[2016] JMCA Civ 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 34/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**OMAR GUYAH**	**APPELLANT**
AND	**THE COMMISSIONER OF CUSTOMS**	**1ST RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND RESPONDENT**

Captain Paul Beswick and Miss Georgia Buckley instructed by Ballantyne Beswick & Co for the appellant

Ms Althea Jarrett instructed by Director of State Proceedings for the respondent

7, 8 December 2015 and 26 February 2016

BROOKS JA

[1] On 27 February 2015, Pusey J declared that the seizure of a 2007 Suzuki Swift motor car by customs officials was wrong, as the vehicle did not constitute uncustomed goods under the Customs Act. In this appeal, Mr Omar Guyah seeks to overturn Pusey J's refusal to also declare that the seizure of the motor car by the customs officials was

unreasonable and an abuse of their authority. Mr Guyah also complains that since the learned judge ruled in his favour in declaring that the seizure was wrong, the learned judge erred in denying him the costs of his claim against the Commissioner of Customs (the Commissioner) and the Attorney General.

[2] The Commissioner and the Attorney General have filed a counter-notice of appeal asserting that the learned judge was wrong in his judgment, in two respects. Firstly, in finding that Mr Guyah had sufficient standing to file the claim, and secondly, in finding that the vehicle did not constitute uncustomed goods.

[3] Before assessing those competing appeals, it is necessary to set out the relevant facts that formed the backdrop to Mr Guyah's claim.

Background

[4] In or about November 2009, the Suzuki was unloaded from a ship and placed in a customs bonded facility, operated by wharfingers, Kingston Logistics Center [sic] Limited (Kingston Logistics). The importer of the vehicle took no steps to clear it through the customs department.

[5] In 2010, customs officials, including Mr Guyah, seized that vehicle, and 13 others, for breaches of the Customs Act (the Act). At the time of the seizure, Mr Guyah was the Director of Customs in the Contraband Enforcement Department of the Jamaica Customs Department. The 14 vehicles, nonetheless, remained in the facility operated by Kingston Logistics. The Commissioner also issued forfeiture orders for the 14 vehicles.

[6] Still no steps were taken by any of the respective importers to set aside the forfeiture or to clear the vehicles, and the vehicles continued to accrue storage charges. By letter dated 11 January 2011, Kingston Logistics applied to the Commissioner for the vehicles to be treated as having been abandoned by their respective importers. As a part of the application, Kingston Logistics asked, on the basis that it was the "wharfingers/agents for the...consignments", to be allowed to clear the vehicles, as being its property, through customs.

[7] By a letter dated 7 March 2011, the Commissioner approved Kingston Logistics' application and gave specific directions as to the process to be used for clearing the vehicles. Those directions were in accordance with a general policy direction that the Commissioner had given in November 2010, concerning goods, including motor vehicles, in such circumstances.

[8] Using the process described above, the Suzuki was appraised at a value of US$6,800.00 by the customs department, and duties and taxes in relation to the vehicle were assessed at J$560,036.39. The duties and taxes for the vehicle were paid by Mr Guyah, and on 26 April 2011, the vehicle was released by customs to Kingston Logistics. The release was on the basis that the customs department had sold it to Kingston Logistics by way of auction, although that did not in fact occur.

[9] On 27 April 2011, Kingston Logistics issued a letter certifying that it had sold the vehicle to Miss Audrey Carter. On or about 2 June 2011, Miss Carter had the vehicle registered in her name and licensed to be operated on the island's roads.

[10] On 15 February 2012, members of the Contraband Enforcement Team of the customs department took one of Mr Guyah's sisters, Miss Kerri-Ann Guyah, also an employee of the customs department, from her post. They questioned her about the Suzuki. Miss Guyah gave them a written statement, which indicated that she had borrowed the vehicle from Miss Carter from about July or August 2011. The enforcement officers seized the vehicle and issued Miss Guyah with a notice of its detention of the vehicle. The notice indicated the reason for the detention as, "investigation".

[11] On 29 February 2012, Miss Carter gave a written statement to officers from the Revenue Protection Division of the Ministry of Finance and Planning concerning the vehicle. She said that she had purchased the vehicle from Kingston Logistics, but that Mr Guyah had carried out the transaction for her. She said that he had advanced the purchase money but that she had repaid him. She said she had purchased other vehicles from Kingston Logistics. It may be gleaned from her statement that Mr Guyah was involved, in a similar way, in at least one of those other transactions.

