

ALMS ✓

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 00790/2003

BETWEEN            ELMA STENNETT                            CLAIMANT  
AND                    THE ATTORNEY GENERAL                    DEFENDANT

J. Clarke and A. Clarke for Claimant

P. Foster and K. Larman instructed by Director of State Proceedings for  
Defendant

**Heard: April 6, May 31, July 25, and November 11, 2005**

**Beswick J.**

The Minister of Finance and Planning granted to Mrs. Elma Stennett, a duty concession which allowed her to pay 20% of the duty due on a motor vehicle which she had imported into the island. She was eligible for this concession as principal of a school.

Investigators of the Ministry kept Mrs. Stennett and the motor car under surveillance and eventually seized the car whilst it was in the possession of someone whom she describes as being her niece.

Some years later, a hearing was held at the Ministry where officials questioned Mrs. Stennett in the presence of her lawyer. The Minister did not attend but subsequently decided to revoke the concession because of what he regarded as the breach of its conditions.

Mrs. Stennett in these proceedings seeks to have a judicial review of the Minister's decision.

### **The Decision**

In a letter dated February 18, 2003 to Mrs. Stennett's attorney-at-law, the Minister advised that :

“[A]fter review of the information relating to the use of the benefit of the 20% duty concession granted to Mrs. Stennett, it is fair to conclude that she had breached the conditions under which the facility was granted.

On this basis the concession has been revoked and Mrs. Stennett will be required to pay outstanding duties/GCT of \$1,200,000.00....”

There was no indication of what the condition was and how it was breached.

The reliefs she claims are:

- i. An order of Certiorari to quash the decision of the Minister of Finance contained in letter dated February 18, 2003 revoking the 20% concession rate of duty granted to the applicant in or about November 1998 for the importation of a 1999 BMW motor vehicle.

- ii A declaration that the Minister and or the officers of the Revenue Protection Department of the Ministry of Finance have no power under Section 32 of the Customs Act to forfeit the claimant's said motor vehicle.
- iii A declaration that the seizure of the claimant's motor vehicle is unlawful.
- iv Damages for unlawful detention of the claimant's motor vehicle.
- v Costs of this application to be borne by the defendants.
- vi Such further or other relief.

Mr. Foster, for the defendant, attacked the application on three grounds, the first two being procedural and the third being substantive. He submitted that the application should be dismissed because of the delay in bringing it and also because there were alternative methods of obtaining relief.

The seizure occurred on June 4, 2001. The Minister decided to revoke the concession on February 17, 2003. Mr. Foster argued that Mrs. Stennett was duty bound to challenge the decision promptly and in any event within three (3) months.

Indeed, he said, the application for leave had been made a day after the 3 month period had expired and reflected a pattern of delay exhibited by Mrs. Stennett, which pattern should now be taken into account.

He conceded that there had been no argument re delay at the application for leave to apply for judicial review, but argued that Rule 56.6 (5) Civil Procedure Rules 2002 shows that delay remains significant even though relief had already been granted. See Caswell v Dairy Produce Quota Tribunal [1990] 2 WLR 1320. According to Mr. Foster, Mrs. Stennett's delay has resulted in the Minister's decision being uncertain for four (4) years.

Leave had been granted to Mrs. Stennett in 2001 to proceed to judicial review for an Order of Prohibition to prevent a hearing into the matter at the Ministry of Finance but she did not pursue that application. Subsequently, there was a change of the Attorney-at-law representing her. The hearing was held and her new Counsel attended with her. Thereafter judicial review of the decision to revoke the concession was sought.

I agree that persons should not be kept in suspense about the legal validity of a public authority's decision for any longer period than is absolutely necessary. See O'Reilly v Mackman (1983) 2 All 237. However, this matter had a circuitous route before this application was made. Correspondence was being exchanged about the hearing, Court proceedings commenced to prevent it, then the change in representation and approach to the case. In those circumstances any delay that there may have been is not sufficient in my view to prevent Mrs. Stennett seeking redress now.

