Excise Department after examination of its contents.”

- [38] Mr. Hippolyte’s evidence in chief was that he had informed Mr. Clauzel on 18th March 2017 that the goods were liable to be seized. In cross-examination, he clarified that the goods had not been seized on 18th March 2017 but had merely been detained. What is clear is that none of the officers who gave evidence was able to account for the statement in the Comptroller’s letter of 11th July 2017 and consistently referred to the notice of seizure which had been issued to RG Investments dated 13th April 2017.

- [39] Section 130(1) of the Customs Act provides that:

“(1) Anything which is liable to forfeiture is seized or detained by any officer or police officer.”

Section 130(4) provides that:

“Schedule 4 has effect in relation to appeals against the seizure of anything seized as liable to forfeiture under any customs enactment, and for proceedings for the condemnation as forfeited of that thing.”

[40] In the case of **Econo Parts Ltd. v The Comptroller of Customs and Excise; Mr. Parts Ltd. v The Comptroller of Customs and Excise**², Smith J stated that “it is instructive to observe that an alternative is provided between seizing and detaining... there is a distinction between the two for the purposes of interpretation of the Act.”³

[41] In the case of **Rambally Blocks Ltd. v The Comptroller of Customs and Excise**⁴ at paragraph 57 it was stated thus:

“It appears that detention and seizure are often treated together. This is probably so, as goods which have been seized are necessarily detained, though not the converse. Once seized and the forfeiture procedure initiated, the distinction between the two becomes less important. However, in a case such as this, where the defendant denies seizure of the goods, it is important to distinguish between detention and seizure and the consequences arising in either case.”

[42] In that case, the defendant, the Attorney General had challenged the claimant’s allegation that the goods had been seized and maintained the position that the goods had not been seized at all but were in fact detained. In the instant case, RG Investments does not allege that the goods were not seized. Their only contention is that the Comptroller has the date of seizure wrong and that the seizure was premature. The question therefore is what under the provisions of the Act evidences seizure. It is here necessary to set out the relevant provisions of Schedule 4 of the Act. Paragraph 1(1) 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.” (my emphasis)

² SLUHCV2014/0309 and SLU/HCV2016/187 consolidated, delivered 10th May 2017, unreported.

³ At paragraph [9].

⁴ SLUHCV2014/0100, delivered 18th March 2019, unreported at paragraph 57.

[43] Paragraph 2 states:

“Notice under paragraph (1) shall be given in writing ...”

[44] These sections are pellucidly clear that seizure may be given by notice in writing so that even if, which I do not accept, Mr. Hippolyte may have used the words ‘seizing the goods’ as alleged by Mr. Clauzel, the notice of seizure is what effected the seizure in accordance with the Customs Act. Notwithstanding paragraph 1(2) of Schedule 4 which allows for seizure in the presence of the agent or servant of the owner of the consignment without need for a written notice to be given, the examination of the first container had not been completed on 18th March 2017 as Mr. Hippolyte had indicated that a detailed examination of the first container was required and requested for this purpose that it be returned to Port Castries. It is undisputed that the detailed examination was conducted on 11th and 12th April 2017 in the presence of Mr. Clauzel and certain findings which confirmed the presence of the undeclared goods were made. I therefore find as a fact that the seizure occurred on 13th April 2017 and in conformity with the provisions of paragraph 1(1) of Schedule 4 and as required set out the grounds for the seizure.

[45] It is a fact that RG Investments did not challenge the grounds for the seizure as stated in the notice of seizure or claim against the seizure. They did not contend at any time that the goods were not liable to forfeiture, thereby challenging the basis for the seizure. Paragraph 3 of Schedule 4 states:

“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.” (my emphasis)

[46] RG Investments admitted in cross-examination that it did not claim against the seizure albeit an explanation was offered for not having so done. In response to the question “So you did not challenge the seizure?”, Mr. Clauzel responded, “It was seized already so I could not challenge it.” Mr. David, RG Investments

Customs Broker in response to a similar question as to why when the notice of seizure was issued it was not challenged, responded that it would not have been practical. He agreed that he was familiar with the notice of seizure form and paragraph 3 of the form which spoke to claiming against the seizure but insisted that they 'could not'.

