

COMMONWEALTH OF THE BAHAMAS

**IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2012/PUB/jrv/FP00001**

THE QUEEN

AND

THE COMPTROLLER OF H.M. CUSTOMS

Respondents

Ex Parte

CALLENDERS & CO (A FIRM)

Applicants

BEFORE: The Honourable Mrs Justice Estelle Gray-Evans

APPEARANCES: Mr Frederick R. M. Smith Q.C. for the applicants
9 February 2012

REASONS FOR DECISION

(Application for leave to apply for Judicial Review)

Gray Evans, J

1. This is probably a case of déjà vu for the applicant and its counsel, Mr Smith, Q.C.
2. In 2010, H.M. Customs required licensees of the Grand Bahama Port Authority, Limited, including the applicant, to obtain a letter of good standing from the National Insurance Board as a condition to being provided with an over the counter bond letter to enable such licensees to purchase bonded items from other licensees.
3. However, while the applicant's application for leave to apply for Judicial Review of that decision was pending, the decision was reversed by H.M. Customs. Consequently leave to apply for Judicial Review was refused by this Court. [See The Queen and The Comptroller of H.M. Customs ex parte Smith Point Limited, Callenders & Co., Bahamian Outdoor Adventure Tours Limited, No. 2011/PUB/Jrv/FP0003 ("Smith Point")].
4. In that case Mr Smith, Q.C., expressed a concern that the Comptroller of Customs ("the Comptroller") may at some point in the future impose a different condition before it would authorize the purchase of goods in bond between licensees. His "fear" appears to have been realized.
5. On 29 November 2011, the applicant, Callenders & Co., wrote to H.M. Customs ("Customs") requesting a renewal of its bond for 2012 to be able to make over the counter purchases.
6. On 1 December 2011, the Comptroller responded as follows:

"Please be advised that in order to consider your request, you are required to provide us with the C14A declarations of your bonded purchases for 2011. ["The first Decision"]

In the meantime, should you need to make any over the counter purchases for 2012, you may do so by way of individual purchase order, stamped and approved by this office. ["The second Decision"]

Please be guided accordingly."
7. On 10 January 2012 the applicant commenced this action and applied ex parte for leave to apply for Judicial Review of the Decisions of the Comptroller contained in the aforesaid letter. By its Notice filed on 10 January 2012, the applicant seeks the following relief:
 - (1) An order of certiorari quashing the Decisions.
 - (2) Various declarations as to the lawfulness of the Decisions.

- (3) An order for restitution of any monies paid by the applicant under necessity and/or under a mistake of law in respect of customs' duties obliged to be paid on goods purchased by the applicant for its business from other Port Authority licensees.
 - (4) Interests on any monies ordered to be repaid pursuant to the equitable jurisdiction of the court, at such rate and for such period as the court thinks fit.
 - (5) Further or other relief.
 - (6) Costs.
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8. In summary, the grounds for the relief sought by the applicant are: illegality and unlawful disappointing of the Applicants' legitimate expectations.
9. The application is supported by the affidavits of Challon Romer filed herein on 10 and 30 January 2012.
10. The applicant contends that:
 - (1) There is no lawful basis on which the Comptroller can unilaterally impose a new reporting requirement on a Licensee before issuing an over the counter letter (other than checking that the Licensee is indeed a Port Authority Licensee).
 - (2) The Hawksbill Creek Agreement does not mention any such reporting requirement.
 - (3) In taking the Decisions the Comptroller acted beyond his powers. He has no authority to do the same derived from statute or any other proper source.
 - (4) The practices of purchasing goods in bond over the counter and issuing over the counter letters were not established on the basis of or conditional upon, any such reporting requirement. The applicant has a legitimate expectation that the previous practice will continue.
 - (5) The decisions are unlawful in that they disappoint the applicant's legitimate expectations and no proper consideration or consultation has taken place to make lawful any change in policy.
11. However, as happened in the Smith Point case, prior to the application for leave being heard, the Comptroller rescinded the Decisions. The applicant was informed of the aforesaid rescission of the Decisions in the following letters from the Comptroller, each dated 16 January 2012 and exhibited to Ms Romer's 30 January 2012 affidavit:

"Callenders & Co.
Etc.

Attention: Frederick R.M. Smith, QC
Dear Sir:

Re: Over the Counter Purchase of Bonded Goods

We acknowledge receipt of your letter, dated 29th November, 2011 in connection with the subject.

Please find attached the over the counter letter for 2012. Also attached, in accordance with Regulation 24(3) of the Customs Regulations, is form C14A which must be completed and submitted with the invoices for your local purchases to this Department before the 15th of the following month.

Should you have any questions in this regard, please feel free to contact this office at 352-7361.

Yours truly,

Assistant Comptroller of Customs"

"Callenders & Co.
Etc.

Attention: Frederick R.M. Smith, QC

Dear Sir:

Re: Over the Counter Purchase of Bonded Goods

We acknowledge receipt of your letter, dated 29th November, 2011 in connection with the subject.

This is to advise that your company may forego the requirements for individual purchase order as approval is now given for the period of one calendar year from 16th January, 2012 to 31 December, 2012.

