COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

PUBLIC LAW DIVISION
2018/PUB/jrv/00030

BETWEEN

EXECUTIVE LAW ADVOCATES

Intended Applicant

AND

THE COMPTROLLER OF CUSTOMS

Intended First Respondent

AND

THE MINISTER OF FINANCE

Intended Second Respondent

Before:	**The Hon. Madam Justice G. Diane Stewart**
Appearances:	**Mr. Anthony Scriven for the Intended Applicant** **Mrs. Sophia Thompson-Williams and Mr. David Whyms for the Intended Respondents**
Ruling Date:	**December 14th 2022**

RULING

1. The Intended Applicant, Executive Law Advocates **(the "Intended Applicant")**, by an Amended Application for Leave to Apply for Judicial Review and for Interim Relief filed 13th December 2018 seeks the leave of the Court to apply for judicial review in order to obtain the following declarations and orders against the Respondents, The Comptroller of Customs and The Minister of Finance **(the "Intended Respondents"): -**

   - A Declaration that section 100 (3) of the Customs Management Act 2011 does not give the Respondents the authority to send demand letters of authorization to the Intended Applicant's clients instead of the Intended Applicant after receiving letters from the Intended Applicant as their client's legal representatives;
   - A Declaration that the Respondents have acted illegally by sending demand letters to the Applicant's clients in accordance with section 100 (3) of the Customs Management Act;
   - A Declaration that the Respondents acted ultra vires section 100 (3) of the Customs Management Act;

- A Declaration that section 100 (3) of the Customs Management Act applies to persons authorized to submit entries to the Customs department and not legal representation;
- A Declaration that section 100 (3) of the Customs Management Act exempts a certain group of persons who are qualified to represent a person;
- An Order that the Intended Applicant falls in a category of persons qualified to represent persons and is therefore exempt according to section 100 (3) of the Customs Management Act; and
- An Order that the Respondents discontinue to send demand letter to the Applicant's clients after receiving letters of representation by the Applicant.

2. The Intended Applicant also seeks interest on all sums found due to at such rate and for such period as the Court thinks fit. The grounds relied on mirrors the relief sought. **(the "JR Leave Application")**

BACKGROUND

3. The JR Leave Application was supported by the Affidavit of Leon Bethel **("Mr. Bethel")** filed 17th August 2018. Mr. Bethel, an attorney and partner in the firm that is the Intended Applicant, averred that on 2nd March 2018, the Client retained its services in relation to a matter with the Bahamas Customs Department and the importation of goods.

4. The Intended Applicant sent a letter to the Intended First Respondent dated 2nd March 2018, advising the Intended First Respondent that they had been retained by the Client to represent them. The Client then received a communication by way of email dated 16th April 2018 from Senior Revenue Officer Cranston Evans demanding a written notification that the Intended Applicant represented the Client.

5. In response, by email also dated 16th April 2018, the Client requested that the Intended First Respondent's request be made in a formal manner. By a demand letter dated 20th April 2018 the Comptroller of Customs requested that the Client write to the Intended First Respondent verifying that they would be represented by Tony Scriven/Executive Law Advocates. The Intended Applicant then, by letter dated 30th April 2018, wrote to the Intended Second Respondent, advising that there were no provisions under the Customs Management Act for the request made by the Comptroller of Customs.

6. In turn, the acting Financial Secretary within the Ministry of Finance wrote to the Intended Applicant on 30th May 2018, stating that the Comptroller of Customs had such authority to make the request by virtue of Section 100 (3) of the Customs Management Act. By letter dated 4th June 2018, the Intended Applicant informed the Intended Second Respondent that the aforementioned section was not applicable to the request made by the Comptroller of Customs. On 19th July 2018, the Comptroller of Customs wrote to the Client and requested that the Client confirm to them that the Intended Applicant was its legal representative.

7. The Intended Respondents filed their Affidavit in Response on 1st November 2018. By the said Affidavit, Dr. Geannine Moss, who was appointed as the Comptroller of

Customs since 8th August 2017, stated that on 28th November 2017 a field audit was conducted by the Intended First Respondent at the premises of the Client, with its owner Mr. Sheldon Morris **("Mr. Morris")** present and during business hours.

8. Mr. Morris was given notification by the Intended First Respondent of the audit and was requested to present certain documents to the Customs Post Clearance Audit Unit in order to assist them in conducting their audit. By letter dated 8th December 2017, the Intended First Respondent received correspondence from Mr. Morris requesting more time to obtain the documents requested.

