

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 44/2011

APPLICATION NO 198/2014

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE WILLIAMS JA (AG)
THE HON MISS JUSTICE EDWARDS JA (AG)**

BETWEEN	COMMISSIONER OF CUSTOMS	1ST APPLICANT
AND	JAMAICA CUSTOMS DEPARTMENT	2ND APPLICANT
AND	SAMUEL BAILEY AND MARCIA BAILEY	RESPONDENTS

Miss Monique Harrison instructed by Director of State Proceedings for the applicants

Aon Stewart instructed by Knight, Junor & Samuels for the respondents

25 May 2016

ORAL JUDGMENT

MORRISON P

[1] This application raises a short point of construction of section 214A of the Customs Act. This is the judgment of the court.

[2] On 4 August 2010, pursuant to powers contained in section 210 of the Customs Act (the Act), the Commissioner of Customs (the Commissioner) made an order for forfeiture in respect of a BMW X5 motor car (the forfeiture order).

[3] By notice of application for court orders dated 24 September 2011, purportedly filed pursuant to section 214A(4)(b) of the Act, the respondents applied to a single judge of this court for an order granting them leave to appeal against the order for forfeiture. This application initially came before Norma McIntosh JA on paper, but the learned judge directed that the matter should be heard *inter partes* and the parties were notified accordingly. After what appears to have been an uncontested hearing, the learned judge granted the application on 15 March 2011.

[4] The respondents accordingly filed notice of appeal against the forfeiture order on 29 March 2011, challenging the Commissioner's decision on a number of grounds. An amended notice of appeal was subsequently filed on 4 April 2011.

[5] By notice of application for court orders filed on 17 November 2014, the applicants (respondents in the appeal) sought an order striking out the notice of appeal. The application was brought pursuant to rule 1.13(a) of the Court of Appeal Rules 2002, which empowers this court to "strike out the whole or part of a notice of appeal or counter-notice". The single ground of this application is that this court has no jurisdiction under either the Act or any other Act to entertain an appeal from a decision of the Commissioner.

[6] In her admirable submissions on behalf of the applicants, Miss Monique Harrison puts the challenge in this way. First, the principal source of this court's jurisdiction to hear appeals is found in the Judicature (Appellate Jurisdiction) Act, none of the provisions of which confers jurisdiction on the court to hear an appeal from the Commissioner. And secondly, although this court may also derive jurisdiction from any other law, section 214A of the Act, pursuant to which the respondents purport to appeal in this case, does not provide for an appeal to the court from a decision of the Commissioner. Mr Stewart for the respondents, on the other hand, submits that such an appeal is as a matter of law rendered competent by section 214A(6) of the Act.

[7] In the absence of any contention that this court's jurisdiction to entertain this appeal derives other than from the provisions of section 214A, therefore, the provisions of section 214A(1)-(6) are set out below:

"214A - (1) Where proceedings are taken for the forfeiture of any goods seized under -

- (a) the customs laws;
- (b) any other law by which officers are empowered to make seizures,

any person who claims an interest in the goods, may, before the forfeiture order is made, **apply to the court** for an order under subsection (2) showing cause why an order for forfeiture should not be made.

(2) **The court shall, in relation to an application under subsection (1),** make an order declaring the nature, extent and value (as at the time the order is made) of the person's interest in the goods if **the court** is satisfied -

(a) that the person was not in any way involved in the commission of the offence on which the seizure was grounded, and

(b) where the person acquired the interest during or after the commission of the offence, that he acquired the interest -

(i) for sufficient consideration; and

(ii) without knowing, or having reasonable grounds to suspect that, at the time he acquired it, the goods were connected with the offence.

(3) Subject to subsection (4), where a forfeiture order has already been made against any goods, a person who claims an interest in the goods may, before the end of the period of two months commencing on the day on which the forfeiture order is made or such longer period as the court may allow, having regard to all the circumstances, **apply to the court** for an order under subsection (2).

(4) A person who -

(a) had knowledge of the application for the forfeiture order before the order was made, or

(b) appeared at the hearing of that application,

shall not, except with the leave of the court, be permitted to make an application under subsection (3).

(5) A person who **makes an application** under subsection (1) or (3) shall give not less than fourteen days written notice thereof to the Director of Public Prosecutions.

(6) **An applicant or the Director of Public Prosecutions may in accordance with the rules of court, appeal to the Court of Appeal for an order under subsection (2).**" (Emphases supplied)

[8] Miss Harrison invites us to observe the clear distinction in these provisions between an application, which is expressed as being to a court (section 214(A)(1), (2), (3) and (4)), and an appeal, which is expressed as being to the Court of Appeal (section 214A(6)). The point is, in our view, well made. It accordingly appears to us that, for the purposes of section 214A and in the absence of any specific definition in the Act, any reference to “the court” must be taken to be a reference to a court other than the Court of Appeal, viz, either Resident Magistrates/Parish Court or the Supreme Court. With this distinction in mind, we therefore consider that the route of challenge established by section 214A in respect of a decision of the Commissioner is as follows:

(a) Where proceedings are taken for the forfeiture of any goods seized under the relevant laws, a person who claims an interest in those goods may apply to the court, before the forfeiture order is made, for an order declaring (providing certain conditions are satisfied) the nature, extent and value of that person's interest (section 214A(1) and (2)).

(b) After a forfeiture order has been made, a person claiming an interest in the goods may apply to the court for a similar order, provided however that, if that person had knowledge of the forfeiture order before it was made, or appeared at the hearing of the forfeiture application, then

leave of the court must be obtained for the making of such an application (section 214(3) and (4)).

(c) In either of the two circumstances set out at (a) and (b) above, the applicant must give at least 14 days written notice of the application to the Director of Public Prosecutions (section 214A(5)).

(d) Either the applicant or the Director of Public Prosecutions may appeal to the Court of Appeal in the prescribed manner from an order under section 214A(2).

(We would observe in passing what appears to be a clear drafting error in section 214A(5), which refers to an “appeal to the Court of Appeal **for** an order under subsection (2)”, when it is clear from the scheme of the entire section that what must have been intended was an appeal **from** an order under the subsection.)

[9] So, as it seems to us, under this procedure an application seeking to challenge a forfeiture order made by the Commissioner must first be made to a court (other than the Court of Appeal) and thereafter, by way of appeal, to the Court of Appeal. It follows from this that, in the instant case, the application for leave to appeal filed in this court was misconceived, as that application ought properly to have been made to a court other than this court, *viz*, either a Parish Court or the Supreme Court. It is, of

course, a matter of regret that the respondents were further encouraged along this erroneous path by the purported grant of leave to appeal by a judge of this court. However, it is clear that, as Mr Stewart quite properly accepted, this court, which is a creature of statute, cannot by its own action vest in itself a jurisdiction which it does not otherwise have.

[10] In the result, we are constrained to make the following orders:

1. The notice of appeal filed on 21 March 2011 and all and any amendments thereto are struck out for want of jurisdiction.
2. The costs of this application are to be the applicants, such costs to be agreed or taxed.