[12] Miss Carter also said that in July or August 2011 she loaned the Suzuki to Miss Kerri-Ann Guyah. She said that there were no financial implications to the loan except that Miss Guyah would be responsible for the maintenance of the vehicle. Miss Carter certified her statement to be true and acknowledged that she would be liable to prosecution if she had wilfully included any false information in it.

[13] On 9 March 2012, officers from the Revenue Protection Division arrested Mr Guyah and charged him with a number of offences, including corruption and breaches of the Act. The specific charges were not disclosed to the court, but they were in respect of all 14 vehicles.

[14] On 11 and 26 April 2012, Miss Carter was questioned at the offices of the Revenue Protection Division. The record of the latter occasion was exhibited to Mr Guyah's affidavit in support of his claim. In one of the answers she gave she said that the Suzuki Swift was never hers; that it belonged to Mr Guyah.

[15] The prosecution of Mr Guyah languished in the Resident Magistrate's Court. During that time, the vehicle was not returned by the customs department. It is against that background, that on 12 August 2013, Mr Guyah filed a fixed date claim in the Supreme Court.

The claim

[16] Mr Guyah named the Commissioner, the Attorney General and Miss Carter as the respondents to the claim. He sought a number of remedies including declarations that the vehicle was not uncustomed goods, was not liable to seizure under section 210 of the Act, and that it had been unlawfully seized by the officers of the customs department.

[17] Miss Carter was never served with the fixed date claim form and did not take part in the litigation. The Attorney General's Department was, however, served and it filed an acknowledgement of service on behalf of the Attorney General and the

Commissioner. The Attorney General's Department failed to act within the time specified by the Civil Procedure Rules (CPR). It suffered the consequences of its sloth. On 29 May 2014, the Attorney General's application for an extension of time within which to file an affidavit, in response to Mr Guyah's, was denied.

[18] The claim therefore came before Pusey J with the only evidence being the affidavits filed on behalf of Mr Guyah. No affidavit was filed by Miss Carter, although both her written statement given on 29 February 2012, and the record of the question and answer session held on 26 April 2012, were exhibited by Mr Guyah's affidavit in support of the claim. It appears that the vehicle was returned to Miss Carter and the criminal case against Mr Guyah was dismissed for want of prosecution sometime after the hearing before Pusey J but before he delivered his judgment.

[19] The issues had also been narrowed by the time the claim came on for hearing before Pusey J. P Williams J, as she then was, by an order made on 18 November 2014, restricted to three, the issues which Mr Guyah was entitled to pursue in his fixed date claim. They were:

> "1. A declaration that the 2007 Suzuki Swift Motor Car...is not legally classifiable as uncustomed goods and as such is not liable to seizure under s. 210 of the Customs Act;
>
> 2. A declaration that the vehicle was unlawfully seized by officers of the Jamaica Customs Department on 15th February, 2012;
>
> 3. A declaration that the officers and agents of the Jamaica Customs Department who effected the seizure of the said vehicle had no authority to effect

> such seizure and abused the powers granted to them under the Customs Act in seizing the said vehicle;

It is of significance that among the claims that were excluded, was one for an order for the Suzuki to be registered in his name.

[20] Although Williams J did not specifically address them, the following orders, which were originally claimed, were considered as being before Pusey J when the fixed date claim came on before him. Rounding off the five issues before Pusey J, therefore, were:

> "[4.] Costs and Attorneys-at-Law costs;
>
> [5.] Such further and other relief as to this Honourable Court may seem fit."

The decision in the court below

[21] Pusey J gave judgment in favour of Mr Guyah. He ruled, at paragraph [30] of his judgment, that the motor car did not constitute uncustomed goods and was not liable to seizure under section 210 of the Act. He also found, at the said paragraph, that the seizure of the vehicle, on the basis that it was uncustomed goods, was wrong in law.

[22] The learned judge refused to grant a declaration that the seizure of the vehicle was an abuse of the authority of the customs officials. He declined to do so, on the basis that he was unaware of the details of the charges that had been laid against Mr Guyah and whether they would have been relevant to the seizure.

[23] He was less than impressed with Mr Guyah's behaviour in respect of the purchase of the vehicle. The learned judge was of the view that Mr Guyah had not lived up to the standard expected of a civil servant. For that reason and the fact that Mr Guyah had withdrawn some parts of his original claim, the learned judge refused to grant Mr Guyah an order for costs. He made no order as to costs.