[47] Mr. David in cross-examination seemed to be clearly disagreeing that the declaration made to Customs was false when asked about the fact that there were items found in the first container which were not listed on the first entry. He attempted for the first time to say that it was not necessarily the case that an entry is supposed to list the items that are to be found in the container as it would depend on whether it was a LCL (less than a container load) or FCL (full container load) container. All of that explanation to my mind seems to suggest that RG Investments disagreed that the goods were liable to forfeiture. Yet, they never claimed against the seizure.

[48] It must therefore be that having not claimed against the seizure, RG Investments was accepting that the goods were liable to forfeiture. For completion though, I will address the issue of whether the goods were indeed liable to forfeiture. The notice of seizure issued on 13th April 2017 stated that one 40ft Container #4806616 was seized as liable to forfeiture for violations of the Customs Laws indicated in schedule 2. Schedule 2 stated: 'Section 113(1)(a) of the Customs Act'.

Liable to forfeiture?

[49] As stated by Smith J in **Econo Parts**, at the time of seizure, the consignment must have been actually liable to forfeiture, and whether this is so is to be based on objectively ascertained facts and not on the beliefs or suspicions of the Comptroller or his officers, however reasonable.

[50] The Act provides that goods are liable to forfeiture upon certain breaches of the Act.

Therefore, before Customs is entitled to seize goods, Customs must have objectively ascertained that the importer committed a breach of one or more of those provisions. In this case, what grounded the seizure on 13th April 2017 was breach of section 113(1)(a). Section 113(1)(a) provides as follows:

“113. Untrue declarations

(1) If any person—

(a) **makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Comptroller or an officer, any declaration, notice, certificate or other document; ...**

(b) ...

being a document or statement produced or made for any purpose of any assigned matter, which is untrue in a material particular, he or she commits an offence and is liable to a fine of \$5,000, and any goods in relation to which the document or statement was made are liable to forfeiture.”

[51] The evidence of the Comptroller gathered up to 13th April 2017 was clear. Mr. Prospere submitted that the evidence and documents obtained from the customer service agent at Makita Latin America⁵ is hearsay evidence and is contrary to the section 48 of the **Evidence Act**⁶, and cannot be relied on as it is inadmissible. Counsel for the Comptroller disagreed and argued that the evidence of Mr. Hippolyte as regards the interactions with Makita customer service representative and the documents obtained from her were assertions contemplated within the exceptions provided in section 50(2) (should be 50(b)) and represent what Mr. Hippolyte heard and perceived about the representations made. Counsel argued that the documents obtained are documents produced in the course of business and are exceptions to the hearsay rule under section 55(3) of the **Evidence Act**.

[52] Section 55(3) of the **Evidence Act** states:

“Subject to subsections (4), (5) and (6) where oral evidence in respect of a matter would be admissible in proceedings, a statement made in a document that was created or received by a person in the usual or ordinary course of business is admissible as evidence of the truth of its content in proceedings, upon production of the document.”

⁵ Paragraphs 10 and 11 of Mr. Hippolyte's witness statement.

⁶ Cap, 4.15 of the Revised Laws of Saint Lucia, 2008.

