[2018] JMSC Civ. 31

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV04302

BETWEEN	**SOUTHWEST AIRLINES CO.**	**APPLICANT**
AND	**COMMISSIONER OF CUSTOMS**	**1ST RESPONDENT**
AND	**COMMISSIONER OF REVENUE APPEALS**	**2ND RESPONDENT**

IN CHAMBERS

Mr Gavin Goffe and Mr Adrian Cotterell instructed by Myers, Fletcher & Gordon for the Applicant

Mrs Susan Reid-Jones instructed by the Director of State Proceedings for the 1st and 2nd Respondents

Ms Monique Edwards watching proceedings on behalf of the 2nd Respondent

Heard: 14 November 2017 and 20 March 2018

Judicial Review – Statutory Interpretation – Revenue Appeals Division Act, 2015 – Jurisdiction – Failure to exercise statutory duty

McDONALD J

[1] The applicant, Southwest Airlines Co. ('Southwest'), was granted leave to apply for judicial review by my brother Rattray J on the 19th of December 2016. As a result,

Southwest filed its Fixed Date Claim Form on the 3rd of January 2017[1] in which it seeks the following orders:

> 1. *An Order of Certiorari to quash the 1st Defendant's decision dated May 31, 2016 that the Claimant contravened sections 209(1) (i) and (ii) 2010(1)* [sic] *and 40 of the Customs Act and was therefore liable to pay penalties totalling $600,000.*
>
> 2. *A Declaration that the Revenue Appeals Division has the jurisdiction to hear appeals filed under section 11 of the Revenue Appeals Division Act in respect of all fines or penalties imposed by a Revenue Commissioner.*
>
> 3. *Costs; and*
>
> 4. *Further or other relied as the Court deems just.*

A supporting affidavit sworn to by Jeffrey Novota, a senior Attorney at the applicant company, was filed on the same day.

[2] It should be noted that on the 7th of February 2017, an order was made by Daye J, pursuant to **CPR** 56.8(2), for this matter to be heard by a single judge in chambers.

Background

[3] Southwest is a fairly well known company which operates an international airline carrier. One of its destinations includes the Sangster International Airport, located in Montego Bay, Jamaica.

[4] On the 31st of May 2016, Southwest received a letter from the 1st Respondent, signed by a Ms Tracy-Ann Green, Manager of the Jamaica Customs Contraband Enforcement Team, for the Commissioner. Southwest was informed via this letter that it had contravened sections 209(1)(a)(i) and (ii), 210(1) and 40 of the **Customs Act** *'by reason of failing to declare a Taurus PT-25 pistol on General Declaration presented to Customs for Southwest flight WN# 272 that arrived at the Sangster's [sic] International*

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[1] The stamp of the Supreme Court indicates that the document was filed on the 3rd of January 2016, however this is clearly an error and is intended to read the 3rd of January 2017.

Airport on Saturday May 7, 2016'. The letter further particularised Southwest's breach as follows:

> *The circumstances are that on May 7, 2016, a passenger, Ms. Nikkii Adams travelling on US Passport # ..., boarded Southwest Airlines flight WN# 272 was allowed to travel to Jamaica with the said firearm packed in her checked-on luggage. It was observed that the firearm was not declared on the General Declaration presented to Customs for the said flight.*

[5] The said letter further advised Southwest, by way of reference to section 219 of the **Customs Act**, that the matter could be dealt with by the 1st Respondent or be prosecuted in the courts. Should Southwest elect to have the 1st Respondent *"mitigate on the matter"* then it was required to –

> *(a) Sign copies of Consent Form A specific to each section of the Customs Act it breached (which were attached to the letter);*
>
> *(b) Provide a written explanation of the circumstances of the breach; and*
>
> *(c) Pay a deposit in the sum of JMD$600,000.00 as a "security against the penalty for the breach."*

[6] A deadline of seven (7) days, after the date of the letter (31st of May 2016), was given to Southwest to respond or else court proceedings would be initiated. Southwest was encouraged to contact the Jamaica Customs Contraband Enforcement Team if further explanation was required and the letter closed with a reminder that Consent Form A was enclosed if Southwest wished to *"use this route to finalize the breach."*

[7] Southwest did not wish to "finalize the breach". In his affidavit, Jefferey Novota ('Mr Novota') denied liability on the part of Southwest. He stated, *"Southwest contends that there is no evidence that the firearm was present on board, the Airline had, and continues to have, no knowledge of its presence and should therefore not be held strictly liable under sections 209 and 210."* He further stated that duty to declare firearms would rest with the passenger, Ms Adams, who in her Immigration/Customs C5 card (exhibited as "JN-3") represented that she was not bringing *inter alia* arms, ammunition or other weapons into Jamaica.

[8] Issue was also taken with the assertion that Southwest breached or committed an offence under section 40 of the **Customs Act**, since that section does not create an offence but provides a list of prohibited goods.

[9] Having formed the view that the decision of the 1st Respondent was an error of law based on the principle of illegality and irrationality, due to the complete lack of evidence to support the conclusion, Mr Novota stated that Southwest instructed its local counsel, Messrs. Myers, Fletcher & Gordon, to challenge the decision of the 1st Respondent.

[10] This challenge was to be by way of an appeal to the 2nd Respondent. Based on Mr Novota's affidavit evidence, it appears that Southwest was advised by its Attorneys-at-Law, Messrs. Myers, Fletcher & Gordon, that the 2nd Respondent has the authority to hear the matter relating to the purported breach of the **Customs Act**. Reference was made to section 11 of the **Revenue Appeals Division Act**.

[11] A letter (exhibited as "JN-4") dated the 14th of July 2016, titled "Re: Notice of Appeal – Southwest Airlines Co." was sent to the 2nd Respondent. Receipt of said letter was acknowledged by the 2nd Respondent's stamp on the 19th of July 2016. This letter set out Southwest's grounds of appeal and enclosed three (3) documents.