The appeal

[24] In his appeal against the judgment, Mr Guyah asserted that the learned judge was wrong in:

(a) making certain statements, which are not supported by the evidence and "are damaging to [Mr Guyah's] character, reputation and integrity";

(b) ruling that the detention of the vehicle may have been reasonable for the purposes of investigation;

(c) ruling that the seizure of the vehicle may have been allowable under common law or some other legislation in relation to the charges laid against Mr Guyah in the criminal court; and

(d) ruling that there should be no order as to costs of the fixed date claim, despite Mr Guyah's success.

[25] The Commissioner and the Attorney General, in the counter notice of appeal, complained that:

(a) the learned judge was wrong in finding that Mr Guyah had standing to bring the claim despite the fact that he is not the registered owner of the vehicle; and

(b) the learned judge erred in finding that the Commissioner acted within his legal remit in releasing the vehicle to Kingston Logistics.

[26] In his judgment, the learned trial judge, at paragraph [17] of his judgment, found that only two issues were before him for resolution, namely:

> "was the vehicle uncustomed goods", and
>
> "was the vehicle unlawfully seized by the agents of the Jamaica Customs department."

[27] The majority of the issues raised on the appeal and counter-notice of appeal may also be assessed in the context of those two issues. There are, however, three additional issues to be assessed.

(1) Did Mr Guyah have standing to bring the claim?

(2) Was Mr Guyah entitled to have an order for costs in his favour?

(3) Were the learned judge's comments, about Mr Guyah's conduct, justified?

[28] These five issues will be considered separately. The issue of standing will be considered first and the issue of the costs, last.

Did Mr Guyah have standing to bring the claim?

[29] In the absence of evidence with which to contest Mr Guyah's claim, counsel for the Commissioner and the Attorney General resorted to points of law. One such point was a submission to Pusey J that Mr Guyah, not being the owner of the vehicle, had no standing to bring the claim.

[30] The learned judge ruled on this point in Mr Guyah's favour. He accepted that Mr Guyah had not proved any proprietary interest in the Suzuki, but ruled that since Mr Guyah had been charged with criminal offences with respect to the vehicle, he did have standing to have its customs status declared. The learned judge said at paragraph [15]:

> "The legal owner, although named in the suit was never served. There was some issue raised as to whether Mr. Guyah had locus standi in this matter. He had claimed he was the equitable owner of the vehicle. I indicated that I cannot make any declarations to his equitable rights in the absence of the legal owner who was not served. However, it is my view that Mr. Guyah has locus standi because the vehicle is the subject matter of a charge (or charges) against him in the criminal court."

[31] Mr Guyah supported the learned judge's finding. In the written submissions to this court, his counsel submitted that in deciding the question of standing, the court was obliged to consider three factors:

> "a. whether the case raises a serious justiciable issue
>
> b. whether the party bringing the action has a real stake or a genuine interest in its outcome, and

c. whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court."

Learned counsel submitted that Mr Guyah had satisfied each of these criteria.

[32] In respect of a stake in the outcome, learned counsel submitted that Mr Guyah "is asserting equitable interest in the…motor vehicle and also the declaration would serve to advance proceedings in his criminal case".

[33] Learned counsel relied on **Attorney General of Canada v Downtown Eastside Sex Workers United Against Violence Society and Another** [2012] 2 SCR 524 in support of their submissions.

[34] Ms Jarrett, for the respondents, made an important concession. She accepted that Mr Guyah had a true interest in the outcome of the criminal proceedings in respect of the vehicle. The concession was properly made. Mr Guyah was the person charged. He would, undoubtedly have had an interest in the outcome of those charges. To the extent that the charges concerned uncustomed goods, that outcome was dependent on the customs status of the vehicle.

[35] When that concession is viewed in the light of Mr Guyah's evidence at paragraph 4 of his affidavit, that he was charged in the criminal court for breaches of the Act with respect to all 14 vehicles mentioned above, it is inconceivable that he would not have had a real interest in a declaration, in a civil claim, that the Suzuki was not uncustomed goods.

