COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2011/PUB/jrv/FP00003

THE QUEEN

AND

THE COMPTROLLER OF H.M. CUSTOMS

Respondents

AND

Ex Parte

(1) SMITH POINT LIMITED

(2) CALLENDERS & CO

(3) BAHAMIAN OUTDOOR ADVENTURE TOURS LTD

Applicants

BEFORE: The Honourable Mrs Justice Estelle Gray-Evans

APPEARANCES: Mr Frederick R.M. Smith, Q.C. and
Mrs A. Kenra Parris-Whittaker for the applicants

Mr Gary Francis and Mrs Erica Kemp for the respondents

22 November 2011

REASONS FOR DECISION

(Application for leave to apply for Judicial Review)

Gray Evans, J

1. This is an application for leave to apply for judicial review of the decision of the Comptroller of H.M. Customs ("the Comptroller") requiring applications by licensees of The Grand Bahama Port Authority, Limited ("GBPA"), for an Over the Counter Bond Letter ("bond letter") for the year ending 31 December 2011 to be accompanied by a Letter of Good Standing from the National Insurance Board ("the Decision").
2. A notice to that effect was published in the 7 October 2010 publication of the Freeport News.
3. By letters dated 17 and 20 December 2010, the first and second applicants applied to the Comptroller for the renewal of their bond letters for 2011 and received the following response in reply:

> "Please be advised that in order to consider your request you are required to submit to this Office a Letter of Good Standing from the National Insurance Board."

4. Letters of Good Standing from the National Insurance Board were requested and obtained by the first and second applicants and forwarded to H. M. Customs ("Customs") in January 2011. The bond letters for the year ending 31 December 2011 were issued by Customs to the first and second applicants by 2 February 2011.
5. A letter of good standing with respect to the third applicant was requested on 17 December 2010. However, it is unclear whether, and if so when, a bond letter was issued to the third applicant, although in his affidavit filed herein on 14 April 2011 the Assistant Comptroller avers at paragraph 14 that the third applicant "also applied for the over the counter letter…and an over the counter letter has been duly issued."
6. In the meantime, letters were written by Mr Ian Rolle, President of The Grand Bahama Port Authority, Limited (15 December 2010) and by Mr Smith, Q.C., on behalf of the Grand Bahama Port Authority, Limited (20 December 2010), to the Right Honourable Prime Minister and Minister of Finance, seeking his reconsideration of the good standing letter requirement and generally providing a "proposal to resolve the various ongoing disputes between H.M. Customs and GBPA Licensees."
7.

On 14 January 2011, the Financial Secretary (Ag) in the Ministry of Finance, responded to Mr Smith Q.C.'s letter to the Prime Minister as follows:

> "Please be advised that the contents of your letter has [sic] been carefully noted.
>
> I am advised by the Comptroller of Customs that this matter is presently before the courts. If this is the case then it may not be appropriate for a meeting to be held as suggested. Your further comments are welcomed."

8. By letter dated 11 January 2011, Mr Smith, Q.C. also wrote to the Honourable Attorney General forwarding a copy of his aforesaid letter to the Prime Minister and on 15 February 2011, the Director of Legal Affairs in the Office of the Attorney General responded as follows:

> "Please note that we will give consideration to this matter and respond as soon as possible."

9. By letters dated 26 January 2011, Mr Smith, Q.C., on behalf of each of the applicants, wrote to the Assistant Comptroller of Customs in the following terms:

> "Dear Sir:
> Re: Smith Point Limited (SPL) – Bond No. 2159
> Over the Counter Sale of Bonded Goods
>
> Yours of 5th ultimo regarding the matter at caption is acknowledged. I note that in order for [the applicant's] request to be considered it must provide a letter from the National Insurance Board showing that it is in good standing with such board.
> Please advise [the applicant] of the law that, first of all, requires it, as a licensee of the Grand Bahama Port Authority, to have such a letter from your Department to allow it to purchase supplies over the counter, and also the law that requires it to obtain and present to your department such a letter from the National Insurance Board.
> I would be most grateful for your earliest possible enlightenment on these matters."