9. By letter dated 19th December 2017, Mr. Morris advised the Intended First Respondent that he was unable to comply with their request as his computer system had crashed which resulted in him losing certain data. The Intended First Respondent had also received a letter from Serving Dealer Worldwide, a storage facility in Florida, which contained the Client's storage server. The said storage facility informed the Intended First Respondent that their systems had sustained damage from Hurricane Irma which prevented them from providing certain information.

10. On 25th January 2018, Mr. Morris received the initial findings of the Intended First Respondent's audit. Thereafter, a meeting was scheduled for Mr. Morris to see Superintendent Gomez of the Intended First Respondent to review the findings of the audit and to provide further proof of duty payments as had been previously requested. Mr. Morris never attended the meeting.

11. By letter dated 2nd March 2018, the Intended First Respondent received a letter from the Intended Applicant, informing them that they represented the Client. An email dated 16th April 2018 was sent to the Client requesting a formal letter verifying that the Intended Applicant in fact represented the Client. By letter the Intended Respondent advised that once the letter of authorization was sent, the Intended First Respondent would release information to the Intended Applicant.

12. The request was as a result of previous interjections by Mr. Anthony Scriven, an attorney within the Intended Applicant who purportedly represented other clients who did business with the Intended First Respondent. Some of the clients had already admitted guilt in breach of certain regulations of the Intended First Respondent and had indicated that they no longer wished to be represented by him.

13. Prior to the matter involving the Client, the Intended First Respondent had requested written authorization from their clients who claimed to have certain attorneys representing them. Sections 99 and 100 (3) allows the Comptroller of Customs to request such authorization.

ISSUES

14. The Intended Applicant submits that there are two issues, namely: -

14.1. Whether the Intended First Respondent or Intended Second Respondent has the authority by section 100 (3) of the CMA to send demands to the Applicant's clients?' and

14.2. Whether the Intended First Respondent was in breach of Article 26 (2) of the Constitution of The Bahamas by using her public office to discriminate against the Intended Applicant?

15. The Intended Respondents submit that the two issues for the Court's consideration are: -

15.1. Whether the Court should act in vain in entertaining an application for judicial review and the reliefs prayed when there has in fact been no decision taken by the Comptroller of Customs to review?; and

15.2. Whether on the true construction of the Customs Management Act the Comptroller of Customs could request from its client a letter or authorization that he was being represented by the Intended Applicant?

SUBMISSIONS

Intended Applicant's Submissions

16. The Intended Applicant relies on the guiding principles governing judicial review applications as set out in Order 53 of the Rules of the Supreme Court in addition to the inherent jurisdiction of the Court.

17. They submit that the Intended Respondents failed to interpret section 100 (3) of the Customs Management Act **(the "CMA")** in accordance with the guiding principles for statutory interpretation. The CMA should be reviewed in the context in which it was written, it must be read as a whole and not a part. Section 100 (3) is found in "Part VII Division Two – Persons Authorised to Make Entries". The caption speaks to the persons of which this section is applicable, namely, persons authorized to make entries, namely custom brokers.

18. Section 100 of the CMA is captioned "Empowerment of authorized agent" and speaks to how the authorized agent receives authority to act on behalf of another, granted by the Comptroller of Customs. Section 100 (3) provides: -

> **"The Customs authority may require any person stating that they are acting in the nature of or on behalf of another person to produce evidence of their powers to act as an authorized agent except where a person belongs to a category of persons entitled to act on behalf of another person."**

19. The section is very clear as it states what evidence must be produced to show that the person has the power to act as an authorized agent and it further provides an exception to the requirement exempting persons who belong to a category of persons entitled to act on behalf of another person. Even if the section were applicable they would fall under

the exemption of the section. They are entitled to act on behalf of other persons. It did not give the Intended Respondents the authority to send demand letters to its clients.

20. The Intended Applicant submitted that the Intended First Respondent was in breach of Article 26 (2) of the Constitution of The Bahamas, by using the public office to discriminate against them. They seek an injunction to prohibit the Respondent, their agents and servants, from sending demand letters to the clients of the Intended Applicant.