[36] In **Attorney General of Canada v Downtown Eastside Sex Workers United Against Violence Society**, Cromwell J, in delivering the judgment of the Supreme Court of Canada, set out the three factors that should be considered in deciding the question of standing. He said, in part, at paragraphs [1] and [2] of his judgment:

> "[1] …The traditional approach was to limit standing to persons whose private rights were at stake or who were specifically affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.
>
> [2] In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. **The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court**: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a 'liberal and generous manner' (p. 253)." (Emphasis supplied, Italics as in original)

[37] The relaxation of the court's approach to standing was also recognised in the United Kingdom. In **AXA General Insurance Limited and others v The Lord Advocate and others** [2011] UKSC 46, [2012] 1 AC 868, Lord Reed stated, at paragraph [170], that the question of standing depended on the context of the claim:

> "…[the approach to standing] cannot be based upon the concept of rights, and must instead be based upon the concept of interests. A requirement that the applicant

> demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess of misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law… **What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context**." (Emphasis supplied)

[38] This court has also recognised that the question of standing is now adjudged according to the litigant's interest in the circumstances of each case, rather than according to strict inflexible rules. Morrison JA (as he then was), with whom the rest of the court agreed, made that point at paragraph [71] of his judgment in **Jamaicans for Justice v Police Service Commission and The Attorney General** [2015] JMCA Civ 12. He said at paragraph [71]:

> "As the cases show, the liberal approach to standing has been at its most pronounced in cases with a public interest in preserving the rule of law or, where applicable, a constitutional dimension. In such cases, it seems to me, the courts have been less concerned with the right which a particular applicant seeks to protect than with the nature of the interest which it is sought to vindicate…."

Although these cases were public law cases, in the sense of issues affecting the public at large, the principle would apply to cases, such as this case, in which a citizen seeks

relief from a public official by way of a claim affecting more narrow interests. It is recognised, however, as Morrison JA stated in the extract cited above, that the relaxation of the strict rule is greatest in cases where "public interest in preserving the rule of law or…a constitutional dimension" are involved.

[39] In light of Mr Guyah's particular interest in whether or not the vehicle was uncustomed goods, the ruling by Pusey J in respect of Mr Guyah's standing, certainly his standing at the time that he filed the claim, is unassailable. This aspect of the counter-notice of appeal should fail. It is noted, however, that in light of the fact that Mr Guyah was not the owner of the vehicle, he would not have standing in respect of all of the orders that he claimed. That qualification will be relevant in respect of the ground concerning the complaint that the customs officials abused their offices in seizing the vehicle.

Was the vehicle uncustomed goods?

[40] The learned judge found that the vehicle was not uncustomed goods. He relied on the fact that the custom duties were properly assessed and duly paid. He set out these findings at paragraph [28] of his judgment:

> "It is my view that having considered the Act, that the vehicle cannot be said to be uncustomed goods. It was entered under the direction of the Commissioner and the properly assessed duties were paid. The phrase "uncustomed goods" means that the goods evaded customs or that the customs duties had not been paid. That is not the situation with this vehicle."

[41] Ms Jarrett argued that the learned judge was in error in restricting the term uncustomed goods to items for which custom duties had been evaded or unpaid. She submitted that goods may also be uncustomed if the process by which they were cleared was contrary to the provisions of the Act. Learned counsel submitted that the process that was used in respect of the clearance of this vehicle was contrary to the Act. In this light she submitted that Kingston Logistics was not entitled to make an application under section 91 of the Act. She also submitted that the Commissioner acted outside of his authority when the allowed the vehicle to be cleared in the way that it was.

[42] Ms Jarrett argued that the flaw with the process adopted by the Commissioner was that once the vehicle had been forfeited and thereafter condemned, as it had been, the Act did not permit the Commissioner to allow it to be cleared by the process that Kingston Logistics had requested. Once goods had been condemned, Ms Jarrett submitted, the goods may only be dealt with, thereafter, in a manner prescribed by the Minister. She submitted that the Commissioner acted outside of his powers when he granted Kingston Logistics' application. Learned counsel relied on sections 215, 219 and 259 of the Act, in support of her submissions. It appears that there was a change in the holder of the office of Commissioner during the course of the relevant events in this case, but that fact does not alter the application of the relevant principles of law to be assessed.

[43] Captain Beswick, in answer to the complaint by Ms Jarrett, adopted the stance taken by the learned judge in addressing the point when it was raised before him. Pusey J ruled that the Commissioner could not seek to nullify his own actions. The learned judge stated at paragraph [24] of his judgment:

> "The shortest answer to Ms. Jarrett's arguments is that even if the Commissioner (who she represents erred) [sic] that error would need to be set aside by the Court or reversed by the Commissioner. The [Commissioner and the Attorney General] are in the unenviable position of saying that they acted wrongfully in law and therefore their own actions are of no legal effect."