[12] A month later, the 2nd Respondent responded by letter (exhibited as "JN-5") dated the 22nd of August 2016, which was received by Southwest's Attorneys-at-Law on the 29th of August 2016. Reference was made by the writer, Ms. Monique Edwards – Acting Senior Legal Advisor, to a previous letter, dated the 4th of August 2016 which was said to reject Southwest's appeal. This August 4th letter is not before the court. What is before the court is the August 22nd letter, which is quite detailed. It advises Southwest that the basis of its appeal is the issue of liability for breaches under the **Customs Act**, as such the issue to be determined whether the 1st Respondent's decision was irregular. Such an issue, according to the 2nd Respondent would best dealt with *"administratively within the Jamaica Customs Agency or in an Administrative Court."*

[13] I think it useful to set out portions of the August 22nd letter, since it is in essence a summary of the 2nd Respondent's position in the instant matter, which is that the 2nd

Respondent has no jurisdiction to hear Southwest's appeal. Reference was made to discussions between counsel for Southwest, Mr Goffe and the Acting Commissioner, Mrs Keita-Marie Chamberlain-Clarke. The letter states:

> *… In the mentioned discussions it was posited that the Revenue Appeals Division in fact has the jurisdiction to hear the instant matter. In light of the Division's principal function of facilitating the determination of appeals by taxpayers against the decision of Revenue Commissioners regarding their "revenue" liability and considering that the term "revenue" is defined in the interpretation section of* ***The Revenue Appeals Division Act, 2015*** *to include "fines."*
>
> *… The word fine as mentioned in* ***The Revenue Appeals Division Act*** *is defined in the Oxford Mini Dictionary as "a sum of money to be paid as a penalty." It is to be noted that the stated definition of "revenue" or "tax" was adopted from the definition of "tax" or "revenue" as contained in* ***The Tax Administration Act.***

[14] The August 22nd letter then goes on:

> *The statutes which govern the taxes for which Tax Administration of Jamaica has the requisite authority to assess and collect, generally classify offences into two categories: 1. those which are liable to prosecution in a Resident Magistrate's Court and if convicted, the guilty party would pay a fine or be imprisoned for a set term of years and 2. minor offences which attract a fine/penalty which can be added to any revenue assessment made. It was alluded to by the taxpayer's representative that if a literal interpretation of the word "fine" as used in* ***The Revenue Appeals Division Act*** *is applied to the instant matter, then the Revenue Appeals Division would have jurisdiction to hear the matter in respect to the penalties imposed by the Jamaica Customs Agency. However it is to be noted that in relation to interpreting revenue statutes, there has been a move away from a literal interpretation to a more purposive approach.*
>
> *…within the context of our function we intended for the use of the word "fine" to encompass instances when penalties would form part of the substantive revenue assessments and not include instances when taxpayers are disputing breaches/penalties/fines in isolation.*

[15] The letter closes by stating that any interpretation contrary to the 2nd Respondent's would open the floodgates of appeals to possibly every breach of sections 209 and 210 of the Customs Act, which deals with the penalties for making false declarations and evading customs laws regarding imported or exported goods. Reference was made to section 219 which provides a mechanism by which the 1st Respondent can mitigate or remit any penalty prior to the matter being brought before the Courts.

The Issues

[16] Based on the foregoing, it is clear that Southwest's dilemma is two-fold. It is firstly seeking relief in relation to its original issue with the 1st Respondent's decision to impose penalties for the alleged breaches of the **Customs Act**. Secondly, it is seeking this court's pronouncement on whether the 2nd Respondent ought to have assisted with the resolution of its first/original issue.

[17] At the outset of the trial, it was noted by counsel for the Respondents, Mrs Reid-Jones, that the 1st Respondent has not sought to defend this matter and as such the only live issue is in relation to the 2nd Respondent. I take this to mean that the 1st Respondent having elected not to defend or challenge the relief sought by Southwest at paragraph 1 of its Fixed Date Claim Form on the 3rd of January 2017, cannot now have any objection with the court granting the order as sought. I would accordingly grant the relief sought by Southwest at paragraph 1 of its Fixed Date Claim Form, with some amendments.

[18] Therefore, the only remaining issue is one of statutory interpretation. This court must consider and determine whether the 2nd Respondent failed to exercise its statutory duty, as contended by Southwest.

Submissions on behalf of Southwest

[19] Counsel, Mr Cotterell made a number of submissions in support of the Declaration sought, particularly that the 2nd Respondent has the jurisdiction to hear appeals filed under section 11 of the **RADA** in respect of all fines or penalties imposed by a Revenue Commissioner, in this case the Commissioner of Customs.

[20] Mr Cotterell commenced his submissions by briefly outlining the 2nd Respondent's position, as he understood it. He submitted that the 2nd Respondent took the view that the RAD was set up to hear matters where a taxpayer was disputing an assessment. He offered by way of example where General Consumption Tax (GCT) or customs duties were assessed as payable on goods imported, but not instances where penalties (fines) were imposed for breaches of sections 209 and/or 210 of the **Customs Act.**

[21] It was emphatically submitted at the outset that the **RADA** is not a taxing act and this would 'set the tone' for the rules of statutory interpretation that this court should use in resolving the matter of the jurisdiction of the RAD. By contrast, he submitted that taxing acts, such as the **Income Tax Act**, are a different species of legislation and that such acts have particular rules of interpretation. Rules of interpretation that would not be applicable to the **RADA**. According to counsel, the **RADA** merely establishes the RAD, speaks to how the Division is to be constituted, lays down procedural rules for the filing of appeals and importantly, does not create any taxes.

[22] Reference was made to the long title of the **RADA** and the section 2 definitions of "Revenue Commissioner", "revenue" or "tax", "revenue law" and "taxpayer".

[23] Mr Cotterell submitted that Southwest would fall under the definition of "taxpayer" and the penalties levied by the Commissioner of Customs would fall under the definition of "revenue" or "tax". He contended that it was important to note that the 2nd Respondent has accepted that if a literal interpretation of the **RADA** was applied then the RAD would indeed have the jurisdiction to hear Southwest's appeal.

[24] It was contended that section 11(1) of the **RADA** gave the RAD jurisdiction to hear appeals in respect of all fines or penalties imposed by the Commissioner of Customs. With respect to section 11(2), counsel submitted that Southwest could not have gone directly to the Revenue Court. Reference was made to the **Judicature (Revenue Court) Act**, in particular section 4(1), which states:

> *4.—(1) The Revenue Court shall have jurisdiction to hear and determine any appeal, cause or matter brought to the Court under or pursuant to any of the enactments for the time being specified in the Schedule.*

Reference was then made to the Schedule, entitled 'Enactments Referring Proceedings to the Revenue Court'. The list includes, *inter alia*, section 18 of the **Customs Act** and section 14 of the **RADA**.

[25] Mr Cotterell submitted that none of the sections that the 1st Respondent decided that Southwest had breached are contained in the schedule. He contends that if the

Legislature intended for every appeal from the **Customs Act** to go to the Revenue Court, it would not have specified section 18 only.

[26] It was submitted that the court should interpret the statute so as to preserve the right of an appeal, rather than to deny it. According to Mr Cotterell, there is no reason to deviate from the plain and ordinary meaning of the **RADA** and the court should be so minded in interpreting section 11 and ultimately in determining the jurisdiction of the RAD. On the point of literal interpretation, reference was made to an excerpt from Halsbury's Laws of England[2] which states:

> *1172. Presumption favouring literal meaning.*
>
> *Prima facie, the legal meaning of an enactment as it applies to particular facts is presumed to be that which corresponds to the literal meaning of the enactment in relation to those facts.*
>
> *The literal meaning of an enactment in relation to particular facts is determined as follows. The starting point is the grammatical meaning of the enactment taken in isolation, that is the meaning it bears in relation to those facts when, as a piece of English prose, it is construed, without reference to any other text, according to the rules and usages of grammar, syntax and punctuation, including the accepted linguistics canons of construction.*

[27] Mr Cotterell submitted that the literal meaning of words in the legislation naturally brings into focus the linguistic rules of interpretation. In anticipation of the 2nd Respondent's argument, Mr Cotterell submitted that although the word 'penalty' as used in sections 209, 210 and 219 of the **Customs Act** is not contained in the section 2 definition of "revenue or tax" that the court should have regard to the linguistic rules of interpretation. In this case, he submitted that the applicable rule is the *ejusdem generis* rule. Reference was made to the definition contained in the Osborn's Concise Law Dictionary[3]:

> *ejusdem generis. [Of the same kind or nature.] A rule of interpretation that where particular words are followed by general words, the general words are limited to the same kind as the particular words.*

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[2] Volume 96 (2012) at paragraph 1172
[3] Ninth Edition, page 146

It was contended that the section 2 definition which ends with, *"…and other charge payable under any revenue law."* contemplates a 'penalty' which is not only within the class of words but is synonymous with a 'fine' which is included. Mr Cotterell also referred the court to the definition of 'penalty' as contained in the Osborn's Concise Law Dictionary[4], which states:

> *penalty. (1) A punishment,* ***particularly a fine*** *or money payment… (emphasis supplied)*

[28] In essence, Mr Cotterell submitted that the penalty imposed by the 1st Respondent falls squarely within the definition of "revenue" or "tax" under section 2 of the **RADA** and that the jurisdiction of the RAD, as stated in section 11, clearly captures the penalty imposed on Southwest and the liability for the breach of the **Customs Act**, which is a revenue law.

[29] According to Mr Cotterell, if the Legislature intended to confine appeals to persons challenging the amount of the assessment only, as opposed to the liability itself, then the **RADA** would have been specific. He further submitted that even if the court were to apply a purposive construction, as the 2nd Respondent contends, the same conclusion would be reached. It was submitted, having regard to the long title, that the RAD was created to save time and resources, not just for the Court but for taxpayers generally. The RAD, Mr Cotterell submitted, was created to divert the flow of matters/appeals from the Court to the RAD.

[30] The 2nd Respondent's contention that a literal interpretation would open the flood gates was rejected by Mr Cottrell, he submitted that the **RADA** does not create new causes of action. He contends that the 'flood' already exists and the **RADA** simply diverts it to a specialised body that is created to handle these types of matters.

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[4] Ninth Edition, page 283

[31] The court was also asked to have regard to the distinction between judicial review and an appeal. Mr Cotterell emphasised that judicial review is not a right but a discretionary remedy, unlike the right of an appeal.

[32] He also stressed the appropriateness of the RAD as the forum for matters of the instant type. Firstly, unlike the internal mitigation process facilitated by the 1st Respondent, taxpayers like Southwest would not be required to admit liability or pay fines as security had the RAD exercised its jurisdiction. Secondly, unlike seeking judicial review by the court, there would be no need for leave to be obtained before the matter could be heard on the merits.

[33] Mr Cotterell contended that the RAD was created for the benefit of the taxpayers and not for the benefit of the Division itself. On this point, it was submitted that the RAD is funded by the Government of Jamaica and is staffed with Commissioners with the relevant expertise. He submitted that the RAD, by declining to exercise it jurisdiction or limiting its jurisdiction was attempting to "pass the buck" to the judicial review court, since matters such as the instant one could not be heard by the Revenue Court. He alluded to the practicality of matters such as the instant one being determined by the RAD, it was noted that it costs taxpayers far more to proceed by way of judicial review. It was also noted that the applicant, Southwest, had to seek judicial review for a $600,000.00 fine imposed in May of 2016 and that it had to wait for more than a year for the matter to be heard. Mr Cottrell surmised that if the matter was heard by way of an appeal to the RAD, it would have been determined long ago.

[34] In response to the 2nd Respondent's contention that a purposive interpretation of the **RADA** should supersede the plain and ordinary meaning (i.e. a literal interpretation) Mr Cotterell made the following submissions:

(1) Firstly, he repeated that the **RADA** is not a taxing act.

(2) Secondly, he distinguished the authority relied on by the 2nd Respondent, ***Commissioner of Taxpayer Audit and Assessment v CIBC Trust and Merchant Bank Jamaica Ltd. et al*** (unreported), Court of Appeal, Jamaica,

[Supreme Court] Civil Appeal No 3/2004, judgment delivered 8 November 2006. He submitted that this case is at best, tangentially related to the case at bar. The said case was concerned with the **Income Tax Act** and how the interpretation of tax laws developed over a course of time. It was submitted that the said case was irrelevant insofar that it dealt with whether a sum paid to trustees of a resulting trust was subject to income tax and whether the said trustees should deduct the tax before making payment to the beneficiaries. The issue for the court was whether the sums paid to the beneficiaries constituted income. Mr Cotterell submitted that the difference between the **Income Tax Act** and the **RADA** is quite apparent. The former is a tax act which prescribes what constitutes income and deals with rates of taxation. By contrast, the latter is not a tax act, it is administrative in nature as the entire Act concerns the administration of the RAD. He argued that the plain and ordinary meaning of the **RADA** cannot be ignored.

(3) Thirdly and perhaps alternatively, it was submitted that even if the purposive interpretation is as the 2nd Respondent claims it to be in this context, that the result would be directly contrary to the purpose of the **RADA** and would defeat its very object and purpose.

[35] Counsel for Southwest, Mr Goffe, interjected to address the statement made by Ms Monique Edwards in her letter dated the 22nd of August 2016 (exhibited as "JN-5"), which is set out at paragraph [14] herein and below for convenience:

> *The statutes which govern the taxes for which Tax Administration of Jamaica has the requisite authority to assess and collect, generally classify offences into two categories: 1. those which are liable to prosecution in a Resident Magistrate's Court and if convicted, the guilty party would pay a fine or be imprisoned for a set term of years and 2. minor offences which attract a fine/penalty which can be added to any revenue assessment made.*

Mr Goffe submitted that this statement is not borne out in the actual legislation. In particular, he submitted that the second point in relation to minor offences could not be found anywhere in the law. He acknowledged that the sections relied on by the Commissioner was not a fine or penalty that was being added to a revenue assessment,

but he went on to submit that the law does not require the Commissioner to add a fine to a revenue assessment, nor does it limit the Commissioner to only imposing fines as an 'add-on' to a revenue assessment. He also acknowledged that in none of the sections of the **Customs Act** which Southwest was found to have breached was there any reference to a revenue assessment, but went on to make the point that there is nothing in the **RADA** that limits the RAD to only hearing appeals where there is a revenue assessment.

[36] Further, Mr Goffe submitted that it would be contrary to the purpose of the Act for a taxpayer to have a tax liability which he cannot appeal simply because the Commissioner did not raise a revenue assessment. This, he contends would give the relevant Commissioner an easy way to insulate himself or his decision from appeal, by simply not raising an assessment.

[37] In the round, it was submitted that whether the purposive, literal approach, or any other approach including identifying the mischief that the law is intended to address, was used the same conclusion would be arrived at. It was submitted that this was not to detract from Southwest's primary argument which is supported by authority. Reference was again made to the Halsbury's Laws of England[5], this time to the third footnote which states: *"However the literal meaning, at least of a modern Act, is to be treated as pre-eminent when construing the enactments contained in the Act. It may occasionally be overborne by other factors, but they must be powerful to achieve this."* In closing, it was submitted that there are no such powerful overriding factors which would justify denying a taxpayer like Southwest the right of appeal that the **RADA** was intended to give.

Submissions on behalf of the Commissioner of Revenue Appeals (2nd Respondent)

[38] Counsel for the 2nd Respondent, Mrs Susan Reid-Jones, submitted that in recent times Courts have generally preferred a purposive interpretation to statutes rather than a strict literal interpretation. Reliance was placed on the decision from the Court of Appeal

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[5] Volume 96 (2012) at paragraph 1172

in ***Commissioner of Taxpayer Audit and Assessment v CIBC Trust and Merchant Bank Jamaica Ltd. et al*** for the contention that there has been a move away from a literal interpretation of revenue statutes in general to a more purposive approach. It was submitted that in the said case the Revenue Court had determined that the sum paid to the respective trustees by the Government of Jamaica and which represented the employee's share of the surplus existing in the Air Jamaica Pension Fund was not liable to income tax. On appeal, the Court of Appeal commented on the trial judge's exercise of a literal interpretation of section 44(3) of the **Income Tax Act** and in referring to the cases of ***Inland Revenue Commissioners v McGuckian*** [1997] 3 All ER 817 and ***Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)*** [2005] 1 All ER 97 and opined that *'The literal construction of revenue statutes was to give way to a more purposive approach.'*

[39] Mrs Reid-Jones referred the court to the following dicta of Lord Steyn from ***Inland Revenue Commissioners v McGuckian***:

> *It is necessary to distinguish between two separate questions of law. The first is whether there is a special rule applicable to the construction of fiscal legislation. The second question is whether there is a rule precluding the court from examining the substance of a composite tax avoidance scheme. I consider first the construction of tax statutes.*
>
> *Towards the end of the last century Pollock characterised the approach of judges to statutory construction as follows—'… Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds' (see Pollock Essays in Jurisprudence and Ethics (1882) p 85). Whatever the merits of this observation may have been when it was made, or even earlier in this century, it is demonstrably no longer true. During the last 30 years there has been a shift away from literalist to purposive methods of construction. Where there is no obvious meaning of a statutory provision the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it. But under the influence of the narrow Duke of Westminster doctrine, tax law remained remarkably resistant to the new non-formalist methods of interpretation. It was said that the taxpayer was entitled to stand on a literal construction of the words used regardless of the purpose of the statute (see Pryce v Monmouthshire Canal and Rly Cos (1879) 4 App Cas 197 at 202–203, Cape Brandy Syndicate v IRC [1921] 2 KB 64 at 71 and IRC v Plummer [1979] 3 All ER 725, [1980] AC 896). Tax law was by and large left behind as some island of literal interpretation…*

[40] Reference was also made to paragraph [28] of the judgment of ***Barclays Mercantile Business Finance Ltd*** which referred to Lord Steyn's dicta. It states:

> *As Lord Steyn explained in IRC v McGuckian [1997] 3 All ER 817 at 824, [1997] 1 WLR 991 at 999, the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. Until the Ramsay case, however, revenue statutes were 'remarkably resistant to the new non-formalist methods of interpretation'. The particular vice of formalism in this area of the law was the insistence of the courts on treating every transaction which had an individual legal identity (such as a payment of money, transfer of property, creation of a debt, etc) as having its own separate tax consequences, whatever might be the terms of the statute. As Lord Steyn said, it was—*
>
> *'those two features—literal interpretation of tax statutes and the formalistic insistence on examining steps in a composite scheme separately—[which] allowed tax avoidance schemes to flourish …'*

Mrs Reid-Jones submitted that this case was merely being cited for the principle in relation to purposive construction.

[41] Reference was made to the English case of ***Peake v Director of Public Prosecutions*** [2010] EWHC 911 which according to Mrs Reid-Jones demonstrates the modern preference for a more purposive interpretation of statutes. In ***Peake*** the appellant had been caught driving in excess of the speed limit, he had passed a number of signs reminding him of the speed limit. In appealing against his conviction, he argued that the signs were defective in nature and thus he was entitled to the protection of section 85(4) of the **Road Traffic Regulation Act**, 1984 which requires adequate guidance. The appeal was dismissed and it was noted at paragraph [26] of the judgment, *'…statutory interpretation has progressed since 1967 from a focus on the actual words of the statutory provision to a combination of the actual words of the provision together with its purpose.'*

[42] Mrs Reid-Jones submitted that the purposive approach to statutory interpretation is a means of interpretation by which the language of an enactment is considered along with the context in which the language is used. The purposive approach to statutory interpretation also considers the purpose of the legislation or statutory scheme in which the relevant language is found. She also submitted that despite the **RADA** not being a taxing act, as contended by Southwest, the purposive approach is of a general applicability since it is always relevant to discover the real purpose that Parliament intended. Mrs Reid-Jones emphatically submitted that it was not intended that the RAD

should deal with appeals from the imposition of penalties or fines that are in isolation from an assessment.

[43] Further, she submitted that the definition of "revenue" or "tax" as contained in the **RADA** was adopted from the **Tax Administration Jamaica Act**. According to Mrs Reid-Jones, it is noteworthy that the statutes which govern the taxes for which Tax Administration Jamaica has the requisite authority to assess and collect (for example, the **Income Tax Act** and the **General Consumption Tax Act**) generally align penalties/fines either to offences which are liable to prosecution in a Parish Court or minor offences, wherein the relevant fines or penalties can be attached/added to any revenue assessment made.

[44] Mrs Reid-Jones submitted that in considering the mandate of the RAD and the statutory scheme of the **RADA** a purposive approach would lead to the conclusion that the RAD was intended to hear and determine appeals from taxpayers in relation to fines when such fines/penalties form a part of the substantive revenue assessment and not when taxpayers are disputing fines/penalties in isolation. By way of example Mrs Reid-Jones alluded to an income tax assessment or property tax assessment which an individual was late in paying and therefore a penalty was attached to the assessment.

[45] Mrs Reid-Jones then went on to make the floodgate argument previously mentioned herein. She submitted that any interpretation contrary to the 2nd Respondent's would open the floodgates of appeals to possibly every breach 'simpliciter' that occurs at port or airports in respect of sections 209 and 210 of the **Customs Act**.

[46] It was further submitted that the 2nd Respondent's interpretation was supported by the section 219 mechanism, whereby the 1st Respondent can mitigate or remit any penalty under the Customs Law prior to the matter being brought before the Court. Section 219 of the **Customs Act** states:

> *Subject to the approval of the Minister (which approval may be signified by general directions to the Commissioner) and notwithstanding anything contained in section 217, the Commissioner may mitigate or remit any penalty or restore anything seized under the customs laws at any time prior to the commencement of*

> *proceedings in any court against any person for an offence against the customs laws or for the condemnation of any seizure.*

Mrs Reid-Jones submitted that section 219 does not require the admission of liability prior to an application to remit or mitigate a penalty.

[47] Finally, Mrs Reid-Jones echoed the RAD's position (as contained in its letter to Southwest) that what was being appealed by Southwest was not the penalty which it had been charged to pay but the issue of liability. As such, it was submitted that the issue to be determined was Southwest's claim that the 1st Respondent took an irregular administrative decision when it sought to penalise them, instead of the passenger, for the breaches which were outside their knowledge. Based on this, it was contended that such issues would be best dealt with either administratively within the Jamaica Customs Agency or in an Administrative Court (i.e. by way of judicial review).

[48] In response to Mr Cotterell's submission that Southwest could not have sought relief before the Revenue Court, counsel Ms Monique Edwards submitted that section 11(2) of the **RADA** gives the taxpayer the right to appeal directly to the Revenue Court and thereby bypass the RAD. Further, she submitted that section 11(2) indicates that the taxpayer can apply to the Revenue Court on the same grounds of appeal that he could have submitted to the 2nd Respondent. Ms Edward submitted that Mr Cotterell's own submission that Southwest's claim could not have been brought in the Revenue Court is an indication that the matter similarly could not have been properly brought before the RAD.