- [53] The evidence of Mr. Hippolyte simply revealed the source of the documents which he relied on to do his investigations. The evidence which he provides are his own assertions based on his observations and do not relate anything which the customer service representative said in relation to the contents of the documents. She simply provided the documents relative to the orders placed by RG Investments and confirmed that the two numbers affixed to the package label were in fact for packages emanating from Makita Latin America and consigned to Rayneau C&I. I am of the opinion that the documentary evidence received from Makita is admissible pursuant to section 55(3) of the **Evidence Act**.
- [54] However even without that information, the evidence revealed that there were items found in the first container which were not found on any of the invoices or the first entry. It cannot be denied that that conclusion could only have been reached after investigation of all the documentation produced with the first entry and comparing that with goods actually found in the first container. I cannot see any circumstances which would fall more squarely in section 113(1)(a) than this. What was declared was not what was in first container. There was therefore an untrue declaration made by RG Investments which rendered the goods liable to forfeiture. The fact that the investigation continued and Customs alleges other breaches of the Act which only came to the knowledge of RG Investments subsequently does not detract from the fact that under this section 113(1)(a), the goods are liable to forfeiture. The basis for the seizure on 13th April 2017 was breach of section 113(1)(a) as stated in the notice of seizure and no other section. The other alleged breaches carried criminal liability which could have been pursued by the Comptroller at a later date.
- [55] Mr. Prospere also submitted that even if the goods are liable to forfeiture and seizure took place on 13th April 2017, it is only the undeclared items which should have been seized. Counsel for the Comptroller referred in his closing submissions to section 131(1)(b) to support the actions of the Comptroller.
- [56] Section 131(1)(b) provides as follows:

“131. Forfeiture of vessels etc., used in connection with goods liable to forfeiture

(1) Where anything becomes liable to forfeiture under any customs enactment—

- (a) any vessel, aircraft, vehicle, animal, container (including baggage) or any other thing which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at the time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and
- (b) **any other thing mixed, packed or found with the thing so liable, is also liable to forfeiture.** (my emphasis)

[57] The action of the Comptroller in seizing the entire contents of the first container was therefore in accordance with the Customs Act and cannot be complained about.

Issue 2-Whether RG Investments agreed to pay the restoration fee of \$30,000.00 and whether the non-payment should have resulted in cancellation of the administrative processing?

[58] The evidence is that RG Investments invoked paragraph 2 of the seizure notice and by letter dated 4th May 2017 requested administrative processing. In that letter RG Investments stated that notwithstanding their right to appeal against the seizure they decided to proceed with administrative processing. That was confirmed by both Mr. Clauzel and Mr. Lee in their evidence who say that they saw this route as a quicker way to resolve the matter without the need for litigation.

[59] The evidence concerning this aspect came primarily from Mr. Sandy who was at the material time employed by the Customs and Excise Department in the capacity of Assistant Comptroller with responsibility for the Enforcement Division. He states that administrative proceedings are authorized under section 130(5) of the Customs Act and is a procedure which allows alleged offenders to settle cases with the department for seized goods instead of having the case litigated in court. It is noted however that nowhere in the Act does it speak to administrative

proceedings or processing and this is a term which has been coined to refer to the procedure outlined in section 130(5).

[60] In his witness statement, Mr. Sandy gives details of a meeting at the office of the Assistant Comptroller of Customs for Enforcement on 30th May 2017. Present at that meeting were Mr. Clauzel, Operations Manager of RG Investments and Peter Lee David, their Customs Broker. Representing Customs were Mr. Hippolyte and Mr. Promesse.

[61] In the meeting Mr. Sandy says Mr. Clauzel said that there were goods in the container which they knew nothing about. Mr. Sandy says he read Mr. Hippolyte's seizure report to the meeting. Mr. Sandy says he allowed Mr. Clauzel and Mr. David to nominate a restoration fee and they suggested \$50,000.00. However, considering the computed revenue defrauded amounted to \$15,344.36, Mr. Sandy says he suggested EC\$30,000.00 as the restoration fee so that RG Investments would have had to pay \$45,344.36 in total. He says both Mr. David and Mr. Clauzel agreed and confirmed that they were satisfied with that recommendation. Mr. Sandy says he agreed to recommend that amount to the Deputy Comptroller which was done by a note on the case file dated 31st May 2017.