Mr. Foster's second procedural point concerned alternative redress.

Rule 56.3(3) (d) of the Civil Procedure Rules 2002 provides that the claimant should utilize alternative means of redress before applying for judicial review. Mr. Foster submitted that here a claim for detinue and conversion would have been adequate to resolve all issues.

In addition, he argued, Section 215(1) of the Customs Act provides a remedy for the owner of items seized, to notify the Commissioner of Customs of the owner's claim to the goods.

Mr. Foster also referred to s.65 of the Judicature (Resident Magistrates) Act which provides for recovery of all penalties or forfeitures to the Crown.

It was his argument that this application should fail as other remedies were available and had not been used. See R v Epping and Harlow General Cmmrs. Ex. p. Goldstraw (1983) 3 All ER 257.

In R v Birmingham City Council ex.p. Ferrero Ltd (1993) 1 All ER 530, Taylor L J referred to the many decisions which affirmed that it is only exceptionally that judicial review should be granted where there is an alternative remedy and especially where Parliament provided a statutory appeal procedure. At page 537, the learned Lord Justice stated that "it is therefore necessary where the exception is involved, to look carefully at the suitability of the statutory appeal in the context of the particular case."

In my view the question to be answered is this. What are the real issues to be determined and is the statutory appeal procedure suitable to determine them?

The main issues are whether Mrs. Stennett is entitled to continue to enjoy the duty concession and whether she can recover her seized motorcar without additional payment. Inextricably intertwined with these are questions as to the limit to the power of the Minister to revoke the concession.

The Customs Act provides for redress for a seizure.

Section 215 (1) Customs Act provides:

“Whenever any seizure shall be made, unless in the possession of or in the presence of the offender .... or owner.... the seizing officer shall give notice in writing of such seizure and of the ground thereof to the....owner ...either by delivery of the same to him personally, or by letter addressed to him, and transmitted by post to, or delivered at his usual place of abode or business if known ....and all [such] seizure .... shall be deemed....to be condemned... unless the person from whom such seizure shall been made....or owner thereof....shall within one calendar month from the day of seizure give notice in writing to the Commissioner that he claims the same....whereupon proceedings shall be taken for the forfeiture....thereof...”

I reject the argument that Mrs. Stennett must be taken to have properly received notice of seizure of the vehicle by virtue of service of the notice on her niece. There is no evidence that her niece was her agent in general, and more importantly, no evidence of agency for service of documents.

Proper service would be necessary before any redress could be accessed under the Statute. Some of the alternative methods of redress suggested by Mr.

Foster offer partial remedies for some of the reliefs sought but none offers total remedy for the reliefs sought.

I therefore regard these proceedings as being properly brought and I now consider the substantive issues.

Ms. J. Clarke, Counsel for Mrs. Stennett, relies on six (6) grounds for the reliefs sought.

**Ground 1 for relief**

**The Minister in arriving at his decision has misinterpreted Section 32 Customs Act and has acted without foundation or in excess of his jurisdiction.**

In a letter of September 4, 2004, Ms. Eureka Stewart, Attorney-at-Law for the Revenue Protection Department indicated that the special conditions governing the grant of the Concession to Ms. Stennett were those contained in:

(a) Section 32 of the Customs Act,

(b) the Ministry of Finance's Reference No. 565 /017 (1) stating

“[W]here a duty concession has been granted, the vehicle cannot be sold or otherwise disposed of within a period of three (3) years of the grant of the Concession. If this is done full duties become payable immediately....”, and

(c) The Import Entry Form containing an endorsement declaring inter alia, that the goods mentioned in the licence “shall be used for my purposes only.” Mrs. Stennett had been required to sign this Form.

Section 32 of the Customs Act provides a penalty where goods have been entered for special conditions and the conditions are not observed.