[49] Ms Edwards outlined the three tiered appeal process that exists in the current tax system. She submitted that the first tier is an internal objection stage by which the taxpayer upon being assessed and in disagreement with such assessment can seek an internal review of that decision within the relevant revenue authority. Upon that review, and a decision being issued if the taxpayer is still not in agreement then he is afforded the opportunity to appeal to the RAD (the second tier). Upon the RAD's review of the appeal lodged and the issue of the relevant decision, if the taxpayer is still not in agreement he is afforded the opportunity to appeal to the Revenue Court (the third tier).

[50] Ms Edwards then referred to the section 4 of the **Judicature (Revenue Court) Act**, which speaks to the jurisdiction of the Revenue Court and makes reference to the schedule attached therein. She agreed with Mr Cottrell's observation that the schedule only speaks to section 18 of the **Customs Act** (not sections 209, 210 or 40). She submitted that it follows logically, having regard to the three tiered appeal process that if reference is not made in the schedule to the **Judicature (Revenue Court) Act**, to any of the aforementioned sections 209, 201 or 40, then those sections are not sections which can form appropriate grounds of appeals to the RAD.

[51] Ms Edwards submitted that sections 18(1) and (3) of the **Customs Act** further support the 2nd Respondent's position. Section 18(1) states:

> *Any person (hereinafter in this Act referred to as the "objector") who has disputed an assessment by notice of objection under section 17 of this Act and who is dissatisfied with the decision of the Commissioner therein may appeal to the Taxpayer Appeals Department within thirty days of the date of receiving the Commissioner's decision.*

[52] According to Ms Edwards section 18(1) gives the taxpayer the authority to appeal to the Taxpayer Appeals Department (now RAD). She noted that this provision was still in effect but steps have been taken to amend it to refer to the RAD. She went on to submit that after receiving the 1st Respondent's decision, if the taxpayer is not in agreement with same and that is after exhausting the objections process that an appeal can be made to the Revenue Court. Reference was made to section 18(3), which reads:

> *An objector who is dissatisfied with the decision of the Taxpayer Appeals Department may appeal to the Revenue Court within thirty days of the date of receiving that decision or within such longer period of time as may be permitted by or pursuant to rules of court.*

[53] Ms Edwards submitted that section 18(1) cannot be read in isolation, she then referred the court to section 17, in particular subsections (1) and (5) which state:

> *(1) If any dispute shall arise as to whether any or what duty is payable on any goods imported into or exported from the Island, the importer, consignee or exporter, or his agent, shall deposit in the hands of the Commissioner the duty demanded by him.*
>
> *(5) Where a person who has objected to an assessment of duty subsequently agrees with the Commissioner as to the amount at which the assessment should*

> *be made, the assessment shall be amended accordingly but, in any other event, the Commissioner shall give notice in writing to the person of his decision in respect of the objection.*

[54] She emphasised that taxpayers are required to exhaust the objection process before engaging in the appeal process at RAD. She also emphasised the word 'duty'. The court was asked to take note that the section speaks to duty and does not speak to any penalty or fine. Ms Edwards submitted that the objection section follows the three tiered appeal process then speaks to the taxpayers right to appeal to the RAD which is aptly dealt with in section 18 of the **Customs Act** which refers to section 17. Thus, she submitted that the logical conclusion and interpretation is that matters that can come to the RAD on appeal are matters that are duty related.

[55] Ms Edwards again emphasised that the objection section (section 17) does not make reference to penalties and/or fines, neither does it make reference to the contents of section 209, 210 or 40 of the **Customs Act**. As such, she repeated her submission that the omission of sections 209, 210 and 240 from the schedule to the **Judicature (Revenue Court) Act** is an indication that those matters, having considered the provisions of sections 18 and 17 of the **Customs Act** and the three tiered appeal process, could not have been within the jurisdiction of the RAD.

[56] Lastly, Ms Edwards echoed Mrs Reid-Jones' submission that the 2nd Respondent only has jurisdiction to hear and determine matters where persons have committed what are considered minor offences, for example failure to file a return for income tax purposes or filing a return late, and these would be associated or attached to any assessment raised in relation the taxpayer's liability. She submitted that it must be noted that this category does not speak to penalties or fines in isolation and that the RAD is but a mere quasi-judicial body and as such could not deal with prosecutorial matters.

The Law

[57] It is useful to set out the relevant provisions of the **Customs Act**:

> ***Section 40.*** *Until revoked by order under section 39 the following goods are prohibited to be imported –*
>
> > *(v) arms and ammunition, except with the written permission of the Commissioner;*
>
> ***Section 209.*** *(1) A person commits an offence if –*
>
> *(a) in any matter relating to the customs, or under the control or management of the Commissioner, he –*
>
> > *(i) make or subscribes or causes to be made or subscribed, any false declaration; or*
> >
> > *(ii) makes or signs or causes to be made or signed, any declaration, certificate or other instrument, required to be verified by signature, which is false in a material particular;*
>
> ***Section 210.*** *(1) Every person who shall import or bring, or be concerned in importing or bringing into the Island any prohibited, goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unloaded or not, or shall unload, or assist or be otherwise concerned in unloading any goods which are prohibited, or any goods which are restricted and imported contrary to such restriction, or shall knowingly harbour, keep or conceal, or knowingly permit or suffer, or cause or procure to be harboured, kept or concealed, any prohibited, restricted or uncustomed goods, or shall knowingly acquire possession of or be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any goods with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or applicable to such goods, or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any import or export duties of customs, or of the laws and restrictions of the customs relating to the importation, unloading, warehousing, delivery, removal, loading and exportation of goods, shall for each such offence incur a penalty of not less than treble the import duties payable on the goods nor more than treble the value of the goods; and all goods in respect of which any such offence shall be committed shall be forfeited.*

[58] The **Revenue Appeals Division Act**, 2015 came into operation on the 4th of August 2015.[6] The purpose of the Act, as stated in the long title, is to *'Provide for the establishment of a division of Government to be known as the Revenue Appeals Division for the determination of appeals by taxpayers against the decisions of Revenue*

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[6] See: The Revenue Appeals Division Act, 2015 (Appointed Day), Notice

Commissioners, regarding their revenue liability under the revenue laws and for connected matters.'