Yours truly,

Assistant Comptroller of Customs"

12. The details as to how the rescission came about are set out in the aforesaid affidavit of Challon Romer in which she deposes, inter alia, as follows:
 - a. Although the Application for Leave has yet to be heard or served upon Customs (as it is an ex parte application), a leading newspaper, The Tribune, publicized the fact that the Applicant had commenced these

proceedings in its issue of 11th January, 2012 (that is, a day after the Applicant filed the Application for Leave).

- b. On 17th January, 2012, The Tribune published an article in which the Prime Minister, the Honourable Hubert Ingraham was quoted as having stated that as a consequence of the complaints from some businesses regarding the requirement by Customs to produce C14A Declarations for 2011 as a condition to such businesses receiving their annual Over the Counter letter, the requirement "will be reviewed".
 - c. The Applicant is not aware of any "review" having taken place but it appears that by issuing to the Applicant the Over the Counter letter for 2012 without the Applicant having submitted all of its C14A Declarations for 2011, Customs has effectively rescinded its self imposed pre-condition. However, Customs has not admitted the unlawfulness of the said pre-condition nor has Customs given any assurance that the Applicant (as well other Licensees of the Grand Bahama Port Authority, Limited ("GBPA") will not be subjected to the same unlawful pre-condition in the future.
13. In the newspaper report to which Ms Romer refers, copies of which were also exhibited to her affidavit, not only is the Right Honourable Prime Minister ("the Prime Minister") reported to have said that the "recent requirement will be reviewed" as a consequence of the complaints which had been made regarding the Decisions, but the Prime Minister is also quoted as having said: "I advise that I will move to establish a committee similar to the one that produced the first Guide in Freeport, and will charge that committee to review the Guide and make recommendations for its amendments taking into account the current realities that prevail in Freeport. As of Monday (16 January 2012), you ought to see change in Customs." As indicated, the aforesaid letters rescinding the Comptroller's decision are dated 16 January 2012, in addition to which the over the counter letter for 2011 was granted on 24 January 2012.
 14. Nevertheless, Mr Smith, Q.C., re-iterates his concern that Customs could simply "re-impose the same unlawful pre-condition at any time" and therefore he says "it is important to the applicant and other licensees of the Grand Bahama Port Authority, Limited, and in the interest of good administration, that the lawfulness or otherwise of the actions taken by Customs be conclusively determined".
 15. In his written submissions, Mr Smith, Q.C., expresses a concern as to whether or not the withdrawal by Customs of its demand vis-a-vis the applicant is extended to other licensees. However, the only licensee before this Court is the applicant and it is clear that as against the applicant, the Decisions have been rescinded as the over the counter letter was issued without the "pre-condition" being met.

16. Additionally, at paragraph 64 of his written submissions Mr Smith, Q.C., makes the following argument:
- “The recent developments do not in any event affect the 2nd Decision. The applicant has an interest in the 2nd Decision and is entitled to clarify its legal rights and obligations in the absence of an over the counter letter. Matters relating to the 2nd Decision need to be determined even if Customs were to admit the unlawfulness of the 1st Decision.”
17. Again the position, in my view, seems to be moot. By the 2nd Decision, as I understand it, if the applicant wished to purchase goods from other licensees, it was required, in the absence of an over the counter letter, to do so by purchase order, stamped and approved by Customs. The applicant has an over the counter letter, so there is no need for the applicant to resort to that procedure.
18. I note here that in the Smith Point case, both the President of the Grand Bahama Port Authority, Limited (“GBPA”) and Mr Smith, Q.C., as their attorney, wrote to the Prime Minister concerning Customs matters. Although it appears that no response was received to those letters, I note that in his letter, Mr Smith, Q.C., indicated that the majority of the disputes between Customs and GBPA licensees had arisen because of a lack of clarity as to the rights and obligations of licensees and Customs under the Hawksbill Creek Agreement and the Customs Management Act and associated Regulations. In that letter Mr Smith, Q.C., also pointed out that the “principal issue in dispute between H.M. Customs and Licensees relates to over the counter sales of goods in bond to other GBPA Licensees.”
19. In his said letter, after outlining the background to the implementation of the over the counter letter and pointing out some of the difficulties and/or challenges faced by both groups, Mr Smith, Q.C., recommended a meeting or series of meetings between representatives of Customs, the GBPA, GBPA licensees and the Chamber of Commerce as a means of simplifying and clarifying the position for the benefit of Customs and the GBPA licensees.
20. That seems like a sensible approach to me, although it appears to date that such a meeting has not yet materialized.
21. However, I note again from the aforesaid newspaper report, that the Prime Minister, as the Minister of Finance and, therefore, the Minister under whose control and direction the Comptroller serves, has foreshadowed the establishment of a committee for the purpose of reviewing the Guide and making recommendations for its amendments, “taking into account the current realities that prevail in Freeport”.

22. The establishment of such a committee may be the way to resolve the matters sought to be raised by this application for Judicial Review. Presumably the meeting to which Mr Smith, Q.C., refers will come about when such a committee is established or at least the recommendations put forward will be considered thereby.
 23. In the meantime, the Decisions having been "effectively rescinded" there is, in my view, no Decision to quash and, therefore, no useful purpose would be served by acceding to the applicant's application at this time.
 24. In the result, in the exercise of my discretion, the application for leave to apply for Judicial Review of the Decisions is refused.
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Delivered this 1st day of March A.D. 2012

Estelle G. Gray Evans
Justice