However, Mr. Foster, for the Attorney-General, expresses a different view as to the conditions applicable. He submits that s.32 Customs Act does not apply here as it refers to cars brought in for a special purpose and not under special conditions as is this case. He argues that the Minister's power to vary a tax is not by virtue of the Customs Act but rather by the Provisional Collection of Tax Act, and Orders made under that Act. By the Provisional Collection of Tax (Customs Tariff) (Revision) Order 1991, the Minister exercised that power to allow a lower rate of duty to be payable by certain named categories of persons including principals of schools and it is only in Ex.87.02 (1) of that Order that a condition is imposed restricting sale or transfer of a vehicle to which the Order applies.

Mr. Foster submitted that the conditions restricting sale on which the motor vehicle was allowed entry with the reduced duty rate were found in the Ministry Reference 575/017 (1) and in the Import Entry Form. He argues that the condition in that Form, specifying use of the vehicle for Mrs. Stennett's purposes only, was placed there by the Commissioner of Customs who has responsibility to enforce the Customs Act and thus can impose conditions on behalf of the Minister of Finance.

Mr. Foster acknowledged that any variation of taxes and conditions by the Minister must be in writing but he argued that the Commissioner of Customs, as a functionary of the Minister, can impose those conditions. Thus the conditions on



the Import Entry Permit would have been properly imposed. He relied on the principle found in *Carltona Ltd. v. Commrs. of Works* [1943] 2 All ER 560 where Lord Greene acknowledged that Ministers' functions are so multifarious that their duties and powers are normally exercised by responsible officials under the Minister's authority.

Mr. Foster submitted that the plain and obvious meaning should be given to the condition that the motor vehicle "shall be used exclusively for the purpose of Elma Stennett". The vehicle must be used for her purposes, but it can be used or driven by a person other than her, provided that the benefit goes to Mrs. Stennett and not to a third party ineligible for the duty concession.

The Minister's letter containing the decision to revoke the concession referred to "a breach of the conditions under which the facility was granted" but did not particularize the breach.

Mr. Foster submitted that Mrs. Stennett would know the conditions applicable to her, and consequently the breach, by being aware of the guidelines in the Ministry Reference . Further, Ms. Stewart's letter concerning the breach had stated that "our surveillance revealed that [Mrs. Stennett] had never been in the care or control of the particular motor vehicle as she at all times was noted to utilize public transportation. The ... motorcar was not observed until January 2001 being driven by a woman later identified as Michelle McIntosh.....[Mrs. Stennett] admitted

that she had breached the terms as outlined above.” Mrs. Stennett should therefore have known the breach.

According to Mr. Foster, allowing her niece to drive does not breach the condition as the driving of the car may be incidental to Mrs. Stennett’s purposes. However, he says, if the incidental purpose becomes an end in itself, it is no longer arguable that the incidental purpose is for Mrs. Stennett’s purpose exclusively.

Mr. Foster submitted that the evidence is that during a two-and- a-half year period of intense surveillance, the vehicle was never seen in Mrs. Stennett’s possession, nor at her home nor her workplace. Further, Althea McPherson, her purported niece, had had sole possession, use, care and control of the vehicle for a protracted period. This would mean that Althea McPherson’s use of the vehicle ceased being incidental to Mrs. Stennett’s purposes and became an end in itself. Thus the condition of exclusive use would have been breached and the Minister would not have acted in excess of his jurisdiction in revoking the concession.

## **Ground 2 for Relief**

### **No evidence before Minister of breach of condition**

Ms. Clarke submitted what she regarded as being the evidence before the Minister. Mrs. Stennett did not know the cost of the vehicle. She referred questions concerning the car to her nephew. She rejected the suggestion to restrict the insurance policy so as to pay a smaller premium and on obtaining the insurance

policy, she handed the insurance document to a man who drove away while she and her nephew left in another vehicle.

Ms. Clarke further stated that the body of evidence on the issue of whether the condition was breached by Mrs. Stennett included questions asked of Mrs. Stennett and her answers as recorded by the Ministry's investigator, and an Action Sheet detailing surveillance of the vehicle with assertions that:

- a. A car parked in Mrs. Stennett's garage was owned by Peter Thomas;
- b. Mrs. Stennett used public transportation;
- c. Mrs. Stennett submitted unjust travel claims. Mrs. Stennett's sworn evidence that this was untrue and that she had been shown a claim without a back page explaining the substance of the front page was not refuted.