[62] Mr. Sandy says he determined based on the evidence contained in the case file and correspondence from RG Investments, that the seizure and breaches of the Customs Act as found by Mr. Hippolyte should be upheld. He says he informed Mr. Clauzel and Mr. David of his decision and prepared the Customs Administrative settlement form bearing the allegations stated in the case file and they read it and stated their agreement. The case file with the recommendations was then submitted to the Deputy Comptroller who agreed with same.

[63] Mr. Sandy says he returned to Mr. Clauzel and Mr. David with the settlement form for their signature to facilitate payment and restoration of the goods but Mr. Clauzel said he would speak to his manager. He wanted Customs to sign the form

and deliver to him for signature by his manager. Mr. Sandy says he advised him that if he signed an original copy would be available to take to his manager but he declined and Mr. Sandy says he declined to give him the unsigned form.

[64] Mr. Sandy says some weeks later a letter from RG Investments along with a cheque for \$15,344.00 was received stating that RG Investments had agreed to pay the outstanding duties and that there were no additional fees to be paid. The Customs Comptroller decided to forfeit the seized goods and as a result returned the cheque to RG Investments on the advice of the Attorney General.

[65] Whilst a lot was made by Mr. Prospere of the seizure report and whether or not a copy had been given to Mr. Clauzel, I do not think that the report is germane to this issue. Mr. Clauzel's evidence is that he and Mr. David never agreed to any restoration fee of \$30,000.00. He says there was much back and forth between Mr. Sandy and Mr. Promesse on what further amount other than the chargeable customs duties of \$15,344.36 should be collected. Mr. Clauzel's evidence is that this fee along with the duties had to be paid before the container and its contents could be released.

Analysis

[66] Section 125 of the Customs Act allows the Comptroller to stay the proceedings for condemnation of anything as being forfeited under the Act or restore subject to such conditions, if any, anything seized under the Act.

[67] Section 130(5)(a) states:

“(5) Although something seized as liable to forfeiture has not been condemned as forfeited, or considered to have been condemned as forfeited, the Comptroller may at any time if he or she sees fit—

(a) deliver it up to any claimant upon the claimant paying to the Comptroller such sum as the Comptroller thinks proper, **being a sum not exceeding that which in the Comptroller's opinion represents the value of the thing, including any duty chargeable thereon which has not been paid;**” (my emphasis)

- [68] The Comptroller contends that the restoration fee was applied by Mr. Sandy pursuant to this section. By letter dated 11th July 2017 written to RG Investments, the Comptroller alluded to Mr. Clauzel's agreement to pay the restoration fee of \$30,000.00 and the 'revenue recovery of \$15,344.36" at the meeting with Mr. Sandy. The Comptroller went on to speak of a meeting on 22nd June 2017 where he said Mr. Clauzel re-iterated his agreement to pay the restoration fee. The letter went on that in a follow-up meeting with the Comptroller (Ag.) and Deputy Comptroller that Mr. Clauzel insisted that he had no issues paying the agreed restoration amount and any outstanding duties and would have all payments made within two weeks. The letter ended by saying that the Department awaited the payment of the said sums and signature of the administrative settlement document.
- [69] By letter dated 23rd August 2017, Mr. Clauzel on behalf of RG Investments responded indicating that whilst he had some queries, he agreed to pay the sum for the outstanding duties but did not agree to payment of the restoration fee of \$30,000.00 as it was not revenue due to the Government and did not form any part of assessment of goods. A cheque for only the outstanding duties accompanied the letter.
- [70] By letter dated 8th November 2017, the Comptroller informed RG Investments that given their reneging on the agreement to pay the restoration amount for the release of the seized goods, the administrative processing had failed and gave notice that condemnation proceedings would commence.
- [71] By letter dated 17th November 2017, the Comptroller again wrote to RG Investments and indicated that the cheque for the chargeable duties which had been submitted in August was being returned 'given that you have expressed your disagreement on settling the above seizure ...through administrative processing and the matter being referred to Attorney General's Chambers for condemnation proceedings...'.