Captain Beswick submitted that the Commissioner could not challenge his own procedures.

[44] In addition to those submissions, Captain Beswick argued that the process, by which Kingston Logistics sought permission to clear the vehicles, was authorised by section 91 of the Act, and that Kingston Logistics was authorised to make the application for the execution of that process. Learned counsel also countered Ms Jarrett's submission by arguing that the Suzuki was not "condemned" for the purposes of the Act and therefore the Commissioner, rather than the Minister, had jurisdiction over it. He argued that goods could only be condemned through proceedings in a court. No such proceedings, he pointed out, had been instituted in respect of any of the 14 vehicles.

[45] Finally, Captain Beswick submitted that even if the approval of the Minister were required, in the face of the execution of an official process, there was no evidence that

that process had not been approved by the Minister. Only the Commissioner, Captain Beswick submitted, could provide the evidence to show that the process had not had the Minister's approval. The Commissioner, he pointed out, did not produce that evidence.

[46] In assessing these competing submissions, it will be necessary to refer to a number of sections in the Act. Firstly, it must be noted that the term "uncustomed goods" is defined by the Act. Section 2(1) defines the term:

> "'uncustomed goods' includes goods liable to duty on which the full duties due have not been paid, **and any goods, whether liable to duty or not, which are imported or exported or in any way dealt with contrary to the custom laws**." (Emphasis supplied)

That definition is wider than that which the learned judge applied. Ms Jarrett is correct in her submissions to that effect. The next step in this assessment is to examine the scheme by which goods are seized, forfeited and condemned.

[47] The general power for the seizure of goods is contained in section 214 of the Act. That section also stipulates that all things so seized "shall forthwith be delivered into the care of the Commissioner". Section 215(1) directs that whenever a seizure has been made "as forfeited under the customs laws", the things seized "**shall be deemed and taken to be condemned**, and may be sold or otherwise disposed of in such manner as the Minister may direct" (emphasis supplied). The latter section goes on to provide for proceedings for forfeiture and condemnation of the goods to be taken in a court if the owner of the items claims them within a calendar month of the seizure.

[48] Where items are condemned they may, generally speaking, only be disposed of or dealt with according to the dictates of the Minister. There is an exception whereby the Governor-General may direct the restoration of items seized, whether or not the items have been condemned. Apart from that exception, however, it is the Minister who determines the fate of items that have been condemned. According to section 216(1) of the Act, all seizures "shall be disposed of in such manner as the Minister may direct".

[49] Section 219 stipulates that the Minister may give either specific or general directions to the Commissioner concerning anything which has been seized. Section 219 also provides that the Minister may direct the Commissioner to restore anything seized. The section 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."

Section 217, referred to in section 219, speaks to the limit of monetary penalties and is not relevant for the purposes of this analysis.

[50] The import of sections 216 and 219 is that the Commissioner has no authority to dispose of anything seized unless the Commissioner has had the approval of the Minister. Any attempt by the Commissioner to dispose of anything seized is subject to the approval of the Minister and is ineffective without the Minister's approval. In Words

and Phrases Legally Defined 2nd edition, at volume 5 page 134, the learned editors cite **Russell v Brisbane City Council** [1955] St R Qd 419 as a case where the court considered the effect of the term "subject to confirmation". Macrossan CJ addressed the point at page 431 of the report:

> "I think the effect of the phrase 'subject to confirmation by the Council' is that **acts done by the Committee purporting to act on behalf of the Council during a recess of the Council are ineffective if they are not confirmed by the Council** by resolution. If they are so confirmed the acts, of course, have effect as from the time when they were done by the Committee." (Emphasis supplied)

The term "subject to the approval of the Minister" would undoubtedly bear a similar effect.

[51] That examination of the scheme for dealing with seized goods confirms one aspect of Ms Jarrett's submissions. It is that the Commissioner had no authority to revoke an act of forfeiture, unless that authority is given to him by the Minister. The examination also demonstrates that Captain Beswick's submission, that forfeiture of goods may only be achieved by virtue of court proceedings, is in conflict with the provisions of the Act. Section 215(1), among other things, stipulates that it is only if the owner of goods claims the goods within a calendar month of the seizure that "proceedings shall be taken for the forfeiture and condemnation thereof". No court action is, therefore, otherwise required. That type of automatic forfeiture was described by Elias LJ in **Eastenders Cash and Carry PLC and Others v The**

Commissioners of Her Majesty's Revenue and Customs [2012] EWCA Civ 15. In his judgment, as part of the majority of the court, he said, in part, at paragraph 79:

> "…Once goods are seized this is the first stage in the route to forfeiture. Indeed the scheme of Schedule 3 is such that following seizure, **forfeiture is automatic unless the tax payer puts in a notice within one month contesting the seizure**. If a notice is lodged, the Revenue must then set in train a hearing where the court will determine whether the goods are liable to be seized or not…." (Emphasis supplied)

The procedure there described is very similar to that required by section 215(1) of the Act.

[52] There is, however, the memorandum issued by the Commissioner containing the directions for dealing with goods which have not been entered by the importer and of which the wharfinger has requested entry. The memorandum is dated 11 November 2010. It addressed several types of goods and had all the indicia of general policy. The heading of the memorandum stated "Procedure for the disposal of Goods under requests made by the wharfinger under Section 91 of the Act".

[53] The portions of the memorandum that provided for motor vehicles stated as follows:

> "This procedure shall guide how the entry of goods should be treated by Customs where the wharfinger makes an application under **Section 91 of the Customs Act** and this request has been duly **approved by the Commissioner**.
>
> …
>
> In the case of motor vehicles, the wharfinger is to obtain the services of a customs broker to prepare a Bill of Sight and

> submit it to the valuation branch for processing. After receiving the assessed CIF value, the Bill of Sight and all other supporting documents, if any, are to be taken to the Queens [sic] Warehouse where the duties will be assessed. Queens [sic] is then to collect the duties and make the relevant entry into the Queens [sic] Auction System (QAS) in order to generate the relevant paperwork to effect registration of the vehicle by the wharfinger. The Certificate generated from QAS and the release documentation is to be prepared by Queens [sic] and given to the wharfinger, wherein the vehicle would be released to them.
>
> …
>
> At all times, Collectors must ensure that the entries for goods processed under this Section, have been adequately vetted to ensure proper duty collection and to prevent any revenue loss. Those clearances must be strictly monitored with adequate approvals for the processing of these goods obtained from the Commissioner prior to these provisions being applied." (Emphasis supplied)

[54] Although Mr Guyah stated in his affidavit that section 91 of the Act was not "conveniently applicable" for the clearance of the 14 motor vehicles, it was section 91 to which the Commissioner expressly referred in outlining the policy of granting the applications of wharfingers. This is also demonstrated in a letter addressed to Kingston Logistics and signed by the Commissioner, in which the Commissioner granted approval, "in accordance with the said Section 91". The letter was exhibited in Mr Guyah's affidavit (exhibit OG-5).

[55] Based on the analysis conducted above, Mr Guyah would be correct in his assertion that section 91 could not properly be used to release a motor vehicle that had been forfeited. He would not be correct in saying that the Commissioner did not

purport to use that section in setting out his general policy and in granting Kingston Logistics' application in respect of the Suzuki.

[56] Mr Guyah's indication, in his affidavit, that the vehicles could have been allowed entry by the Commissioner invoking his powers granted under section 259 would also be incorrect. This is because that section could only apply before the goods were forfeited. Section 259 states:

> "The Commissioner may permit the entry, unloading, removal and loading of goods, and the report and clearance of aircraft and ships in such form and manner as he may direct to meet the exigencies of any case to which the customs laws may not be conveniently applicable."

Section 259 would not be consistent with the scheme which placed all forfeited goods under the domain of the Minister.

[57] The Commissioner having given the general directions concerning the process to be followed for the entry of goods, including vehicles, which had been forfeited, there is the possibility of the applicability of a principle that it must be presumed that he was acting in accordance with general directions from the Minister. "There is a presumption that decisions are validly made, sometimes expressed in the maxim *omnia praesumuntur rite esse acta* or as the presumption of regularity." Those were the words of John Howell QC (sitting as a deputy High Court judge), at paragraph [47] of his judgment in **Mordue v Secretary of State for Communities and Local Government and others** [2015] EWHC 539 (Admin).