21. In **Bruno Rufa and The Queen and William Pratt SCCiv App No. 131 of 2016** referring to **Pinner v Everett [1969] 1 WR 1266 at 1273**: -

> **"In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase.....Viscount Simonds stressed the interpreter's need to read and absorb the whole Act before deciding whether real doubt exists as to the legal meaning of an enactment..."it must often be difficult to say that any terms are clear and unambiguous until they have been read in their context....the elementary rule must be observed that no one should profess to understand any part of a statute.....before he has read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous."**

22. Courts should take the usual approach to statutory interpretation which is that the judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute.

23. The Intended Applicant submitted that the Intended Respondents acted illegally, which was one of the grounds to be relied on in an application for judicial review. In **Council of Civil Service v Minister of Civil Service [1984] UKHL 9**, Lord Diplock stated the principles for the grounds in which a party could seek judicial review, as: - illegality, irrationality, procedural impropriety. Illegality meant doing an act with no legal authority, misinterpreting the law governing the decision and failure to retain a discretion being "that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it."

24. The Intended Respondents did not consider the full effect of the law and did not understand the law correctly when making the decision to send demand letters to the Applicant's clients after receiving a letter from the Applicant. An ultra-vires act occurs when an act performed or powers exercised by the administrative agent are in excess of the powers conferred by statute or violates a constitutional or statutory provision and to the extent that it conflicts with or contradicts the parent statute. The Intended Respondents acted ultra vires the provisions of the Customs Management Act.

25. In **Padfield v Minister for Agriculture, Fisheries and Food**, the Minister acted beyond his statutory authority and it was held that he acted ultra vires the relevant Act. "The Minister had power to direct an investigation in respect of any complaint as to the operation of any marketing scheme for agricultural produce. Milk producers complained about the price paid by the milk marketing board for their milk when compared with prices paid to producers in other regions. The Minister refused to appoint a committee. It was held that the Minister was under a duty to give proper consideration to the question whether to refer the complaint, and any such decision had to be based on good reasons, and consistent with the statutory purposes."

Intended Respondents' Submissions

26. The Intended Respondents raise the preliminary objection that the Court should not accede to the JR Leave Application as it was bad and wholly deficient and not in compliance with the pellucid rules of pleadings under Order 53 of the RSC. The Intended Appellant failed to encapsulate all of the relevant and mandatory elements which would have properly and sufficiently advanced the JR Leave Application and sought its dismissal.

27. The application does not show any relief being sought, specifically whether it sought an order of mandamus, prohibition or certiorari with respect to a decision of the Comptroller of Customs as was mandated by the RSC. In **Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374**, Lord Diplock summarized the grounds for reversing an administrative decision by way of judicial review as illegality, irrationality, procedural impropriety and legitimate expectation.

28. There was nothing produced or shown by the Intended Applicant which suggested that the Comptroller of Customs had made a decision in the exercise of its power against the Client which was either illegal, irrational or procedurally improper nor that there was any legitimate expectation held out that the Intended First Respondent could not make a request of him to simply affirm whether or the Client was being represented by the Intended Applicant.

29. There was no decision made by the Comptroller of Customs for the Court to review, only a request by email for Mr. Morris to state that the Intended Applicant was authorized to act on his behalf. They considered **American Cyanamid v Ethicon Limited [1975] 2 WLR** 316 to be instructive as it was held that it was not the court's role to consider conflicting evidence in respect of an interim application and at the stage of an interim application all that was necessary was for it to be shown that there was a real issue to be tried. In the case of the Intended Applicant there was no real issue to be tried.

30. In **American Cyanamid** (supra) Lord Diplock held: -

> **".....The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, there is a serious question to be tried."**

The letter sent to the Client by the Intended First Respondent was clear evidence that the Comptroller of Customs was not minded to make any decisions regarding the matter prior to the letter of authorization being furnished. Nothing novel turned on the request to have the letter of authorization."

31. Whether or not any reference was made to a particular section of the CMA, it was irrelevant to the question of compliance or non-compliance by the Client to furnish the requested letter. There was no loss which could be suffered from the Comptroller of Customs requesting a letter of authorization which could warrant an award of damages.

32. Despite the submission that there was no loss suffered, if in fact there was, damages would be an adequate remedy if the Intended Applicants provided evidence of loss. As stated in **Halsbury's Law of England, 584**: -

> **"Unless the material available to the court at the hearing of the application for an interim injunction fails to disclose that the claimant has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interim relief that is sought".**

33. There would be no loss suffered by the Intended Applicant if an injunction is not granted. The Intended Respondents would continue to be able to exercise their right to make certain written requests of their clients to provide certain information which would not result in any loss to the Intended Applicant.