10. Having received no response to that letter, the applicants commenced this action on 23 February 2011 and sought leave, ex parte, from Longley, J. to apply for Judicial Review of the Decision. The ex parte application for leave commenced before Longley, J. on 10 March 2011 and was adjourned to 14, then 30 March 2011. On 29 March 2011, counsel for the applicants as well as the Court received the following letter from the Director of Legal Affairs:

"March 25th, 2011

Callenders & Co
Island House
Freeport, Grand Bahama
Bahamas

Attention: Mrs. Anthea Parris-Whittaker

Dear Mrs. Parris-Whittaker

RE: The Queen and The Comptroller of H.M. Customs
ex parte (1) Smith Point Limited, (2) Callenders & Co.
(3) Bahamian Outdoor Adventure Tour Limited
2011/PUB/JRV/00003

Reference is made to the above captioned.

We advise that the Comptroller of H. M. Customs has been instructed to discontinue, with immediate effect, the request that licensees provide a letter of good standing from the National Insurance Board ("NIB") in order to secure an over the counter bonded sale letter.

We trust this more amicable approach will bring this matter to an end. However, it should be noted that this approach ought not to be regarded as any admission or otherwise prejudicial to or as a waiver of any other statutory obligation on the part of your clients or other licensees.

Sincerely yours

Deborah Frazer (Mrs.)
DIRECTOR OF LEGAL AFFAIRS

cc: The Chairman
National Insurance Board
Nassau, Bahamas"

11. On 30 March 2011 Longley J. adjourned the matter to 15 April 2011 for an *inter partes* hearing.

12. On 14 April 2011, the aforesaid affidavit by Lincoln Strachan, Assistant Comptroller of Customs, was filed on behalf of the respondent in objection to the granting of leave on the ground that the Decision about which the applicants were complaining had been reversed on or about 25 March 2011.

13. I pick up the chronology of events from the second affidavit of Challon Romer filed 17 November 2011 in which she deposes, inter alia, as follows:

(1) At the hearing on April 15th before Longley J the Judge directed that the parties attempt to settle the matter as the respondent had essentially conceded. The applicants insisted that there were live issues before the Court as the letter merely stated that the respondent would no longer pursue a letter of good standing from Licensees; the letter did not admit that it was unlawful to demand such a letter of good standing. The Judge adjourned the matter to May 13th to allow Counsel for the respondent time to take instructions on whether the respondent would provide compensation for the duty already paid by the applicants, and to allow the parties to attempt to reach a settlement. This was the fourth adjournment.

(2) On May 13th the parties again attended in front of Justice Longley. At that hearing the Judge failed to make a decision on the application. He indicated that he thought that Customs should agree to pay the applicants' costs and any overpaid duty, and that on receiving such payments the applicants should drop their application for leave. He invited the applicants and the respondent to agree an order giving effect to these indications. However, he did not give a ruling on the matter: the application was not dismissed, nor was leave granted. There was no decision against which the applicants (or the respondent) could appeal – the matter was simply left in limbo. In effect, this was a fifth adjournment.

(3) On July 4th, 2011 the applicants proposed a form of Order to the respondent Exhibit CR2 pages 1 to 4. This was not an Order with which the applicants were or are content – they consider it important that a proper decision on the legality of Customs' action should be reached as a matter of general public importance, and an injunction granted to prevent a repeat of any unlawful action. Nonetheless, this draft Order reflected what appeared to be Justice Longley's thinking on the matter.

(4) Following some further communication between the parties, on July 8th Customs replied with an amended form of Order Exhibit CR2 pages 5 to 7. Customs sought to limit the damages recoverable by the applicants, and reduce the costs of the applicants for which Customs was to be liable.

(5) As the parties could not agree on a form of Order, on about July 20th the applicants wrote to Justice Longley setting out the impasse and enclosing copies of the applicants' and respondent's draft orders as indicated above. The applicants also stated that they were in any event unhappy with leave being refused, and that any order made which dismissed their application for leave was not made by consent.

(6) On August 9th, Counsel from Callenders made inquiries of Justice Longley on the matter, who said that he was still considering what to do.

(7) On August 17th, Kenra Parris-Whittaker, an attorney at Callenders & Co., along with Counsel for the respondent attended Justice Longley at his request in chambers to discuss the draft Orders. As no order had been agreed, the Judge indicated that the application for leave should be set down for a date in September 2011. This was, in effect, the sixth adjournment.