[72] From the evidence of Mr. Sandy in cross-examination, what signals settlement at administrative processing is the signing of the administrative settlement form. There is no evidence that Mr. Clauzel ever signed the form. In fact, he asked that he be given the form to take to his manger for signature. At that point, it cannot be said that there was any agreement to pay the amounts levied. The subsequent correspondence from RG Investments clearly shows a disapproval with the levying of the restoration fee and indicating that despite efforts to obtain an explanation of the basis for the fee, none had been given. Whilst there may have been verbal agreement to the fee as alleged by the Comptroller what evidences that agreement is the settlement agreement. The conclusion to be drawn is that when Mr. Clauzel left the meeting on 30th May 2017, there was no settlement agreement and the administrative processing procedure was still open. Based on the 23rd August 2017 letter from RG Investments and the issue of the cheque for the chargeable duties alone, the Comptroller concluded that there was and would be no agreement with respect to the restoration fee and deemed that the process was at an end. I think based on the posture of RG Investments in its letter that was a fair conclusion.

Issue 3-Whether the imposition of a restoration fee of \$30,000.00 is a proper exercise of the Comptroller's powers contemplated by section 130(5) of the Customs Act and whether this is an issue which can be addressed in these proceedings?

[73] Counsel for the Comptroller submitted that these proceedings are not the appropriate forum to challenge the actions taken by the Comptroller and the exercise of the powers under section 130(5) of the Customs Act. Counsel further submitted that these proceedings are for the determination of whether the consignment is liable to forfeiture or not and therefore the challenge to the restoration fee is misconceived.

[74] The imposition of the restoration fee took place in May 2017 and in November 2017, the Comptroller advised of his decision to pursue condemnation

proceedings as the administrative processing had failed. Mr. Clauzel in his evidence says that RG Investments was unable to appeal the Comptroller's decision to levy the restoration fee because of the absence of a constituted Customs Appeal Commissioners under section 137 of the Customs Act.

- [75] The current proceedings are forfeiture proceedings and the sole issue for Court's determination is whether the seized goods are liable to forfeiture. I agree with Counsel for the claimant that this is not the appropriate proceedings in which the Comptroller's exercise of discretion to levy the restoration fee can be challenged. If RG Investments was of the view that the levying of the restoration fee was outside the powers of the Comptroller, then it should have taken steps to challenge that exercise of discretion which was possible from as far back as June 2017 and up to February 2018 when these proceedings would have been instituted. They cannot purport to mount this challenge in defence to a claim for condemnation of the goods and consequently, I will make no determination in relation to this issue which is more suited to other proceedings. I will only say that perhaps what has confused this matter is the use of the term restoration fee which does not appear in the Customs Act and what is required is a look at the substance of the section rather than the nomenclature which is used.

Issue 4-Whether the consignment should be condemned as forfeited?

- [76] Paragraph 5 of Schedule 2 provides:
- “If, on the expiration of the relevant period under paragraph 3 for the giving of a notice of claim, no such notice has been given to the Comptroller, or where such notice is given, that notice does not comply with any requirement of paragraph 4, the thing seized shall be deemed to have been duly condemned as forfeited.”
- [77] That forms the basis of this claim by the Comptroller. As noted earlier in the judgment, RG Investments did not claim against the seizure, the administrative processing failed and no other proceedings have been initiated by RG Investments concerning this matter. Therefore, in accordance with paragraph 5 of schedule 2, the goods seized are deemed condemned as forfeited.

Conclusion

[78] In light of the foregoing, the Court finds that the contents of the first container were liable to forfeiture and that their seizure was lawful. The Court therefore orders:

- (1) That the container identified by Number GESU 480661-6 and its contents be deemed condemned as forfeited pursuant to section 130(4) and the provisions of paragraph 5 of Schedule 4 of the **Customs (Control and Management) Act** to the Comptroller of Customs.
- (2) Prescribed costs on the claim be paid to the Comptroller in the sum of \$7,500.00.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar