COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2010/PUB/JRV/FP/00006

IN THE MATTER OF an Application by Kelly's Freeport Limited
for Leave to Apply for Judicial Review
(Pursuant to the Rules of the Supreme Court, Order 53 rule 3)

BETWEEN

THE QUEEN

AND

THE COMPTROLLER OF H.M. CUSTOMS

Respondent

Ex Parte
KELLY'S FREEPORT LIMITED

Applicant

BEFORE	The Honourable Mrs Justice Estelle Gray Evans
APPEARANCES:	Frederick Smith QC along with Mr R. Dawson Malone for the applicant
	Mr Gary Francis for the respondent
Application heard:	2014: 13 June; and 2015: 24 November;

JUDGMENT

Gray Evans J.

1. This is another application for relief made in judicial review proceedingschallenging a decision ofthe Comptroller of H. M. Customs in Freeport, Grand Bahama.

The Parties

2. The applicant, Kelly's Freeport Limited ("Kelly's"), is a company incorporated under the laws of the Commonwealth of The Bahamas and carries on business at #8 Yellow Pine Street in the City of Freeport in the Island of Grand Bahama. The applicant is also a licensee of The Grand Bahama Port Authority, Limited ("GBPA") under a license dated 31 December 1985 (as amended by supplemental license agreements dated 1 August 1988 and 1 July 1995) ("the License"); and is licensed to, and does, carry on business in a wide range of activities including the assembly and manufacture of goods and the importation, wholesale and retail sale of goods and materials.

3. As a licensee of the GBPA the applicant is entitled to, and does,import materials and supplies for its business under bond, free of Customs duties, pursuant to the provisions of the Hawksbill Creek Agreement of 1955 (as amended) ("HCA").

4. Further, the applicant as a licensee of the GBPA has sold goods in bond to other licensees of the GBPA over the counter for use in their respective businesses, also free of customs dutiesfor upwards of 20 years.

5. The respondent, the Comptroller of H.M. Customs ("the Comptroller"),is appointed under the Customs Management Act 1976, chapter 293, Statute Laws of The Bahamas ("the CMA") to be responsible for the administration of the CMA and as such he is responsible for the acts or defaults of any customs officer or any other person performing a duty under the CMA. Included amongst the duties of the Comptroller are the duties to ensure revenue is collected, protected, accounted for and deposited to the Consolidated Fund.

Background facts

6. The background facts as set out in the application for leave to apply for judicial review and gleaned from the various affidavits filed on behalf of the applicant are not in dispute and are set out hereunder.

7. By letter dated 5 August 2010, the Assistant Comptroller of Customs wrote the following letter to the applicant:

> "Dear Madam:
>
> Re: Bonded Sales Report
>
> As you are aware the over the counter sale of bonded goods <u>is conditioned upon the submission of monthly bonded sales report.</u>
>
> A perusal of our records indicates that your company has been delinquent in this regard.
>
> This therefore serves as a reminder that your monthly bonded sales report must be submitted to this office by the 15th of each month.

Failure to comply may result in this concession being withdrawn.

Please be guided accordingly.

Yours truly..."

8. The applicant did not submit the report.

9. In September 2010, shortly after receipt of the 5 August 2010 letter, the applicant imported six containers with merchandise into Freeport.The applicant says that the usual import procedures were followed by itsCustoms Agent, including the submission of the usual Entries to Customs for processing and clearing of the sixcontainers in the normal course of business.

10. However, on 21 September 2010, Customs returned the Entries to the applicant's Customs Agentalong with a "Query Slip", with the following note: "*Bonded Sales for January – August are needed*".

11. A "Query Slip" is used by Customs to request clarification of one or more of the documents contained in the Entries. However, there was nothing on the Query Slip to indicate that Customs had found any irregularity in the Entries.

12. The applicant still did not submit a report of its bonded sales and the six containersremained at the Freeport Harbour in Customs' possession.

13. On 24 September and 28 September 2010 respectively, the applicant imported two further containers of goods. On 29 September 2010, the applicant's Customs Agent presented the usual Entries to Customs in respect of those two containers, but Customs refused to accept the Entries and to clear the said containers.

14. Consequently, by that date, Customs had in its possession eight containers of goods belonging to the applicant, and, according to the applicant,Customs refused to process any of the said goods for entry into Freeport, despite the demands made by the applicant to Customs for the surrender up of its containers.

15. Also on 29 September 2010, the applicant's attorneys met with Mr Lincoln Strachan, the Deputy Comptroller of Customs, and other Customs officers in Freeport, and sought to persuade Customs to release the aforesaid containers. According to the applicant, at that meeting, the applicant's attorneys told Customs that in due course, and on a cooperative basis with Customs, the applicant would be willing to work with Customs, the GBPA and other licensees, to develop a standard reporting process and report that would apply to all licensees conducting similar businesses; that in the meantime, however, Customs was not entitled to hold the applicant ransom in relation to its spontaneous demand for the bonded sales report by withholding entry of the applicant's containers, the contents of which had nothing to do with the sales reports (bonded or otherwise) of goods previously imported. The applicant says that at that meeting Customs made it clear that the aforesaid containers would not be released without the bonded sales report.

16. On30 September 2010, the applicant, through its Attorney, wrote to the respondent, stating that:

a) There was no basis in law orin practice for Customs to demand monthly bonded sales reports;

b) The right to sell goods in bond over the counter to other GBPA licensees was not a "concession" granted by Customs, but was along-standing practice which the applicant had a legitimate expectation would continue;

c) There was no basis in law for the detention of the applicant's containers;

d) The actions of Customs amounted to a conversion of the containers for which damages (including aggravated and punitive damages) would be sought.

17. Also on 30 September 2010, the applicant's attorney, sought the assistance of the then Minister of State for the Ministry of Finance, and the then Prime Minister and Minister of Finance in having the matter resolved and on 1 October 2010 the applicant's Customs Agent was contacted by Customs and asked to resubmit the aforesaid Entries so that the applicant's containers could be released. Customs processed the Entries for the said containers and they were eventually released to the applicant.

18. The applicant says, and the respondent does not deny, that the procedure regarding the reporting of duty paid sales which Customs and the applicant have followed since 1986, and which is usually completed within 15 days, is as follows: the duty paid sales report is filed with Customs within three to four days after the end of the month to which they relate; Customs then returns the report to the applicant, whothen pays the duty.

19. However, the applicant says that on 5 October, 2010, it attempted, through its Customs Agent, to file with Customs the returns for its duty paid sales for the month of September 2010, to the value of $50,504.20 in customs duties, butCustoms refused to accept the returns. Instead Customs advised the applicant's Customs Agent that such returns would not be accepted unless accompanied by returns/report for over the counter sales of bonded goods for the same period.

20. On 7 October, 2010 the applicant's Managing Director wrote to Customs resubmitting the duty paid sales report for the month of September stating that:

a) Customs' refusal to accept the duty paid report was a complete departure from the procedure which had been followed for the past 20 years;

b) Despite the fact that there was no basis for suddenly demanding a bonded sales report, the applicant was happy to meet and discuss the establishment of a mutually agreeable report and procedure.

21. The applicant's Attorney also wrote to Customs on 8 October2010 assertingthat the demand for the returns of sales of bonded goods had no basis in law.

22. By letter dated 12 October 2010, the Assistant Comptroller of Customs advised the applicant that theEntry submitted by its broker on 5 October 2010 for the dutiable sales for September was rejected because the bonded sales report for the same period had not been provided. He returned the duty paid sales report and Entry which had been resubmitted by the applicant's Managing Director with her letter of 7 October 2010. In his 12 October 2010 letter, the Assistant Comptroller also cited section 83 of the Customs Management Act, 1976 as authority for his actions.

23. The applicant contends that the demandfor the aforesaid report had no basis in law and was, therefore, unlawful; and in the alternative, that even if there was a lawful

basisfor the aforesaid demand, there was no lawful basis for the respondent's enforcement actions.

24. Hence the applicant's commencement of these proceedings for judicial review.

The Application

25. By its ex parte application for leave to apply for judicial review and for interim relief filed on 15 October 2010, the applicant sought relief in respect of:

> The decision of the Comptroller of H.M Customs ("Customs") to demand that Licensees of The Grand Bahama Port Authority, Limited (GBPA) submit returns to Customs on over the counter sales of bonded goods ["the first decision"]; and the decision of the Comptroller to seize unrelated goods of such Licensees or otherwise take enforcement action against them for refusing to comply with such demand ["the second decision"].

26. The applicant wasgranted leave, ex parte, by Hartman Longley, Sr J (as he then was), to apply pursuant to Rules of the Supreme Court ("RSC") Order 53 rule 3 for Judicial Review as set out in its aforesaid application. That order was, on the application of the respondent, set aside by Longley, Sr J (as he then was) by order dated 19 April 2011 and filed herein on 28 April 2011, on the ground that the applicant had failed to file the requisite notice of motion within the 14 days limited therefor by RSC Order 53 rule 5(5).

27. The Court of Appeal allowed an appeal of that order, and in its judgment dated 24 September 2013, remitted the matter for trial.

28. Pursuant to that order, the applicant filed its originating notice of motion on 7 October 2013, seeking the following relief:

1) A declaration that the selling of duty exempt goods in bond by the applicant is not conditional upon the submission of monthly reports to Customs on the sale of such goods;

2) A declaration that there was no lawful basis for the Comptroller of H.M. Customs or any customs officer or employee or agent of H.M. Customs to have demanded monthly returns of sales of duty exempt goods sold in bond from the applicant, being a licensee of the GBPA;

3) A declaration that there was no lawful basis for the Comptroller of H.M. Customs or any customs officer or employee or agent of H.M. Customs to detain goods, or refuse to process imported goods for entry in the usual way, or otherwise take enforcement action against GBPA licensees, on the basis of non-receipt of duty exempt bonded sales reports or on any other basis not sanctioned by law;

4) An injunction restraining the Comptroller of H.M. Customs or any customs officer or employee or agent of H.M. Customs from detaining goods or refusing to process imported goods for entry in the usual way, or refusing to accept returns for duty paid sales or otherwise taking enforcement action against GBPA licensees on the basis of non-receipt of duty exempt bonded sales reports or on any other basis not sanctioned by law;

5) Damages against the Comptroller of H.M. Customs to be assessed for the wrongful detention and or conversion of the Applicant's goods and the wrongful refusal to process the Applicant's goods for import in accordance with law and established practice;

6) Aggravated and punitive damages in respect of the arbitrary and high-handed actions taken by the Comptroller of H.M. Customs without regard to the legality of his actions;

7) Interest on all such sums found due to the applicant at such rate and for such period as the Court thinks fit;

8) Further or other relief;

9) Costs.

29. In relation to the injunction sought at paragraph (4) of the originating notice of motion, the respondent, at an inter partes hearing before Longley Sr J, (as he then was), on 26 October 2010, gave an undertaking in the following terms:

> "Until judgment in this matter or further order, neither the respondent nor any Customs officer or employee or agent of HM Customs may detain goods or refuse to process imported goods for entry in the usual way or refuse to accept returns for duty-paid sales, or otherwise take enforcement action against the applicant or other GBPA licensee on the basis of non-receipt of duty exempt bonded sales reports, or on any basis not sanctioned by law."

30. Although the notice of motion was filed in 2013, each side relied on affidavits filed in 2010 and 2011. The applicant relied on the affidavits of Christopher Lowefiled on 15 October, 2010, 21 October 2010, and 28 April 2011 respectively; and the affidavits of Anthea Parris-Whittaker, filed on 11 April 2011 and 21 April 2011 respectively. The affidavits filed on behalf of the applicant for the most part confirmed the truth of the aforementioned background facts and the grounds for the review.

31. The respondent relied on the affidavits of Mr Lincoln Strachan, Assistant Comptroller of Customs, filed on 26 October 2010 and 9 March 2011 respectively, although the latter affidavit was said to have been in support of the respondent's application to set aside the leave to apply for judicial review.

32. In his affidavit filed on 26 October 2010, Mr Strachan avers, inter alia, that a 2009 amendment to the Customs Management Regulations (CMR) which came into effect on 27 May 2009 was the respondent's authority for demanding the bonded sales reports; that to the best of his information and belief, the applicant had sufficient notice of the said Regulation and the obligation to produce the said reports and declaration; and that as a result of the applicant's refusal and or failure to comply with the regulations in, inter alia, failing to satisfy the Comptroller as to the legitimate disposal of bonded goods in the production of said bonded sales reports, the Comptroller in exercise of his powers under the CMA and its Regulations was entitled to take legitimate measures to ensure such compliance and to protect public revenue.

33. The amendment to which Mr Strachan refers is Statutory Instrument No. 57 of 2009 which inserted subparagraphs (3) and (4) immediately after paragraph 2 in Regulation 24 of the CMR.

34. For completeness, I set out hereunder Regulation 24 of the CMR, as amended, along with Form No. C14B referred to therein:

> "24. (1) Imported goods, other than goods for trans shipment or goods imported for a temporary use or purpose only in accordance with regulations 86 to 92 shall be entered in whichever of the undermentioned forms is appropriate –
>
> (a) Home consumption entry for imported goods (Form No. C13);
>
> (b) Entry for goods imported conditionally duty free under the Hawksbill Creek Agreement (Form No. C14);
>
> (c) Bill of sight (Provisional entry)(Form No. C15);
>
> (d) Warehousing entry (Form No. C16);
>
> (2) In the case of goods entered for warehousing, bond shall be furnished in Form No. CB3 to cover the removal of the goods from the place of unloading to the bonded warehouse.
>
> (3) In the case of goods referred to in paragraph 1(b) and then sold as over the counter sale of bonded goods, the purchaser shall furnish to the Comptroller the declaration specified in Form No. C.14A and the vendor shall furnish to the Comptroller a declaration in Form No. C.14B.
>
> (4) The expression "over the counter sale of bonded goods" in paragraph (3) means the sale of bonded goods by a licensee to another licensee.
>
> (5) A person who contravenes paragraph (3) is guilty of an offence.
>
> "Form C 14B
>
> Declaration by vendor for goods sold as over the counter sale of bonded goods
>
> Bahamas Customs Department
>
> I.....declare that I am duly licensed by the Port Authority within the terms of the Hawksbill Creek Agreement and the goods on this summary report* are herein stated as SUPPLIES/MANUFACTURING SUPPLIES which have been sold in the course of my business.
>
> Signed
>
> Dated
>
> *(The summary report must identify the Licensee, display the Licensee's bond number and submitted with the declaration to the Customs Department before the 15th day of the following month)."

35. The applicant contends that notwithstanding the aforesaid Regulations, as amended, there is no lawful basis for the respondent demanding such reports from licensees because:

1) The sale of goods in bond to other licensees is permitted under the HCA and the HCA alonegoverns what steps, if any, a Port Authority Licensee needs to take to be permitted to make such sales;
2) By entering into the HCA, the Government undertook not to impose any regulations which affected businesses in the Port Area differently from

businesses in the rest of The Bahamas. Regulations which purport to do this may not, therefore, lawfully be passed or given effect;

3) Alternatively, if and to the extent that the HCA does not permit the sale of goods in bond, statements by, and the practice of, Customs have given rise to a substantive legitimate expectation that such sales can be made free of duty as well as the legitimate expectation of being consulted prior to any change in the policy. This legitimate expectation arose without any requirement for monthly sales reports, and exists independently of any requirement for such reports. Such a requirement cannot lawfully be imposed subsequently and unilaterally.

4) Additionally, the regulations do not provide any justification for the unlawful enforcement action taken by Customs.

36. The following issues arise for determination:

1) Was the over the counter sale of bonded goods conditioned upon the submission of monthly bonded sales report?

2) Was there a lawful obligation on licensees to provide customs with a bonded sales report every month?

3) Were Customs' purported enforcement actions lawful, whether or not there was a lawful obligation on the applicant to provide a monthly bonded sales report?

4) Whether there isa necessity for a permanent injunction in the terms requested?

5) Whether the applicant is entitled to general and or exemplary and aggravated damages?

Whether the over the counter sale of bonded goods is conditioned upon the submission of monthly bonded sales report?

37. The respondent in paragraph 1 of his letter of 5 August 2010 asserts that: "the over the counter sale of bonded goods is conditioned upon the submission of monthly bonded sales report".

38. Mr Strachan in his first affidavit acknowledges that the practice whereby licensees of the GBPA are permitted to sell bonded goods to other licensees has existed since as early as 1989; and while he avers that the practice required the production of monthly sales reports and declarations in respect of over the counter bonded and dutiable goods on or about the 15th of each month, Mr Strachan provided no evidence for that assertion.

39. The applicant disagrees with Mr Strachan's assertion and asserts instead that although it has engaged in the practice of selling bonded goods over the counter to other licensees for more than twenty years, it has never been asked to produce such a report, that is, until its receipt of the first decision.

40. Furthermore, counsel for the applicant makes the following observations and submissions:

1) The respondent's assertion in the first decision that the over the counter sale of bonded goods is conditioned upon the submission of monthly bonded sales report is plainly wrong, as it arrogated to Customs the right to permit or refuse the transfer of goods in bond from one Port Authority Licensee to another, when that is not a power which Customs has or had; nor is it a power which is purportedly granted to Customs by the aforesaid 2009 amendment.

2) The falsity of Customs' claim is apparent from an analysis of the relevant provisions of the HCA. Port Authority Licensees are entitled to transfer goods in bond to another Licensee without the permission of Customs at all. There are no "conditions" enforceable by Customs relating to such transfer. The power Customs has in relation to goods imported under the HCA is to cause a Licensee to forfeit his bond if the goods are used for non-approved purposes.

3) Goods may be imported free of duty by Port Authority Licensees for certain purposes under the terms of the HCA. This is set out in Clause 2 of the HCA which contains the covenants entered into by the Government with the Port Authority.

4) As a Licensee, the Applicant is entitled under clause 2 of the HCA to import duty exempt goods for use within the purposes set out in Clauses 2(1), 2(2) and 2(3), that is, for the Port Project, the Port Area Development, Manufacturing Purposes and or Administrative Purposes.

5) A Licensee is required to do two things in order to import goods free of duty:

   a) make a declaration to Customs that the goods imported free of duty are intended to be used solely for the defined purposes (Clause 2(4)(a)); and

   b) enter into a bond in the form set out in the Schedule to the HCA in respect of all goods imported exempt from duty, for an amount equal to double the amount of the duty which would ordinarily attach to the goods (Clause 2(4)(b)).

6) Clause 2(4)(c) sets out:

   "That if any of the said Supplies...in respect of which such bond shall have been given shall be used or applied in breach of the conditions of the bond such articles shall be liable to be forfeited... and in addition thereto the penalty of the bond may be recovered as liquidated damages."

7) The "conditions of the bond", as set out in the example bond in the Schedule to the HCA are as follows:

   "Now the condition of this obligation is such, that if the goods as aforesaid are used for the purposes set out in sub-clause (4)(a) of clause 2 of the said Agreement or are exported from the Colony in their original state or in a different state resulting from manufacturing, processing, assembling or otherwise dealing with the same then this obligation to be void, or else to remain in full force and virtue".

8) From these clauses it is clear that the obligation entered into by the importing Licensee is to ensure that the goods are used for the proper purposes. The circumstances in which the conditions in the bond are breached, set out in Clause 2(4)(c) above, relate solely to the ultimate use of the goods. There is no obligation for the importer himself to use the goods for such purposes. This is not a condition mentioned anywhere in the HCA.

9) It is logical that it does not matter who ultimately uses the goods, provided they are used for a proper purpose within the terms of the HCA, because:

   a) The bond entered into by the Licensee remains in full force and effect until the goods are used for the approved purposes. If there is a breach, then the bond may be forfeit. Customs' remedies, if there is a breach, and, therefore, the scope of Customs' protection, are unaffected.

   b) Rather than buying goods in bond, a Licensee could import the same goods from outside the Bahamas free of duty anyway. If further restrictions were placed upon the transfer of goods in bond, as Customs seeks to do, all that will occur is that Licensees will have to import all their goods directly themselves: this will harm businesses who will have more capital tied up in stock (and conversely benefit the Florida economy at their expense), but will not benefit Customs one iota.

10) Further, the HCA itself envisages that goods may be transferred in bond from one Licensee to another. Clause 2(4)(d) of the HCA states:

"If at any time the Importer or any person in whom the property in the Supplies, the Manufacturing Supplies, and the Administrative Supplies, or any of them as the case may be, shall be vested shall desire to use any of the said articles otherwise than for the said Purposes or any of them it shall be lawful for the Comptroller on payment of the several amounts of customs duties payable on such articles (or on so much thereof as the Comptroller shall consider reasonable) by a memorandum endorsed on the bond to cancel the same so far as it relates to such articles".

11) This wording refers to "the Importer or any person in whom the property in the Supplies... shall be vested". It is clear from the fact that property in the goods may be vested in some person other than the Importer that the goods do not have to be used by the Importer personally: property in the goods may never have vested in the Importer, or the Importer may transfer the goods to another person. There is nothing in the HCA to suggest that such transfer requires any paperwork or other formalities. This is because there is no need for any such formalities: as envisaged by Clause 2(4)(d), on a transfer of goods to another Licensee the original bond continues in force and effect. It is only if the goods are used outside the Purposes specified in the HCA (by the Importer or anyone to whom the goods are transferred) that customs duties are payable.

12) This point alone should settle the matter.

   a) A Licensee who transfers goods in bond to another person does so within the terms of the HCA.

b) He is therefore bound to fulfil all the requirements of the HCA, but no more.

c) The Government cannot unilaterally alter the terms of the HCA by imposing additional requirements on the Port Authority or Licensees, any more than the Port Authority can unilaterally alter the terms of the HCA to impose additional requirements on the Government.

41. The applicant's assertion that the first decision was the first time it had been asked to produce a report for its over the counter sale of bonded goods has not been refuted by the respondent, nor have the foregoing observations andsubmissions of counsel for the applicant been challenged by counsel for the respondent.

42. In the circumstances, I accept the applicant's evidence and the submissions of its counsel and find that the respondent has failed to show that, as a licensee of the GBPA, the production of a bonded sales report was a condition of the applicant, as a licensee of the GBPA, being permitted to sell bonded goods toother licensees of the GBPA, as asserted by the respondent in the first decision.

43. I, therefore, grant the relief sought by the applicant at paragraph 1 of the originating notice of motion.

Whether there was a lawful obligation on licensees to provide Customs with a bonded sales report every month?

44. The applicant contends that not only is its ability to sell bonded goods to other licensees of the GBPA not conditioned upon its production of monthly reports of such sales, but also that its sale of bonded goods to other licensees is governed by the terms of the HCA, which terms the Government cannot unilaterally alter by imposing additional requirements on the GBPA or its licensees, anymore than the GBPA can unilaterally alter such terms to impose additional requirements on the Government.

45. In that regard, counsel for the applicant argues that the HCA makes no provision for monthly reports of any kind to be given to Customs as is apparent from the face of the document as well as the admissionof Customs in the case of R v Comptroller of H.M. Customs ex parte International Underwater Explorers Society Limited, Supreme Court Action No. FP99 and 239 of 2002. Counsel for the applicant submits further, that unless and until the HCA is amended to make provision for such reports, there is no obligation for the applicant, or any other licensee, to provide the same.

46. Therefore, counsel for the applicant submits, the respondent's demand for the production of monthly reports of sales of goods sold in bond is unlawful.

47. Moreover, counsel for the applicant submits, the aforesaid amendments to Regulation 24, upon which the respondent relies as its authority for the first decision, were not validly made, are *ultra vires,* and cannot be used to justify Customs' unlawful actions for the following reasons:

1) First, because the Regulations are contrary to Clause 2(28) of the HCA, which provides:

"That during the continuance of this Agreement there will be no restrictions, regulations, or conditions, the making or imposition of which are not excluded or prohibited by the provisions hereinbefore contained, made or imposed by

the Government affecting the Port Area or any business undertaking or enterprise carried on therein differently from the rest of the Colony and which thereby discriminate against the Port Area or any such business undertaking or enterprise carried on therein when compared with the rest of the Colony..."

2) The new Regulation, amending Regulation 24, does discriminate against businesses in the Port Area differently from business in the rest of The Bahamas. It only applies to Port Authority Licensees who transfer goods after the goods have entered The Bahamas. No equivalent burdens were imposed on other importers of goods into the Bahamas.

3) The new requirements, therefore, impose an additional burden on the cost of doing business which only applies to Port Authority Licensees.

4) Secondly, and alternatively, if the Regulations are not *ultra vires,* then in any event they cannot impose new burdens which have the effect of amending or repealing the HCA. This is because:

   a) The HCA is part of the Statute Law of the Bahamas, see for example:

      i. Commonwealth Brewery Limited v Attorney General of the Bahamas, 14 of 1997 Judgment of Sawyer CJ dated December 30th, 1999 where Chief Justice Sawyer held that: "...the Hawksbill Creek Agreement is contained in the Schedules to the statutes which I enumerated above and is therefore part of the statute law of The Bahamas"; [p. 11.]

      ii. Moore J. at paragraph 51 of UNEXSO [Tab 6], where he stated: Though Lord Reid was speaking in the context of a criminal statute, the Criminal Justice Act, 1967, and Oliver J, with reference to the Income and Corporation Taxes Act 1970 and The Finance Act 1976, the principles which they have stated so authoritatively apply with equal force to the CMA, The Hawksbill Creek Agreement Statutes, and their subsidiary legislation, and I have applied them in interpreting the statutory material that I have considered in this case."

      iii. The comments of Conteh J.A. at paragraph 43 of his dissenting judgment in Callenders & Co v The Comptroller of H.M. Customs SCCivApp No. 63 of 2011 Ruling dated February 7th, 2014: "it would also be eminently a matter of general public importance to have authoritative judicial pronouncement regarding the interplay and effect of the provisions of the Hawksbill Creek Agreement (which is a part of the statute laws of The Bahamas) regarding the licensees of the GBPA and public officers acting or purporting to act or take decisions pursuant to other laws.

   b) The HCA itself does not empower or permit the Government to make regulations which require licensees to submit reports or returns additional to those set out in the HCA. By contrast, where it is envisaged that the Government might make Orders which affect the HCA, this is expressly provided for (see, for example, clause 3(4) HCA which permits the government to prohibit the sale in the rest of The Bahamas of products manufactured in the Port Area);

c) The Regulations are secondary legislation, and it is trite law that in general secondary legislation cannot expressly repeal, still less impliedly repeal, primary legislation such as the HCA. This is the case *a fortiori* in the case of a statute of a constitutional nature such as the HCA: see for constitutional nature of HCA:- Boat Ltd v R, 28 of 2000, Ruling of Lyons J dated April 6th 2000 at paragraph 4; Shangri-La (1982) Limited v Grand Bahamas Port Authority, Limited 154 of 1984 Judgment of Adams J dated June 14th, 1984 at paragraph 20.

48. Alternatively, the applicant contends, even if the HCA does not permit the transfer of goods in bond from one licensee to another, such a practice has long been established and accepted by Customs. See judgments of Ganpatsingh, J in Hepburn v Comptroller of H.M. Customs No.249 of 1995; and Isaacs J. in R v Comptroller of H.M. Customs (ex parte Freeport Concrete) 2006/pub/JVR/FP/0005.

49. Accordingly, counsel for the applicant submits, the applicant has a legitimate expectation of the practice continuing and of being consulted before any changes are made thereto, both of which Customs, by imposing onerous new requirements on licensees, is purporting to disappoint.

50. In support of those submissions, counsel for the applicant cited the case of R v North and East Devon H.A ex parte Coughlan [2001] QB 213 in which the court considered the standard by which courts should consider the authority's decision to disappoint the legitimate expectation of an applicant and recommended three approaches which may be summarized as follows:

1) That the public authority is required only to bear its previous policy in mind before deciding whether to change course. The decision is then reviewed on *Wednesbury* principles;

2) That there is an expectation of the parties affected being consulted before the decision is taken; or

3) That the expectation is of a substantive benefit, where the unfairness to the applicant must be weighed against the overriding interest relied upon for a change in policy.

51. In counsel for the applicant's submission, Customs has acted unlawfully on any of those approaches and he makes the point through the following observations and or submissions:

1) There is no evidence that Customs even considered its previous policy when deciding to impose new requirements on the applicant (and other Port Authority Licensees). The first decision attempts to effect an arbitrary extension of the control exercised by Customs over the activities of Port Authority Licensees. As noted above (and *in extenso* in the Applicant's original Application Notice) the new policy will cause harm to Licensees and business in Freeport, but has no effect on the amount of customs duties collected. A Licensee has the same opportunity to misuse goods bought free of customs duties whether goods are acquired from Florida or from another Port Authority Licensee. Customs' decision therefore has no practical benefit – it is without real purpose and so unreasonable that no reasonable decision maker could have taken it.

2) As to the second approach, Customs neither gave adequate notice of the change in regime, nor consulted about the proposed change. Both of these were required as a matter of procedural fairness.

3) On the need for proper notice see for example R (on application of Jones) v Environment Agency[2005] EWHC 2270, where Ouseley J. held (at para 82) that a notice period of a year was required for the Agency to insist on a licence where none had previously been required for 20 years. Again, even according to Mr Strachan's own evidence at paragraph 6 of his first affidavit, the practice of selling goods in bond over the counter has continued since about 1989, or over 20 years. This would suggest that a notice period of at least a year should have been given.

4) As to consultation, Mr Strachan does not even suggest that any consultation has been carried out.

5) Indeed, until the service of Mr Strachan's first affidavit on October 26th, 2010, Customs itself appeared not to know about the new Regulations on which it now attempts to rely. The applicant held a meeting with Customs on 29 September 2010, in an attempt to resolve the issue. The new regulations on which Customs now rely were not mentioned. The applicant wrote to Customs on 30 September, 7 October, and 8 October 2010, stating that Customs demand had no basis in law, and inviting them to specify the grounds on which Customs sought the monthly reports. Again, the new regulations were not specified in any reply. Customs appeared to be unaware that the new regulations existed at all. Clearly no meaningful consultation, or consideration of the applicant's legitimate expectation, can have taken place in circumstances where Customs itself had no knowledge of the matter on which they should have been consulting.

6) In these circumstances, the Court should take a sceptical view of Mr Strachan's assertion at paragraph 14 of his first Affidavit that "to the best of my information and belief Kelly's Freeport Limited had sufficient notice of the Regulation and the obligation to produce said reports and declarations". Since Mr Strachan appeared not to know about the Regulation, it is remarkable that he considers that Kelly's had sufficient notice of it.

7) As to the third approach, no overriding policy reason for Customs' decision to disappoint the Applicant's substantive legitimate expectation has even been advanced; it, therefore, should go without saying that there has been no attempt to balance that policy reason against the unfairness to the applicant of disappointing its substantive legitimate expectation.

8) By all three standards of judicial review set out in *Coughlan*, therefore, Customs falls short. Its disappointment of the Applicant's legitimate expectation has not been justified, nor have appropriate procedures of consultation and consideration been complied with. In light of the existence of the legitimate expectation, Customs' decision to impose the new requirement of monthly reports remains unlawful.

52. On the other hand, the respondent contends that the decision and any action by Customs were lawful under the provisions of the CMR2009 and the HCA.

53. In that regard, counsel for the respondent makes the following additional observations and submissions:

1) While the HCA makes certain provisions relative to operations in the Port Area including that for the dealings with bonded goods and duty exemptions, etc., section 8 of the CMA makes it clear that all goods imported into The Bahamas are subject to Customs control. Granted, at the end of the day, some exemption may be applicable based on an exemption agreement (i.e. under the HCA).

2) The implementation of administrative and or lawful procedures and regulations under the Act to ensure good governance, accountability, compliance and other safeguards to protect public revenue from abuse cannot be unreasonable, irrational or without lawful authority in the circumstances. These objectives cannot be and are not abandoned or abdicated by virtue of the HCA particularly in the face of a valid law.

3) Any lawful request under the provisions of the CMA and, in particular, the 2009 Amendment Regulation is not inconsistent with the intent and the spirit of HCA and no such unlawful or inconsistent act on behalf of Customs has been so demonstrated.

4) The provisions under the HCA cannot be immune to nor trump lawful procedures and regulations which may be justifiable to ensure and enhance compliance with the terms and spirit of the agreement and more importantly in ensuring an overriding compliance with the laws of the Commonwealth of The Bahamas. The implementation of such law and or regulation, (i.e. the 2009 Amendment) is one such regulation and as such any claim to a breach of any legitimate expectation in the face of a valid law is totally misconceived especially in the face of the applicant's clear breach of the law and failing to comply with the law.

5) In the circumstances the 2009 Regulations which is central to this dispute is a lawful requirement and until such time as it is repealed and or declared unconstitutional remains binding.

54. In counsel for the respondent's submission, the statutory provision under the 2009 Amendment Regulations is a complete answer to the applicant's complaint and "ought to dispose substantially of the challenge which is the genesis of the Judicial Review application in the first instance". Counsel for the respondent submits further that if the applicant has an issue with the aforesaid amendment then it has alternative recourse than judicial review as, in his submission, judicial review is not the proper course to challenge the aforesaid Regulation.

55. In support of that submission counsel for the respondent relied on the comments of Adderley J.A. in the majority decision of the Court of Appeal in the case of Callenders & Co. (a Firm) and The Comptroller of H.M. Customs, SCCivApp No. 63 of 2012, at paragraph 20, where he stated: "whether at the leave stage or any other stage, judicial review is decidedly the wrong originating procedure to use in 2012 to apply to the court

to make a determination on whether or not a regulation implemented since 2009 is ultra vires."

56. In response to counsel for the respondent's submissions, counsel for the applicant submits that Customs is wrong to assert that the existence of a statutory instrument is a "complete answer" to this judicial review challenge; or that "the provisions under the HCA cannot be immune to nor trump lawful procedures and regulations". In that regard, counsel for the applicant argues that the HCA is primary legislation which cannot be amended by secondary legislation such as the Customs Regulations and he submits that the operation of the HCA has also (a) bound the Government, and (b) given rise to legitimate expectations, either of which may serve to render the decision of Customs unlawful.

57. As for counsel for the respondent's argument that the judicial review process cannot be used to challenge the validity of the aforesaid Regulation, counsel for the applicant makes the following observations and submissions:

1) Customs asserts that "...a Judicial Review application cannot be the proper process to challenge the validity of an existing law" *and* cites Callenders v H.M. Customs in support thereof. However, that citation is misleading, and the point advanced by Customs is simply wrong.

2) In Callenders the Bahamas Court of Appeal commented (obiter – the comments form no part of its reasoning on the issue in question) that Judicial Review was not appropriate to challenge a regulation which had been in force for more than three years. That was a comment on timing, not on the amenability of secondary legislation to judicial review in general.

3) In fact, it is clear that secondary legislation (and even primary legislation) may be subject to judicial review:

   a) "Judicial review has developed to the point where it is possible to say that no power—whether statutory, common law or under the prerogative—is any longer inherently unreviewable" : De Smith on Judicial Review, 7th ed, at 1-032;

   b) "...whereas in the past judicial review challenges focused on administrative action, the court's supervisory jurisdiction now extends to legislation. Byelaws made by local authorities and other public authorities have for many years been amenable to judicial review. So too is delegated legislation in the form of Statutory Instruments made by ministers, including those passed by affirmative resolution of Parliament. All grounds of review, substantive as well as procedural, may be invoked against secondary legislation. The court is not confined to giving declaratory relief; a quashing order may be made, either of the whole instrument or, if an offending provision is severable, of that provision": De Smith on Judicial Review at 3-011;

   c) By way of recent example, in Ahmed v H.M. Treasury [2010] UKSC 2, the Supreme Court of the United Kingdom quashed the Terrorism (United Nations Measures) Order 2006 as it was ultra vires the enabling Act;

d) Even primary legislation may be challenged by way of judicial review: the lawfulness of the 2004 Hunting Act was challenged in Jackson v Attorney-General [2005] UKHL 56.

58. While I accept, as pointed out by counsel for the applicant, that the comments in the Callenders case were made obiter, and that they appear to have been made in respect to the timing of the application and not necessarily the amenability of secondary legislation to judicial review in general, I note that the regulation which is being challenged in these proceedings is the same regulation that was being challenged in the Callenders' case, except that in this case, the applicant is a vendor/licensee whereas in the Callenders' case, the applicant was a purchaser/licensee.

59. However, in my judgment, even if those comments formed no part of the court's reasoning on the issue in question and were not intended to apply generally, or they only relate to the timing of the application, in my judgment, they are equally applicable to this case as they were in the Callenders' case – this application having been made approximately four years after the implementation of the aforesaid amendment.

60. In any event, although in his written submissions for trial as well as his supplementary submissions, counsel for the applicant had also argued that the aforesaid amendment was ultra vires and or was unconstitutional, I understood him, during his oral submissions to say that those were issues that needed not to be determined in these proceedings in order for the court to make the declarations sought by the applicant. That is because, again, as I understood him, even if the regulation was lawful, there was still a question of whether the aforesaid decisions madewerein accordance therewith.

61. Moreover, subsequent to the commencement of this action in 2010 and prior to the Court of Appeal's decision in September 2013 sending the matter back for trial, the aforesaid amendment was repealed by the Customs Management Act, 2011 (CMA 2011) and the Customs Management Regulations, 2013(CMR 2013), both of which came into effect on 1 July 2013.

62. In the circumstances, I am prepared to assume, without deciding, that the aforesaid amendment was validly made and that, pursuant thereto, there was a lawful obligation on licensees of the GBPA, one of whom is the applicant,to provide Customs with a declaration of its bonded sales every month; and that, as the respondent contends, the applicant had a duty, until the aforesaid Regulation was amended, repealed or declared ultra vires, to comply with a demand made thereunder.

63. Consequently, I find that the aforesaid amendment to Regulation 24 provided the lawful basis for the respondent to have demanded returns of sales of duty exempt goods sold in bond from the applicant.

64. The aforesaid amendment places an obligation on a vendor of bonded goods sold over the counter, that is, from one licensee to another, to furnish to the respondent a declaration in Form No. C14B supra stating that the vendor is a Port Authority Licensee, giving the vendor's bond number, and a list of the goods sold during the reporting period. A note at the bottom of the form states that the declaration is to be submitted to the Customs Department before the 15th day of the following month.

65. The evidence is that the respondent in the first decision "reminded" the applicant that its "monthly bonded sales report must be submitted to Customs by the 15th of each month". There is no indication in that letter as to the format of the requested report nor was there any indication in that letter that the respondent was relying on Regulation 24 of the CMR, as amended, which as pointed out by counsel for the applicant, called for the provision of a declaration and not a report.

66. However, it is unclear to me how the information being requested from the respondent differed, if at all, from the information which was required by Regulation 24 as amended to be provided by vendor/licensees such as the applicantand I am inclined to agree with counsel for the respondent that whether the respondent asked for a report or a declaration may really be a matter of semantics.

67. In any event,I accept the respondent's assertion that Regulation 24, as amended,was the provision upon which it was relyingwhen making the aforesaid demand.

68. In the circumstances, I accept the submission of counsel for the respondent that the said amendment answers the applicant's complaint that there was no lawful basis for the first decision, that is, for the demand of the reports for over the counter sale of bonded goods.

69. In the circumstances, Idecline to grant the relief sought at paragraph 2 of the originating notice of motion.

Were Customs' purported enforcement actions lawful, whether or not there was a lawful obligation on the applicant to provide a monthly bonded sales report?

70. The applicant complains that even if the respondent was entitled to demand reports on over the counter sales of bonded goods, the actions taken by Customs to enforce its demand have no basis in law.

71. The evidence is that after receipt of the respondent's 5 August 2010 letter, on or about 21 September 2010, the applicant imported several containers with merchandise into Freeport. However, the respondent refused to clear the containers and release the goods to the applicant because the bonded sales reports for January through August were "needed". A few days later, 24 and 28 September 2010, the applicant imported two further containers of goods which Customs again refused to clear, notwithstanding the applicant having provided all the usual Entries for doing so. The applicant asserts that at a meeting with Customs officers, it was made clear that Customs would not release the aforesaid containers without the bonded sales report.

72. It appears that it was only after the applicant's attorney made an appeal to the then Minister of State for the Ministry of Finance, and the then Prime Minister and Minister of Finance for their intervention, that Customs processed the Entries for the said containers and eventually released the same to the applicant.

73. The evidence also is that when the applicant attempted, via its broker, to file its returns for duty paid sales for the month of September 2010, to the value of $50,504.20 in customs duties, Customs refused to accept the returns and advised the applicant that the Entry submitted by its broker for the dutiable sales for September was rejected because the bonded sales report for the same period had not been provided. Customs

then returned the duty paid sales report and Entry and advised that that action was taken "in accordance with section 83 of the CMA which states as follows:

> "83. (1) where goods liable to import duty have been imported or taken out of bond free of import duty or at a reduced rate of import duty in accordance with any law relating to the Customs and are subsequently disposed of or treated in any manner inconsistent with the conditions or purposes for which they were granted relief from import duty, then, unless the Minister otherwise directs, they shall on such disposal or treatment be liable to import duty at the full rate applicable to goods of that class or description at the time of such disposal or treatment."

74. However, counsel for the applicant argues, and I agree, that neither that section nor the aforesaid Regulation 24 provides any justification for the respondent refusing to accept the applicant's duty paid sales report.

75. While he concedes that there was some delay in Customs releasing the applicant's containers with its imported goods, counselfor the respondent suggested that such delay may have been as a result of administrative delays in processing the goods; and that such delays "are expected from time to time". However, in his submission, such "dilatoriness" did not amount to a seizure of the goods so the issues of conversion and damages do not arise since Customs derived no benefit or value from the goods; and, in any event, when Customs seizes goods they are not returned.

76. Mr Strachan's evidence is that the actions taken by the respondent were "as a result of Kelly's refusal and or failure to complywith the regulations"; and "the Comptroller in exercise of his powers under the CMA and its Regulations is entitled to take legitimate measures to ensure such compliance and to protect public revenue."

77. It is, in my judgment, clear from Mr Strachan's evidence that the reason for what counsel for the respondent suggests was "administrative delay" or "dilatoriness" on the part of the respondent in releasing the applicant's goods, was, in fact, an attempt by the respondent to enforce the applicant's compliance with the demand for reports of bonded sales, as there is no evidence to the contrary.

78. So, while there can be no dispute that the respondent in the exercise of his duties under the CMA is, as counsel for the respondent argues, entitled to take legitimate measures to ensure compliance therewith and to protect public revenue, it is also accepted that the respondent is a creature of statute and as such he cannot take administrative action which is not in compliance with the law. In that regard, counsel for the applicant pointed out, and I accept, that the remedies available to Customs under the HCA or the CMA where a licensee has imported goods and dealt with them not in accordance with the HCA, include: (i) forfeiture of the bond, (ii) forfeiture of the goods; and or (iii) a fine of twice the amount of the value of the goods.As noted in the Unexso case, the respondent cannot create new ways of enforcement, by administrative fiat or otherwise.

79. Consequently, I agree with counsel for the applicant that even if, at the date of the first decision, the respondent had a legal right to call for the production of a monthly bonded sales report, Customs did not have the right, as a means of forcing the applicant's compliance with Regulation 24 aforesaid, to refuse to clear or to detain the

applicant's container with imported goods; or to refuse to accept reports of duty-paid sales, as those are not remedies available to the Comptroller under the CMA for any failure to comply with any of the provisions of the CMA and its Regulations.

80. Moreover, while it is clear from Regulation 24(5) of the CMR that a person who fails to furnish to the respondent the relevant declarations regarding sales of goods in bond "over the counter...is guilty of an offence", no specific penalty is specified for that offence. However, Regulation 3 of the CMR provides that any person who commits an offence against those Regulations for which no specific penalty is provided shall be liable on summary conviction therefor to a fine of $2,000.00.

81. I, therefore, accept the submission of counsel for the applicant that, even if the respondent had authority to demand the aforesaid report of over the counter bonded sales, the only lawful penalty which the respondent could have imposed for the applicant's failure to provide such reports was, following summary conviction, a fine of $2,000.00.

82. It is clear, however, that the respondent "took matters into his own hand" and engaged in "self help remedies" in an attempt to enforce the applicant's compliance with Regulation 24 as aforesaid; and I accept the submissions of counsel for the applicant that the respondent's "enforcement actions" were arbitrary, unreasonable and contrary to the law.

83. In that regard, I find that by refusing to accept the applicant's paperwork and entriesfor clearing and releasing its containers of imported goods and detaining the said containers and goodsfor no reason other than the applicant's "refusal and or failure to complywith the regulations", specifically Regulation 24, the respondent unlawfully detained the said goods.