[58] The presumption of regularity was also discussed and applied in **R (on the application of Newhaven Port and Properties Ltd) v East Sussex County Council** [2013] EWCA Civ 276; [2013] 3 All ER 677. In that case, Lewison LJ said at paragraph [134]:

> "The bye-laws on which our attention was focussed are contained in Pt V of the Bye-Laws relating to Newhaven Harbour. They were made by the Southern Railway Company on 20 February 1931 and confirmed by the Minister of Transport on 6 March 1931. There is no reason to suppose that they were not given the publicity required by ss 86 and 87 of the 1847 Act before the minister confirmed them: *omnia praesumuntur rite esse acta* (the presumption of regularity). The inspector herself applied the presumption: see her report at para 6.21. In my judgment this is equivalent to a finding of fact (which is unchallenged) that the appropriate procedure (including the requirement of advance publicity, and the publication on boards in the harbour) was followed."

[59] The presumption only applies if there is no indication of an irregularity. In this case, there are several indications of irregularity. Firstly, not only do the Commissioner's communications not refer to any authorisation by the Minister, they do not suggest that the Commissioner is cognisant of the fact that he is dealing with condemned goods. Secondly, the reference to section 91 suggests that the Commissioner's directions are independent of any authorisation by the Minister. The section seems to speak to a time, shortly after the item has been imported and before it has been seized or forfeited. The section states, in part:

> "Where the owner of any goods imported in any ship (not being a steamship as defined in section 2) into the Island fails to make entry thereof, or having made entry, fails to land the same or to take delivery thereof by the times

> severally hereinafter mentioned, the shipowner or Master or the agent of either, may make entry of the said goods at the times, in the manner, and subject to the conditions following, that is to say—
>
> (a) if a time for the delivery of the goods is expressed in the charter party, bill of lading or agreement, then at any time after the time so expressed; and
>
> (b) if no time for delivery of the goods is expressed in the charter party, bill of lading or agreement, then at any time after the expiration of seventy-two hours, exclusive of a Sunday or public holiday, after the report of the ship:
>
> …"

Thirdly, the section speaks to the entry being made by "the shipowner or Master or the agent of either". The direction that an application by a wharfinger would be acceptable for the purposes of section 91, without a reference to proof of agency, is irregular. There is nothing to indicate that a wharfinger is automatically the agent of either a shipowner or the master of a vessel.

[60] Fourthly, the requirement that the sale to the wharfinger be on the basis as if it had been sold by public auction, although that did not occur, also indicates irregularity. Section 88 of the Act speaks to a sale by auction. It also seems to suggest that the Commissioner, by himself, could only authorise a sale if there has been no seizure of the goods involved. It states:

> "(1) **Where under the provisions of this Act any goods are required to be deposited in a Queen's warehouse** and such goods are of a perishable nature, then it shall be lawful for the Commissioner, notwithstanding such provisions, to sell the same forthwith by public auction; and if such goods, though not perishable, are of a kind not permitted by any other provision of law to be deposited in a

Queen's Warehouse, it shall be lawful for the Commissioner, notwithstanding such provisions to sell the same by public auction after fourteen days' notice by publication in the *Gazette.*

(2) **Where any goods are deposited in a Queen's warehouse under the provisions of this Act** and the same are not entered for warehousing or delivery from such Queen's warehouse within three months after such deposit, or within such further period as the Commissioner may direct, and all charges for removal, freight and rent and all other expenses incurred in respect thereof duly paid, such goods may be sold by public auction after one month's notice being given by publication in the *Gazette.*

(3) In all cases where goods are sold under the provisions of this section, the proceeds shall be applied first in discharge of duties (if any), of the expenses of removal and sale, and of rent and charges due to the Government, and then of freight and other charges; and the balance, if any, shall be paid to the owner of the goods on his application for the same, if such application be made within two years from the time of the sale of such goods, but otherwise shall be paid into the Consolidated Fund." (Emphasis supplied)

[61] Sections 84 and 85 demonstrate the point that section 88 does not contemplate seized goods. They say, respectively:

"84. If the importer, having made a declaration in accordance with section 80, shall not make entry as therein provided, or if the Commissioner is not satisfied as aforesaid (in which case any entry which shall have been made shall be *ipso* facto void), **the Commissioner shall cause the goods referred to in such declaration to be deposited in a Queen's warehouse and dealt with as provided in section 88.**

85. Notwithstanding anything hereinbefore contained, if the Commissioner is satisfied, whether before or after the warehousing under section 84 of any goods liable to duty *ad*