[59] Although not mentioned by counsel on either side, it is useful to note that the **Revenue Appeals Division Act** ('RADA'), pursuant to section 22, deletes Part IVA of the **Revenue Administration Act** which established a department of Government called the Taxpayer Appeals Department ('TAD'). The duty of the TAD[7] was to provide for and establish procedures in relation to –

(a) the hearing of appeals by taxpayers against decisions of Revenue Commissioners in relation to assessments made under the relevant laws relating to revenue; and

(b) the settlement of disputes arising between a taxpayer and a revenue Department in relation to the taxpayer's liability under any such relevant law.

[60] The main provisions, about which the issues of interpretation turn, are sections 4 and 11 of the **RADA**, as well as a number of terms contained in section 2 (the interpretation section).

[61] Section 4, which speaks to the principal function of the RAD, provides:

> *4.—(1) Subject to the provisions of this Act, the principal function of the Division is to facilitate the determination of appeals by taxpayers against the decisions of Revenue Commissioners, regarding their revenue liability under the revenue laws.*
>
> *(2) In the case of appeals relating to revenue liability, the parties to the proceedings under this Act shall be the relevant Revenue Commissioner and the relevant taxpayer.*
>
> *(3) Subject to the provisions of this Act, the Division may, for the purpose of carrying out its functions, consult with and seek assistance from such technical experts or other persons as the Commissioner considers appropriate.*

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[7] See: section 11A(2) of the Revenue Administration Act

[62] Section 11 speaks to an aggrieved taxpayer's right of appeal to the RAD:

> *11.—(1) A taxpayer that is aggrieved by a decision of a Revenue Commissioner regarding the liability of the taxpayer under any revenue law (hereinafter called an "aggrieved taxpayer") may, appeal to the Commissioner in accordance with the prescribed appeal rules.*
>
> *(2) Nothing in subsection (1) is to be regarded as precluding an aggrieved taxpayer from appealing directly to the Revenue Court, on the same grounds of appeal that the taxpayer would have submitted to the Commissioner, in which case, the provisions of section 14 shall, with such modifications as the circumstances require, apply as to the aggrieved taxpayer, as they apply to an appellant referred to in that section.*

[63] Critical to the interpretation of sections 4 and 11 are the following terms defined in section 2:

> *"revenue" or "tax" includes any duty, fee, levy, **fine** and other charge payable under any revenue law;*
>
> *"Revenue Commissioner" means –*
>
> *(a) the Commissioner General of Tax Administration Jamaica;*
>
> ***(b) the Commissioner of Customs;***
>
> *(c) the Commissioner of Land Valuations;*
>
> *(d) the Commissioner of Revenue Protection;*
>
> *"revenue law" means any law relating to revenue;*
>
> *"taxpayer" includes any person who a Revenue Commissioner is satisfied is liable to pay revenue pursuant to a revenue law and whose liability to make payment of revenue is in question, whether or not, in the event, the payment is waived or remitted or no amount is found to be payable;*

[64] On the point of statutory interpretation, while I have considered the authorities relied on by counsel I am guided by the concise dicta of Brooks JA from ***Jamaica Public Service Company Limited v Dennis Meadow et al*** [2015] JMCA Civ 1 at paragraphs [53] and [54] wherein the major principles are summarised:

> *[53] … The major principles of statutory interpretation, currently approved, include the use of the plain and ordinary meaning of words in the document, the application of the context of the document and the rejection of any interpretation that makes nonsense of the document.*
>
> *[54] The learned editors of Cross' Statutory Interpretation 3rd edition proffered a summary of the rules of statutory interpretation. They stressed the use of the*

natural or ordinary meaning of words and cautioned against "judicial legislation" by reading words into statutes. At page 49 of their work, they set out their summary thus:

> *"1. 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; he must also determine the extent of general words with reference to that context.*
>
> *2. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing.*
>
> *3. The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and* ***he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute****...." (Emphasis supplied)*

This summary is an accurate reflection of the major principles governing statutory interpretation.

Analysis & Conclusion

[65] I wish to thank counsel for their industry, research and clear submissions which were very useful to the court. As mentioned previously, I am minded to grant the first order sought by Southwest which was in any event unchallenged.

[66] With regard to the 1st Respondent, I would wish to make the following observations: (1) Southwest is correct that section 40 of the **Customs Act** is not an offence creating provision. As such, it would be inaccurate to allege that it committed an offence under section 40(v) which provides that arms and ammunition are prohibited goods (without the Commissioner's written permission). Instead, it seems that if a prohibited good listed in section 40 was imported then the offence committed would be the evasion of customs laws regarding imported goods, which is provided for under section 210(1). Therefore, the third Consent Form A which particularised the nature of the breach in terms of section 40 was unnecessary. (2) I would agree with Mrs Reid-Jones' observation that section 219 does not require the admission of liability prior to an application to remit or mitigate a penalty. As such, any insistence by the 1st Respondent or his agents may very well be improper. If the 1st Respondent's power was limited to mitigation, then perhaps an

admission of liability could be a condition precedent to the exercise of this power. However, it is noted that the 1st Respondent has the power to remit penalties, the dictionary meaning includes *"to cancel or refrain from exacting or inflicting (a debt or punishment)*[8] In practical terms it is unclear in what circumstances the 1st Respondent would be able to cancel or refrain from inflicting a penalty where there has been an admission of the commission of an offence. Perhaps this explains why Ms Tracy-Ann Green (for the Commissioner) in her letter to Southwest only presented the option of mitigation and used words such as 'finalize the breach'. In my view this does not accord with the provision of section 219 and could potentially have natural justice implications.