84. I also find that the respondent's refusal to accept the applicant's report of duty paid sales for the month of October 2010 because the applicant had not provided a report for its over the counter sales of bonded goods, was unreasonable and unlawful.

85. I, therefore, grant the relief sought by the applicant at paragraph 3 of its originating notice of motion.

86. In addition to the aforesaiddeclaration as to the respondent's wrongful enforcement actions, the applicant also seeks an injunction and damages for unlawful detention and or conversion of several of its containers and their goods.

Injunction

87. Counsel for the respondent argues that the issue of an interim injunction is "moot and of no moment" as the subject goods have long been released to the applicant. In that regard, Mr Francis argues, since the object of the court in granting an interlocutory injunction is to prevent mischief and to maintain the status quo until the hearing is completed (Plimpton v Spiller [1876-1877] 4 Ch. D. 286), given the release of the subject goods some years ago, an interim injunction as pleaded in the original judicial review application is no longer practicable nor, in his submission, does it serve any practical purpose as the action complained of was abated.

88. While counsel for the applicant accepts that the interim injunction is no longer relevant, he saysthata permanent injunction is part of the relief sought following the trial of the plaintiff's application, as, he argues, without the injunction, there was no guarantee that the respondent and or his officers would not repeat their actions.

89. It seems to me that,in light of my finding that the respondent's enforcement actions were unlawful, coupled with the fact that the provisions in Regulation 24 on which the respondent purported to rely as his authority for the aforesaid decisions having now been repealed, there should be no reason for Customs to demand the aforesaid reports or to seek to enforce compliance with any such demand by detaining the applicant's goods, or taking any other enforcement action not sanctioned by law.

90. I, therefore,grant the relief sought atparagraph 4 of the notice of motion.

Damages

91. In relation to its claim for damages, counsel for the applicant argues that the applicant's claim for damages arises out of the tortious acts of the respondent which would be actionable at common law as detinue and or conversion and could have been claimed in an action commenced by writ. Accordingly, counsel submits, the applicant's claim for damages fulfils the conditions set out in RSC order 53 rule 7 which provides as follows:

92. RSC Order 53 rule 7 provides as follows:

> 7. (1) On an application for judicial review, the court may, subject to paragraph (2) award damages to the applicant if:
>
> (a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates; and
>
> (b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.
>
> (2) Order 18 rule 2 shall apply to a statement relating to a claim for damages as it applies to a pleading.

93. The applicant, therefore, seeks damages,in accordance with RSC Order 53 rule 7, for the unlawful detention and or conversion of its goods namely eight of its containers (as set out in paragraph 23 and 28 of its Notice to Apply for Judicial review, and the unlawful detention and or conversion of a further three of its containers (as set out in the second affidavit of Mr Christopher Low).

94. In response, counsel for the respondent submits that, in all the circumstances, the claim for damages is misconceived and not applicable given the facts of this case; that the applicant has in fact suffered no damages; and that in any event, the applicant's failure to comply with the law significantly resulted in the events of which he complains.

95. According to the learned authors of De Smith, Woolf and Jowell's Fifth Edition of Judicial Review of Administrative Action "in limited circumstances, an applicant may be entitled to damages or restitution." At paragraph 19-003, the learned authors state:

"A fundamental tenet of English law is that the failure of a public body to act in accordance with public law principles of itself gives no entitlement at common law to compensation for any loss suffered. Nor does the careless performance of a statutory duty in itself give rise to any cause of action in the absence of a common law duty of care in negligence to a right of action for breach of statutory duty. To recover damages, a recognised cause of action in tort must be pleaded and proved. In short, while in some cases it may be a necessary condition, it is never a sufficient one for the award of damages that the act or omission complained of be "unlawful" in a public law sense." [underline added]

96. At paragraphs 23 of its application for leave to apply for judicial review, the applicant stated that by the end of September 2010, Customs had in its possession eight containers of goods belonging to the applicant, and refused to process any of the applicant's goods for entry into Freeport, despite the demands made by the applicant to Customs that Customs should surrender up its containers.

97. At paragraphs 27 and 28 of the said application for leave, the applicant alleges that:

27) Between October 4, and October 8, 2010 Customs processed the Entries for the applicant's eight containers which were subsequently released to the applicant in the usual way. During this time other containers have been imported by the applicant, which have been duly cleared by Customs.

28) By reason of the wrongful detention and/or conversion of its containers, the applicant suffered loss and damage. By reason of Customs' unlawful actions, the applicant lost opportunities to sell the goods in the containers that would have been available had the containers been cleared in the normal course of business in a timely manner. Further, as the applicant had run out of various items of stock due to the detention of the containers, it is highly likely that the applicant's customers seeking to buy those items would have purchased them from the applicant's competitors. The applicant also incurred increased demurrage and warehousing expenses. The applicant will seek an order for damages to be assessed.

98. In his first affidavit filed 15 October 2010, Mr Lowe confirmed and adopted the facts stated in the application for leave as his own which he believed to be correct and true.

99. In his second affidavit filed on 21 October 2010, Mr Lowe deposed at paragraphs 4 through 12 as follows:

4) That at 1:30pm Wednesday 20th October 2010 I received a telephone call from Mrs Raquel Bethel of Bethel's Customs Agents ("BCA") who informed me that she had been to Bahamas Customs to collect the Entry Forms for three containers destined for the applicant, and that BCA had submitted to them. She informed me that the Entry's had been returned by Bahamas Customs with a Query Slip stating "Dutiable Sales due Sept 10 payment is due".

5) I instructed Mrs Bethel of BCA to fax a copy of the Query Slip to me. She faced the same to me at 1:45pm. A copy of the fax is exhibited at Tab 27 of CL2.

6) I further instructed Mrs Bethel of BCA to provide the Entry Forms an the Query Slip to me. The Entry Forms and the Query Slip are exhibited at Tab 28 and Tab 29 of CL2.

7) The entry Forms are for three (3) containers destined for our Building Department. This is a very busy time of year for the building department and the containers hold much needed lumber (some items are already out of stock with others nearly close to being out of stock), white shingles (for which customers are waiting), windows and some special order items for a valued customer.

8) This is the Christmas Season shopping time for the applicant, a time when our customers renovate or improve their homes for Christmas and so our sales volume in building materials, especially paint, increases dramatically at this time of year.

9) This is a critical time for the applicant as during November and December we experience a 25% increase in sales. More importantly for the respondent, is the fact that most of the purchases at this time are by non licensees with the result that the applicant's duty paid sales payments to the respondent 50% higher in November and December.

10) The applicant has always made and continues to make prompt payments to the respondent with respect to the duty paid sales reports. However, as can be seen by my earlier affidavit in this matter filed on October 16, 2010, the respondent has refused to accept payment from the applicant for the month of September.

11) During the period between now and Christmas between forty (40) and fifty (50) container/trailers of goods will be shipped to the applicant. The continued refusal fo the respondent to release the applicant's goods will cause serious financial hardship to the applicant with the possibility of forced reductions in staff not to mention denying the Public Treasury of hundreds of thousands of dollars of customs duty.

12) The circumstances have changed dramatically. The applicant was in fear that this exact situation would occur and are even more fearful given the respondent's current actions.

100. Having found that the respondent unlawfully detained the applicant's containers and goods for varying periods during the months of September and October 2010, I accept the applicant's assertion that by reason of such wrongful detention it has suffered loss and damage, in that it not only lost opportunities to sell those goods had they been cleared in the normal course of business in a timely manner, but that it also incurred increased demurrage and warehousing expenses in the process; and I am satisfied that, if the claim had been made in an action begun by the applicant at the time of making its application, it could have been awarded damages.