34. As for the true construction of the CMA and whether it enables the Comptroller of Customs to request a letter of authorization, the Intended Respondents seek to distinguish the findings of the Court of Appeal **in Bruno Rufa v The Queen and William Pratt (in his capacity as Director of Immigration) SCCivApp No. 131 of 2016**.

35. In **Bruno Rufa**, it was held that on the true construction and interpretation of the Immigration Act, the word 'vary' ought to have been given its literal, plain and ordinary meaning. The case involved the meaning of a single word whereas the Intended Applicant's case involved the entirety of section 100 (3) of the CMA. In **Bruno Rufa**, Crane-Scott JA opined: -

> **"52. In his discussion of what he describes as the "informed interpretation rule", Bennion highlights the dangers of what he says is the 'first glance' approach to statutory interpretation. In Part XIII, he underscores the crucial importance of courts bringing an informed mind to the task of statutory interpretation no matter how plain the statutory word may first appear. In his commentary on the necessity for a court to examine the disputed word within the context of an enactment before determining whether there is real doubt as to its meaning, Bennion draws attention to the approach to statutory interpretation advocated by the House of Lords in A-G v. Prince Ernest Augustus of Hanover [1957] AC 436. At page 451 Bennion states: "Viscount Simonds stressed the interpreter's need to read and absorb the whole Act before deciding whether real doubt exists as to the legal meaning of an enactment: "...it must often be difficult to say that any terms are clear and**

unambiguous until they have been read in their context...the elementary rule must be observed that no one should profess to understand any part of a statute...before he has read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous." [Emphasis added]

36. The long title of the Customs Management Bill 2011 reads: -

> **"A Bill for an Act to reform the law relating to customs, to provide general rules applicable to the administration of the Customs business in the customs territory of The Bahamas, to repeal the Customs Management, Act CH. 293 and for connected matters."**

37. The **Interpretation and General Clauses Act, CH. 2** at section 3 defines Crown Agents as: -

> **"The person or body for the time being acting as crown agent for overseas Government and Administrations."**

Agent is defined as **"the person or body for the time being acting"**....The definition of this word could be given its plain and ordinary meaning as in the context of the statute and therefore ought to be interpreted as anyone who is acting for another person.

38. By correspondence dated 2nd March 2018 and 30th April 2018, the Intended Applicant claimed that he represented or 'acted' for the Client. In light of the power vested in the Comptroller of Customs, she was entitled to know definitively from the Client directly and not from the Agent, whether the Intended Applicant in fact acted for the Client.

DECISION

39. The Applicant's JR Leave Application is governed by Section 19 of the Supreme Court Act and Order 53 of the Rules of the Supreme Court. By **Section 19 (3) of the Supreme Court Act**, leave must be obtained to commence a judicial review application of a decision made by a public body which a private citizen claimed aggrieved them. **Section 19 (3)** states: - '

> **"No application for judicial review shall be made unless the leave of a judge has been obtained in accordance with rules of court; and the judge shall not grant leave to make such an application unless the applicant has a sufficient interest in the matter to which the application relates."**

40. **Order 53 rule 3 (2) of the RSC** confirms that leave is needed: -

> **"(2) An application for leave shall be made *ex parte* to a judge by filing in the Registry —**
>
> **(a) a notice in Form A in the Schedule to this Order containing a statement of —**
>
> **(i) the name and description of the applicant;**
>
> **(ii) the relief sought and the grounds upon which it is sought;**
>
> **(iii) the name and address of the applicant's counsel and attorney (if any); and**

(iv) the applicant's address for service; and (b) an affidavit which verifies the facts relied on.

(3) The judge may determine the application without a hearing, unless a hearing is requested in the notice of application, and need not sit in open Court and in any case, the Registry shall serve a copy of the judge's order on the applicant:
Provided that in no case shall leave be refused without giving the applicant a hearing.

(4) Where the application for leave is refused by the judge, or is granted on terms, the applicant may renew it by applying —
(a) in any criminal cause or matter, to the Court of Appeal;
(b) in any other case, to a single judge sitting in open Court:
(5).....
(6).....
(7) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

41. The test for the granting of leave requires an intended applicant to show that he has a sufficient interest to maintain the challenge to the decision and that he has a prima facie case. Given the nature of the application, it should be brought promptly and by a party who has sufficient interest in obtaining any relief sought as a result of the alleged decision made by the public body.