(8) On about September 28th, Ms Parris-Whittaker was advised by the court that Justice Longley was unable to deal with the matter further, and that it was being transferred to Justice Evans.

14. The matter came on for hearing before me on 22 November 2011 at which time Mr Francis objected to me hearing the application on the ground that Longley, J. had already refused to grant the leave sought by the applicants. In fact, Mr Francis submitted that it was clear from the drafts of the order proposed by counsel on both sides that the parties were of the view that the application for leave had been refused. In that regard, I note that the only order common to both drafts is an order that: *"The application for leave to apply for Judicial Review is dismissed."*

15. Mr Smith, Q.C. insisted that no such determination had been made.

16. I, therefore, heard the application and undertook to review the transcript of the proceedings before Longley, J. on 15 April 2011. Having done so, I am satisfied that Longley, J. had not, in fact, made a determination on the applicants' leave application.

17. According to the transcript, Longley, J., adjourned the matter for the respondent to consider its options and for the parties to "confer", to see whether there was any "common ground" on certain issues before he made "a final determination". In fact, in response to Mr Francis' inquiry as to whether his "final determination" was "regarding costs", Longley, J. responded *"regarding leave..... If you two can't agree then I may just have to decide whether or not to grant leave."*

18. As indicated, the parties were unable to agree the terms of the order, and it is common ground that neither draft was approved or signed by Longley, J.

19. The applications say that the Decision was illegal; that it was an unlawful disappointment of a legitimate expectation and breaches the provisions of the Hawksbill Creek Agreement and that it is discriminatory against licensees of the Grand Bahama Port Authority, Limited.

20. The applicants therefore seek the following relief:

(1) An Order of certiorari quashing the Decision;

(2) A declaration that there is no lawful basis for the Decision;

(3) A declaration that the Comptroller of H.M. Customs has unlawfully disappointed the legitimate expectations of the Applicants to be permitted to buy and sell goods in bond from and to other GBPA Licensees;

(4) A declaration that the Decision is illegal, void, and of no effect in that it breached the applicants' rights not to be discriminated against under the provisions of Clause 2 (28) of the HCA;

(5) A declaration that the Decision was irrational, in that it departed from the established guidelines without reasonable notice of this change of policy being given to Licensees or the GBPA, and has imposed an unlawful penalty on certain Licensees;

(6) An order that Customs do make restitution to the applicants of monies paid by the applicants under coercion and/or under a mistake of law in respect of customs duties obliged to be paid on goods purchased by the applicants for their respective businesses from other GBPA Licensees;

(7) Interest on any monies ordered to be repaid pursuant to the equitable jurisdiction of the court, at such rate and for such period as the court thinks fit;

(8) Further or other relief;

(9) Costs.

21. By Order 53 rule 3 of the Rules of the Supreme Court ("RSC") no application for judicial review may be made without the leave of the Court. In order to obtain such leave an applicant must show that he has a sufficient interest in the subject matter; that the claim has merit – is not frivolous, vexatious or hopeless and he has not waited too long to make his application. Additionally, leave may be refused if there is an alternative remedy for addressing the alleged wrong.

22. There is no question that the applicants in this case have a sufficient interest in the subject matter. They are all licensees of The Grand Bahama Port Authority, Limited, and therefore entities to whom the Decision was directed. The Decision was published in the local newspaper in October 2010. The letters from Customs notifying the applicants of the Decision were issued in December 2010 and January 2011. This action was commenced in February 2011, well within the six months required by RSC Order 53 rule 4 and the applicants say that their application is grounded in law and the facts and so it is definitely not frivolous, vexatious or hopeless. It is clear from the

several Judicial Review cases involving Customs that its actions and decisions are subject to review. The applicants say that they have tried extra judicial means of resolving the current dispute with Customs without success and since Customs is a public body, it is appropriate to commence Judicial Review proceedings with all the protection for the public body which RSC Order 53 proceedings afford. (see R v The Comptroller of H.M. Customs ex parte Freeport Concrete Company Limited, No. 2006/PUB/JRV/FP0005).

23. It would appear from the foregoing that the applicants have satisfied the aforementioned criteria for obtaining leave to apply for Judicial Review of the Decision, but for the 25 March 2011 letter reversing the Decision ("the Reversal") which counsel for the respondents says effectively put an end to the need, if any existed, for these proceedings. Therefore, in his submission, to continue these proceedings would serve no useful purpose.

24. Mr Smith, Q.C., disagrees. In his submission, a declaration of unlawfulness in relation to the Decision will put on record that Custom's conduct in reaching and implementing the Decision was unacceptable and, "crucially, that it will not stand if such an attempt is made in future." He submits further that it is unacceptable for a public body to be able to take unlawful decisions, persist in the face of opposition and cave in (without admission) at the eleventh hour with no consequences to deter it and other public bodies from "repeating the process all over again in future".

25. In that regard, Mr Smith, Q.C., points out that the 25 March letter does not contain an admission that the Decision was unlawful and/or irrational; that it does not contain any guarantee that Customs will not reinstate this practice in the future; it does not contain any guarantee that Customs will not at some point in the future impose a different "equally indefensible and arbitrary" condition before it will authorize the purchasing of goods in bond between licensees nor, he points out, does the letter offer restitution of customs duties, or payment of the applicants' costs for this action.

26. Consequently Mr Smith, Q.C., presses for "a judicial pronouncement on whether or not Customs can lawfully do what they have done". In fact, Mr Smith, Q.C., was so convinced that the applicants' case was indefensible, that he invited this Court, to grant not merely the leave the applicants seek, but also the substantive relief, thereby sending, as he puts it, "a message that this kind of arbitrary conduct on the part of Customs will not stand and has consequences."

27. On the other hand, Mr Francis for the respondent argues that as the substance of the applicants' claim rests on the request for the National Insurance Board letter of good standing, which request has been withdrawn, there is no longer a live issue between the parties. In response to the applicants' "concern" that without a judicial pronouncement, there was nothing to stop Customs from making the same or a similar decision in the future, Mr Francis submits that the applicants' "proper and more convenient course" would be to await a further claim and "to bring their claim, if necessary, when and if the issue arises - where there is an actual controversy which the Court could undertake to decide as a living issue."

28. In any event, Mr Francis submits, to make the declarations sought by the applicants now would be purely academic.

29. I am persuaded that but for the Reversal, the applicants would have been entitled to leave to apply for Judicial Review.

30. However, it seems to me that that letter sufficiently disposes of the dispute between the parties as there is no longer a decision to quash and although I note Mr Smith, Q.C.'s concern about a "repeat performance" by Customs, I agree with Mr Francis that that bridge ought to be crossed if we come to it.

31. Mr Smith, Q.C., for the applicants, as did counsel for the applicants in R (on the application of C and another) v Nottingham City Council sought to buttress the applicants' position by pointing to the wider implications of this case. Indeed, he admitted that this was a test case and submitted, rather forcefully, that a judicial pronouncement on the main issues in this case would impact hundreds if not thousands of other licensees in Freeport. However, as did Jackson, L.J., delivering the judgment of the Court of Appeal in Nottingham City Council case, the Court has a heavy workload and does not exist to decide moot points.

32. In addition to the order of certiorari and the declarations as to the illegality and/or irrationality of the Decision, the applicants also seek an order for restitution of customs duties paid as a result of the Decision, together with interest, and their costs.

33. With regard to restitution of customs duties which may have been paid as a result of the Decision, I note here that section 88 of the Customs Management Act, chapter 293 Statute Laws of The Bahamas provides a remedy:

> **88.** In the collection and receipt of monies in respect of any duty, repayment of sums, being not less than five dollars, overpaid or paid in error may be made on proof to the satisfaction of the Comptroller that the same have been overpaid, or paid in error, provided that the claim to

repayment and the evidence in support thereof is submitted to the Comptroller within two years of the date of overpayment.

34. I, therefore, conclude that, in the circumstances, allowing these proceedings to continue would serve no useful purpose. In exercise of my discretion, therefore, I refuse to grant leave for Judicial Review of the Decision.

35. Notwithstanding that I have refused to give the relief sought by the applicant, in light of the facts as outlined above, I nevertheless order that the respondent is to pay the applicants' costs, to be taxed if not agreed.

Delivered this 1st day of March A.D. 2012

Estelle G. Gray Evans

Justice