101. I, therefore, grant the relief sought at paragraph 5 of the notice of motion.

102. In addition to its claim for general damages, the applicant also seeks aggravated or exemplary damages, in support of which counsel for the applicant makes the following observations and submissions:

1) The fact that Customs continues to deny any wrongdoing in relation to its "enforcement" actions, even though, after more than 3 years, it has still not identified any factual or legal defence in respect of those actions, is also relevant to the assessment of damages, and in particular to the assessment of aggravated and exemplary damages.

2) As set out by Lord Devlin in Rookes v Barnard (No.1)[1964] AC 1129, such punitive damages may be awarded for "oppressive, arbitrary or unconstitutional action by the servants of the government" (and see also *De Smith* (7th edn) at 19-062.

3) In Tynes v Barr (1994) 45 WIR 7, Sawyer J. held (at p.24) that the following factors were relevant to the establishment and assessment of aggravated and exemplary damages:

    a) The way in which the defence was conducted (including untenable evidence given at trial);

    b) The fact that liability was not conceded until part way through the trial;

    c) The lack of an apology (until prompted by the plaintiff's counsel).

4) This approach was endorsed when that case went to the Court of Appeal. In Barr et al v Tynes, SCCivApp 18 of 1994, Zacca P. giving the judgment of the Court of Appeal of The Bahamas, noted (at p. 15) that:

    "Where it is shown that a defendant is persevering in the charge which he originally made, this evidence can be taken into account for the purpose of aggravating the damages."

5) Similar factors were again cited in Merson v Cartwright et al SC 1131 of 1987 where Sawyer J. (she was then) identified (at p.92) the following factors as relevant to the assessment of aggravated and exemplary damages:

    a) The attempt to justify unlawful behaviour to the very end of the trial;

    b) The lack of any genuine apology.

6) Relevant factors in this case, both justifying the award of aggravated and compensatory damages, and relevant to the quantum on assessment, are:

    a) Customs' failure to identify, in evidence or submissions, the basis in law for Customs' "enforcement actions";

    b) Customs persisting in asserting that such actions were lawful until trial, without identifying a proper basis for such assertions;

    c) Customs giving "evidence" in submissions to try to justify Customs' enforcement action which is (a) pure assertion and not in evidence, and (b) has not previously been raised by Customs as an explanation or defence;

    d) The conduct of the case by Customs generally (taking an unmeritorious technical point to avoid trial, failing to be ready for the

trial at the last hearing, ignoring the Court order made at the last hearing by serving its submissions 9 days' late);

e) A failure by Customs to apologise for seizing the applicant's trailers of goods without due cause.

7) Those factors are in addition to the factors justifying aggravated and punitive damages set out at paragraph 66 of the original application for leave, namely:

(a) The detention of the applicant's goods (amounting to 11 containers) is a wholly disproportionate remedy to impose in a dispute over paperwork;

(b) Customs has at no stage alleged that the applicant has failed to pay duty which should have been paid – this is not a dispute over revenue but only over bureaucratic procedure;

(c) There is no basis in law for seizing goods which were not themselves even the subject of the dispute. In more than three years following the unlawful seizure, Customs have not even put forward a justification for such seizure. There was no proper basis on which they could have taken such action, and it is plain that there is not even a fig leaf of justification for it;

(d) The enforcement action was calculated to disrupt the applicant's business and thereby enforce unquestioning compliance, with no thought given to the legality of the actions taken;

(e) The placing of improper pressure on the applicant in the letter of 5 August 2010 by stating that the applicant was "delinquent" in complying with a measure of which it had never previously heard;

(f) The threat in the letter of 5 August 2010 that the right to sell bonded goods over the counter, which right had previously been established by custom and affirmed in the Supreme Court, would be withdrawn;

(g) The seizing of the applicant's goods which were plainly wholly unrelated to the goods about which the respondent had required the report; and

(h) The refusal to accept paperwork from the applicant so as to attempt to force the applicant into breaching its own obligations to provide import documentation and duty paid sales returns, such refusal being wholly arbitrary, not sanctioned by law, and intended solely to put illegitimate pressure on the applicant.

103. Exemplary damages are recoverable where there has been oppressive, arbitrary or unconstitutional conduct by government servants. See Rookes v Barnard supra; Tynes v Barr, supra and Merson v Cartwright et al supra.

104. In my judgment, the respondent's actions and those of his subordinate officers in detaining the applicant's containers and goods "as a result of Kelly's refusal and or failure to comply with the regulations", were indeed arbitrary and I agree with counsel for the applicant that those actions were calculated to disrupt the applicant's business in an attempt to force the applicant to comply with the first decision, without regard to the legality of such actions.

105. So, having considered the evidence and the submissions of counsel for the applicant with respect to the applicant's claim foraggravated and exemplary damages, which I accept,I find that in addition to general damages, the applicant ought alsoto recover aggravated and exemplary damages from the respondent.

106. In that regard, the applicant requests an order for an inquiry into damages so that themore detailed factual matters necessary to determine the appropriate level of damages could be considered further if the parties are unable to agree terms.

107. I so order.

DECISION

108. In summary then, the order of the Court is as follows:

1) The applicant's application for the following relief is refused:

   a) A declaration that there was no lawful basis for the Comptroller of H.M. Customs or any customs officer or employee or agent of H.M. Customs to have demanded monthly returns of sales of duty exempt goods sold in bond from the applicant, being a licensee of the GBPA;

2) The applicant's application for the following relief is granted:

   a) A declarationthat the selling of duty exempt goods in bond by the applicant is not conditional upon the submission of monthly reports to Customs on the sale of such goods;

   b) A declaration that there was no lawful basis for the Comptroller of H.M. Customs or any Customs officer or employee or agent of H.M. Customs to detain goods, or refuse to process imported goods for entry in the usual way, or otherwise take enforcement action against the applicant on the basis of non-receipt of duty exempt bonded sales reports or on any other basis not sanctioned by law;

   c) An injunction restraining the Comptroller of H.M. Customs or any customs officer or employee or agent of H.M. Customs from detaining goods or refusing to process imported goods for entry in the usual way, or refusing to accept returns for duty paid sales or otherwise taking enforcement action against GBPA licensees on the basis of non-receipt of duty exempt bonded sales reports or on any other basis not sanctioned by law.

   d) Damages against the Comptroller of H.M. Customs to be assessed for the wrongful detention of the applicant's goods and the wrongful refusal to process the Applicant's goods for import in accordance with law and established practice;

   e) Aggravated and exemplary damages in respect of the arbitrary and high-handed actions taken by the Comptroller of H.M. Customs in wrongfully detaining the applicant's goods without regard to the legality of his actions;

109. That an inquiry into damages as aforesaid be conducted by the Registrar, unless the parties are able to agree terms otherwise and I invite the parties to provide me with your written submissions within fourteen days from today, on the issue of interest on those damages, that is, at what rate and for what period.

110. On the issue of costs, it is accepted that costs are in the discretion of the court and as a general rule costs follow the event.The applicant has, for the most part, been

successful in its application. My provisional view is that the respondent should pay 80% of the applicant's costs, to be taxed if not agreed.

111. If, however, the parties wish to be heard in support of a different costs order, I invite your submissions on the matter as well.

112. It is merely left to me to thank the parties and counsel for your patience in awaiting the delivery of this decision and to apologise to you for the delay. Although a number of factors contributed thereto, suffice it to say that I accept full responsibility therefor.

DELIVERED this 1st day of December A.D. 2016

Estelle G. Gray Evans
Justice