42. The prima facie case should be evident when claiming relief under one or more of the heads for judicial review namely illegality, irrationality, procedural impropriety or legitimate expectation. While the test was formerly a relaxed one, it is now more stringent as outlined in **Sharma v Browne Antoine [2007] 1 WLR 780,** where Lord Bingham of Cornhill and Lord Walker of Gestingthorpe declared :-

> **"(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: see *R v Legal Aid Board, Ex p Hughes* (1992) 5 Admin LR 623, 628 and *Fordham, Judicial Review Handbook* 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468, para 62, in a passage applicable, mutatis mutandis, to arguability:**
>
> > **"the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."**
>
> **It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen": *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, 733."**

43. The role of the Court when hearing a judicial review application is a supervisory one to review the process utilized by a public body in making a decision to ensure that there has been no abuse in their decision making power. It is not to act as an appellate court over any decision made by the public decision making body but as an overseer of the process relied on to come to the decision made. It must not tamper with a decision which was not irrational, illegal or procedurally unfair.

44. The burden falls on the applicant to prove that a decision should be reviewed by way of judicial review and this process should be a last resort, specifically, the applicant should exhaust any right of appeal or other means provided for challenging the decision before utilizing the judicial review procedure.

The Preliminary Objection

45. The Intended Respondents queried whether the Court should act in vain in entertaining an application for leave to commence proceedings for judicial review when there has been no decision taken by the Comptroller of Customs.

46. Upon reviewing the evidence of the parties, it is clear that the requests for a letter of authorization were made directly to the Client and not the Intended Applicant. This begs the question of whether the Intended Applicant has a sufficient interest in obtaining the relief sought. Similarly, the correspondence between the Financial Secretary of the Ministry of Finance and the Intended Applicant was on behalf of the Client.

47. In **R (on the application of Kides) v South Cambridgeshire District Council and others - [2002] All ER (D) 114**, Parker LJ considered the issue of standing in a judicial review application where the South Cambridgeshire District Council ("the Council"), as local planning authority, discharged its statutory duty under section 70(2) of the Town and Country Planning Act 1990 ("the 1990 Act") to have regard to all material considerations in dealing with an application for planning permission. He stated: -

> **"132. That leaves the issue of standing. As to that, it seems to me that there is an important distinction to be drawn between, on the one hand, a person who brings proceedings having no real or genuine interest in obtaining the relief sought, and on the other hand a person who, whilst legitimately and perhaps passionately interested in obtaining the relief sought, relies on grounds for seeking that relief on matters in which he has no personal interest.**
> **133. I cannot see how it can be just to debar a litigant who has a real and genuine interest in obtaining the relief which he seeks from relying, in support of his claim for that relief, on grounds (which may be good grounds) in which he has no personal interest.**
> **134. It seems to me that a litigant who has a real and genuine interest in challenging an administrative decision must be entitled to present his challenge on all available grounds. Nor do I read the judgment of Sedley J (as he then was) in *ex parte Dixon* as casting doubt on that proposition. Similarly, Lord Donaldson MR's reference (in *R v. Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 WLR 763 at 773) to "the applicant's interest" is, as I read it, a reference to the applicant's interest in obtaining the relief sought: in this case, the quashing of the planning permission.**
> **135. Accordingly, I would respectfully disagree with the judge's conclusion (in paragraph 109 of the judgment) that the appellant be debarred from relying on the argument based on affordable housing.**

> **136. In so far as Mr Drabble submitted that the appellant has no standing to bring the proceedings at all, I have no hesitation in rejecting that submission. The appellant has lived in Longstanton for upwards of 30 years. She plainly has a real and genuine interest in seeking to prevent the substantial development permitted by the planning permission."**

48. As it was the Client who had received the letters requesting formal authorization that the Intended Applicant represented it, it is the Client who has a real and genuine interest in any relief if they felt aggrieved by the Intended First Respondent's request for a formal letter. Therefore, I am satisfied that the Intended Applicant does not have a sufficient interest to seek the declarations and orders sought in its JR Leave Application and hereby dismiss the Leave Application.

49. I apologize for the delay in issuing this ruling, however all submissions and evidence were reviewed.

50. The Intended Applicant shall pay to the Intended Respondents their costs to be taxed if not agreed.

Dated this 14th day of December 2022

Hon. Madam Justice G. Diane Stewart