[67] Having carefully considered the submissions of counsel as well as the authorities relied upon, I am not minded to grant the second and third orders. As it relates to the 2nd Respondent, I find that it acted correctly in refusing to hear Southwest's appeal filed under section 11 of the **RADA**. To my mind the RAD does not have the jurisdiction to hear and determine matters which could not be pursued before the Revenue Court. I am persuaded by Ms Edward's submissions set out at paragraphs [48] – [50] herein. The court is unable to ignore section 11(2) of the **RADA** which states that aggrieved taxpayers could go directly to the Revenue Court on the same grounds of appeal that the taxpayer would have submitted to the 2nd Respondent. Further, section 14 is also relevant. It provides a means of appealing from the 2nd Respondent's decision to the Revenue Court. The Revenue Court has the jurisdiction to hear such appeals by virtue of the amendment to the schedule of the **Judicature (Revenue Court) Act** to include section 14 of the RADA[9]. In practical terms, the only way that the Revenue Court could hear Southwest's appeal is if the 2nd Respondent accepted jurisdiction and determined the matter and Southwest was aggrieved by that decision. The Revenue Court would have no jurisdiction otherwise and this would render section 11(2) of the **RADA** inoperable.

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[8] *Oxford English Dictionary Online*

[9] See: Second Schedule of the Revenue Appeals Division Act, 2015

[68] Put another way, it seems that the **RADA** is intended to be a non-mandatory quasi-judicial body. Section 11(2) makes it clear that aggrieved taxpayers are not even required to first appeal to the 2nd Respondent before appealing to the Revenue Court. How then could the RAD have jurisdiction where the Revenue Court, which may act either as an alternative forum or an appellate forum, does not?

[69] While there is merit in Mr Cotterell's submission that word 'penalty' could fall within the definition of "revenue" or "tax" under section 2 of the **RADA**, and while I am prepared to accept that that a penalty may indeed be a synonym for a fine and also that the **Customs Act** is indeed a revenue law, I am not convinced that the jurisdiction of the RAD *'clearly captures the penalty imposed on Southwest and the liability for the breach of the Customs Act',* as he submitted.

[70] The court is unable to grant a Declaration that the RAD has the jurisdiction to hear appeals filed under section 11 of the **RADA** in respect of all fines or penalties imposed by a Revenue Commissioner. In my view such an order would be far too wide as all breaches of the revenue law (which can result in fines or penalties) are not justiciable in the same manner. I would tend to agree with the 2nd Respondent's assertion that the statutes which govern the taxes for which the Revenue has the requisite authority to assess and collect, provide for two categories of offences. The first category being those which are liable to prosecution in the Parish Court (or on indictment in a Circuit Court) and the second category being those which can be added to any revenue assessment made by the relevant Commissioner. I note that the 2nd Respondent did not respond directly to Mr Goffe's submission that this categorisation is not borne out in the actual legislation. To this end, I find it useful to have regard to the Part X of the **Customs Act**, which is titled 'Legal Proceedings'.

[71] Part X of the **Customs Act** governs, *inter alia*, how customs offences are to be prosecuted. Section 240(1) provides:

> *240.- (1) Subject to the express provisions of the customs laws, any offences under the customs laws may be prosecuted, and any penalty or forfeiture imposed by the customs laws may be sued for, prosecuted and recovered summarily, and all rents, charges, expenses and duties, and all other sums of money whatsoever payable*

> *under the customs laws may be recovered and enforced in a summary manner on the complaint of any officer.*

[72] The **Interpretation Act** defines 'summarily' and 'court of summary jurisdiction' as follows:

> *"summarily", "in a summary manner" or "on summary conviction" means respectively before a court of summary jurisdiction;*
>
> *"court of summary jurisdiction" means –*
>
> *(a) any justice or justices of the peace to whom jurisdiction is given by any Act for the time being in force, or any Resident Magistrate sitting either alone or with other justices in a Court of Petty Sessions;*
>
> *(b) a Resident Magistrate exercising special statutory summary jurisdiction;*

Further, section 4 of the **Judicature (Resident Magistrates) (Amendment and Change of Name) Act**, 2016 provides that all other enactments are amended to reflect the change in the styling of the Courts administered under the principal Act from Resident Magistrates Courts to Parish Courts.

[73] Given that there is nothing in sections 209 and 210 of the **Customs Act** (set out at paragraph [57] herein) which expressly excludes the applicability of section 240, it is my view that the appropriate forum for disputing liability in relation to the offences which the 1st Respondent alleged Southwest committed, would have been the Parish Court. I therefore conclude that: (1) the 2nd Respondent was correct in refusing to hear Southwest's appeal; (2) had the 2nd Respondent exercised jurisdiction it would have acted *ultra vires* and usurped the function of the Parish Court; and (3) although Mr. Cotterell is quite correct that the **RADA** is not the same as the **Income Tax Act**, in the case at bar a literal interpretation would produce a result which is contrary to the purpose of the statute and would be irreconcilable with other enactments, such as the **Customs Act**.

[74] As an aside, I find the floodgate argument advanced by the 2nd Respondent to be irrelevant and somewhat troubling. If the RAD had the requisite jurisdiction then it ought to properly exercise it, regardless of whether it would be burdened or inundated by the number of matters brought by aggrieved taxpayers. The question of resources and

capacity is an entirely separate matter which could not be used to justify any form of dereliction from a statutory mandate.

Disposition

[75] It is hereby ordered:

1. Certiorari is granted to quash the 1st Respondent's decision dated the 31st of May 2016 that the Applicant contravened sections 209(1)(a), 210(1) and 40 of the **Customs Act** and was therefore liable to pay penalties totalling $600,000.00;

2. Declaration that the Revenue Appeals Division has the jurisdiction to hear appeals filed under section 11 of the **Revenue Appeals Division Act** in respect of all fines or penalties imposed by a Revenue Commissioner is refused; and

3. No order as to costs pursuant to **CPR** 56.15(5).