Also included was an admission of guilt by Mrs. Stennett after being told by an investigator that she had committed a breach by allowing her niece to drive the car.

Ms. Clarke concluded that none of this provided evidence of breach of any condition and that the Minister's decision was therefore ultra vires, void and an abuse of power.

Mr. Foster submitted that not only was there evidence of Mrs. Stennett not being in possession of the vehicle but there was also evidence that she knew no basic information about the vehicle, its cost – insurance – registration, inter alia.

Further, he added, at the hearing at the Ministry of Finance, Mrs. Stennett could have produced evidence that the vehicle was used exclusively for her purposes. She had presented no witnesses and no independent evidence.

### **Ground 3 for Relief**

#### **Minister's decision is Wednesbury unreasonable.**

Mr. Foster submitted that the Minister showed an appreciation of natural justice and had made a reasonable and lawful decision because Mrs. Stennett had been given the opportunity to resolve the matter up to one year and three months after the seizure. The evidence was such that a reasonable person exercising his powers could have reached that decision to revoke the concession and therefore it should not be quashed.

### **Ground 4 for Relief**

#### **Failure of Minister to give reasons for decision**

Mr. Foster acknowledged that there has been a trend towards giving reasons for decisions if fairness demands it. However, he relied on the approach of Cooke J (as he then was) in a duty concession case, where he said that a concession was a privilege and that the Minister in fairness was “not obliged to give any

reasons for his inevitable decision.” *R v The Minister of Finance & Planning & the Director of the Revenue Protection Division ex. p. Linton Simpson* Suit M150/98 at pg. 6.

### **Ground 5 for Relief**

#### **Minister has taken irrelevant matters into consideration**

The submission for Mrs. Stennett is that most of the matters put before the Minister were irrelevant and were forwarded because the Revenue Protection Department wished to influence the Minister to revoke the licence.

### **Ground 6 for Relief**

#### **Applicant was not given a fair hearing**

A hearing was held at the Ministry of Finance prior to the revocation of the concession. Mrs. Stennett was told to come to the hearing to show why the concession should not be revoked.

Mr. Foster submitted that Mrs. Stennett had waived the right to challenge the proceedings of that hearing as she had submitted to the hearing. She had Counsel who actively took part and who did not object to the presence of the investigative officers at the hearing but rather, asked questions of one of these officers.

There was no response to Ms. Clarke’s submission that non-disclosure of the Action Sheet detailing the surveillance deprived her of properly responding to her case.

## Unlawful Seizure

Ms. Clarke urged the Court to make an Order that the seizure was unlawful as service of Notice of the Seizure was improper.

Initially, Mr. Foster's submission had been that service was good because it was obvious that Ms. McPherson must be an agent of Ms. Stennett. Subsequently, however Mr. Foster argued that the Notice was served on Ms. McPherson, not as agent but as owner as defined by the Customs Act, that is, as a person entitled to possession.

His further submission was that the officers of the Revenue Protection Department had reasonable suspicion that the conditions of the concession were being breached. and the seizure was valid.

Mr. Foster relied on R v Commissioner of Customs and Excise, ex. p. A & F Farm Produce Co. Ltd and Andre Chin Suit No. M47/1993. There Langrin J (as he then was) opined that the decision to seize is not invalid, where that decision is but one step in a number of events and where there is procedure for hearing at a later date.

Mr. Foster argued that Mrs. Stennett was not prejudiced in the proceedings because the Minister did not sell the seized vehicle though he had that power.

It is my view that seizure is lawful when there is a failure to pay duties after there has been a finding of breach of condition. See Section 32 of the Customs Act.

Here the seizure occurred before there was any request to pay duties. The seizure was premature and therefore unlawful.

### Minister's jurisdiction

In determining if the Minister exceeded his jurisdiction in revoking the concession, I consider first the conditions attached to the concession to pay reduced duty on the vehicle.

It is my view that the conditions were not made clear to Mrs. Stennett.

The Attorney-at-Law for the Government's Revenue Protection Department wrote to her, after the hearing, and specified conditions found in the Customs Act, the Ministry's Reference Paper and the Import Permit. The Attorney General seems to argue that the relevant condition is to be found only in the Import Permit. These Government departments do not speak with one voice as to the condition(s) relevant to Mrs. Stennett's vehicle.

The Customs Act carries no condition concerning use of the vehicle for Mrs. Stennett's purposes only.

Section 32(1) provides:

“If any goods which are ordinarily liable to duty at a given rate are allowed by law to be, and are in fact, entered at a lower rate of duty, .....on **any special conditions**,.... and if such **conditions are not observed**, or the goods are **at any time within three years of the date of importation thereof** used for any other than the specified purpose, or....**are sold or transferred to any other person**, such goods, unless the full duties thereon shall have been paid, shall be forfeited.....”(Emphasis mine)

The focus is on restricting disposal.

The Ministry of Finance's Reference 565/017(1) to which Ms. Stewart's letter had referred, specified that "the vehicle cannot be sold or otherwise disposed of within a (sic) three years of the grant of the concession. If this is done, full duties become payable immediately." This document was drafted by S. Tyndale (Miss), Financial Secretary in the Ministry of Finance and Planning.

There is no reference in it to any condition restricting use of such a vehicle. In any event, the Ministry Reference was written after the concession had been granted to Mrs. Stennett.

The evidence is that Mrs. Stennett was presented with the Customs Import Entry form including a declaration restricting use of her vehicle. She was required to sign. There is no evidence that the condition concerning use of the vehicle was explained to her or was even brought to her attention. Indeed there is evidence that Mrs. Stennett denies signing the Import Entry Form and cannot recall signing the declaration.

There is no evidence as to the genesis of this added condition concerning use of the vehicle nor is there evidence of the Minister authorizing its inclusion or even being aware of its inclusion on the Form signed by Mrs. Stennett.

The Provisional Collection of Tax (Customs Tariff) (Revision) Order 1991 was modified by the Provisional Collection of Tax (Miscellaneous Duties)



(Confirmation and Extension) Resolution 1991. It now provides that the grant of the reduced rate of duty shall be subject to terms, conditions or restrictions as the Minister may *in writing* direct (my emphasis).

The Minister, having been so empowered to make directions, cannot, without more, delegate that power to anyone else. It follows that any conditions imposed by some authority other than the Minister could not have validly been imposed.

It is my view therefore that the additional condition on the Import Permit Form concerning use of the vehicle is of no legal effect as against Mrs. Stennett as it was not added in writing by the Minister nor was Mrs. Stennett properly informed of its presence and meaning.

I now consider whether or not the Minister could reasonably have decided that there had been a breach of conditions of the concession.

Although there is a veiled insinuation that there has been an unlawful parting with the vehicle, there has in fact been no clear evidence of that. Indeed there has not even been a clear allegation of such a parting. There is evidence of neither sale, nor transfer of, the motor vehicle.

“[A] person entrusted with a discretion must... direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Associated Provisional Picture House Ltd V Wednesbury Corporation (1948) 1K B 223 At 229.

If there is no evidence on which the Minister could reasonably arrive at the conclusion that conditions had been breached, his decision can be reviewed by the Court.

“A Tribunal which has made a finding of primary fact wholly unsupported by evidence, or which has drawn an inference wholly unsupported by any primary facts found by it, will be held to have erred in point of law.”

De Smith, Woolf and Jowell, the learned authors of *JUDICIAL REVIEW of ADMINISTRATIVE ACTION* 5<sup>th</sup> edition at p. 288 thus expressed their understanding of the law.

No doubt it would have been useful to have sight of the Minister's reasons for his decision to revoke the concession. Although a request was made of the Minister to give reasons for his decision, he failed so to do .

There is no obligation for the Minister of Finance to give reasons for his decision. But Lord Donaldson's view as he stated in *R v Civil Service Appeal Board* (1991) 4 ALL E R 310 may well be considered to be fair and wise.

There he opined at p. 315:

“[P]ublic law bodies and the courts should be regarded as being in partnership in a common endeavour to maintain the highest standards of... the administration of justice ... if leave to apply for judicial review was granted by the court, the court was entitled to expect that the respondent would give the court sufficient information to enable it to do justice and that in some cases this would involve giving... fuller reasons for a decision than the complainant himself would have been entitled to.”

Here the Minister of Finance did not give the reasons for his decision, to Mrs. Stennett, or to this Court. He did not detail the information on which he acted. Mrs. Stennett is entitled to the concession by virtue of her job, so that if the concession is being taken away, reasons should be given .

I adopt Lord Donaldson's view expressed at p.320.

"...[F]airness requires .....sufficient reasons for... decision to enable the parties to know the issues... addressed... and that [the tribunal] acted lawfully."

The uncontradicted evidence is that the Minister was presented with information to which Mrs. Stennett had not been given the opportunity to respond. The words of Lord Denning in the Privy Council case of Kanda v. Govt. of Malaya [1962] 2 WLR 1153 are applicable.

"...[W]hoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other....the risk of [prejudice] is enough." p.1161

Indeed the evidence is that even when the hearing was being held, there was relevant material which was not disclosed to Mrs. Stennett herself.

"If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness, irrespective of whether the material in question arose before, during or after the hearing." De Smith (supra)

Natural justice cries out for Mrs. Stennett (1) to be informed as to what information and law are being considered and (2) to be given an opportunity to prove the information wrong and comment on the law applied.

I accept as true the uncontroverted evidence that the material placed before the Minister for his consideration did not include any explanations by Mrs. Stennett on fundamental allegations. The action sheet, containing the surveillance report with allegations that the vehicle was outside of her control, had not even been put to Mrs. Stennett to allow any comments or explanations. Indeed, it appears that the decision that the concession would be revoked seems to have been taken from before the hearing. Ms. Stewart, of the Revenue Protection Department, in the letter to Mrs. Stennett, had described the hearing as being “preparatory for revocation.”

It was Lord Denning in the Judicial Committee of the Privy Council who said:

“If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict them.” *Kanda* (supra)

In the Trinidadian case of *DeVerteuil v. Knaggs* [1918] A.C.557, the Privy Council opined that:

“there is....a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice.”

There is no evidence that the Minister considered all the relevant information and indeed only the relevant information from both sides at the hearing. Further, two of the investigators of the case, took part in the hearing and there was a real danger of bias. R v Gough [1993] 2 All E.R.

Mrs. Stennett was denied her right to a fair hearing before the Minister made a decision affecting her property.

### **Reasonableness of decision**

It is my view that a tribunal considering the relevant information in this matter could not reasonably reach the conclusion that any condition was breached and thereby revoke the concession. The only relevant condition concerns the possible sale or transfer of the vehicle and there is no proof nor even allegation that that has been breached.

In revoking the concession on the ground that Mrs. Stennett had “breached the conditions under which the facility was granted”, it is my view that the Minister has exceeded his jurisdiction.

Further, I hold there was not proper service of a Notice of Seizure on Mrs. Stennett and the seizure was therefore premature and unlawful.

In all the circumstances I therefore grant the reliefs sought and:

- 1) Make an order of Certiorari to quash the Minister’s decision revoking the concession rate of duty

- 2) Declare that the Minister and or the officers of the Revenue Protection Department of the Ministry of Finance have no power under Section 32 Customs Act to forfeit Mrs. Stennett's motor vehicle.
- 3) Declare that the seizure of the Claimant's motor vehicle is unlawful.
- 4) Order damages for unlawful detention of the Claimant's motor vehicle to be assessed.