> *valorem*, that it is impossible for the importer to obtain satisfactory documentary evidence of the value of such goods, or if in any case the documentary evidence relating to such goods, though not complete, is in the opinion of the Commissioner sufficient to enable a reliable estimate of the value to be made, **it shall be lawful for the Commissioner to permit such goods to be entered according to the estimated value**." (Emphasis supplied)

The Queen's warehouse, mentioned in those sections, is a place designated for the housing of goods as directed by the Commissioner. Section 2(1) of the Act defines the term as follows:

> "'Queen's warehouse' means any warehouse or place whatsoever for the time being occupied or used by the Commissioner for the deposit of goods for security thereof or of the duty due thereon;"

[62] Based on those indications, it would seem that the presumption of regularity should not apply. In the absence of authorisation by the Minister, the Suzuki was not properly released from the custody of the customs department. It would, therefore, on the definition of "uncustomed goods" contained in section 2(1) of the Act, and on Ms Jarrett's approach, constitute uncustomed goods.

[63] The next aspect to be assessed is whether the learned judge was correct in his assessment that the Commissioner, having authorised the scheme by which the Suzuki was sold to Kingston Logistics, was prohibited from asserting that the vehicle was uncustomed goods. There is a well established principle that a party should not be permitted to benefit from its own wrong. It is reflected in the Latin maxim, *ex turpi causa non oritur actio*, which, when translated, means "an action does not arise from a

base cause". The principle not only applies to prevent actions, such as in the case of illegal contracts, but also applies to defences.

[64] The principle was recognised in the relatively recent case of **Socieìteì Geìneìrale, London Branch v Geys** [2012] UKSC 63; [2013] 1 All ER 1061. Lord Hope, in the Supreme Court of England held that an employer was not entitled to rely on its own breach in asserting that a contract of employment had been terminated. He said, in part, at paragraph [18]:

> "...It is the objection that the party who is in the wrong should not be permitted to benefit from his own wrong that is determinative [of the issue]...."

[65] The principle is usually applied in the private law arena of contract. The court has, however, had occasion to apply it against agents of the state. In **Regina v Horseferry Road Magistrates' Court, Ex parte Bennett** [1994] 1 AC 42, the House of Lords ruled that the court was entitled to stay the prosecution of a person who had been brought before it in breach of extradition laws. The headnote, which accurately reflects the judgment, states that their Lordships decided:

> "that where a defendant in a criminal matter had been brought back to the United Kingdom in disregard of available extradition process and in breach of international law and the laws of the state where the defendant had been found, the courts in the United Kingdom should take cognisance of those circumstances and refuse to try the defendant; and that, accordingly, the High Court, in the exercise of its supervisory jurisdiction, had power to inquire into the circumstances by which a person had been brought within the jurisdiction and, if satisfied that there had been a disregard of extradition procedures, **it might stay the**

> **prosecution as an abuse of process and order the release of the defendant**." (Emphasis supplied)

It may, however, be justifiably said that the case only shows that the court was merely demonstrating that it was in charge of its own process.

[66] The principle, although well established, is not without exceptions. In **Buswell v Goodwin** [1971] 1 WLR 92, it was held that the maxim would not be applied if the application would result in a breach of a statutory duty imposed on a public authority in the public interest. In that case a landlord sought to recover possession of premises from a tenant. The landlord relied on a closing order that had been imposed by the local authority on the basis that the premises were not fit for human habitation. The tenant sought to resist the recovery. He asserted that the landlord had allowed the premises to deteriorate and should not be allowed to benefit from his own wrong.

[67] Widgery LJ ruled against the tenant's position. He held that the wider requirements of public duty trumped the narrow private issues between the parties. The learned judge of appeal said at page 96:

> "[Counsel for the tenant's] first submission to us, as to the judge below, was that to allow the landlord to obtain possession in the circumstances of the present case would be to allow him to take advantage of his own wrong. The proposition that a man will not be allowed to take advantage of his own wrong is no doubt a very salutary one and one which the court would wish to endorse, but I am not satisfied that it can be applied to the circumstances of this case. **This is not a case in which the only issues are matters of private right between landlord and tenant. The closing order was made by the local authority in pursuance of its public duty for the maintenance of public health.** The point of the closing order is to prevent

> people from living in insanitary conditions with the unhappy consequences to the public which might result. The local authority when making such an order are concerned only with the factors mentioned in section 16 of the Act of 1957, namely, whether the premises are unfit for human habitation, and whether or not they are capable at reasonable expense of being rendered so fit. If a local authority is satisfied on those issues, it matters not by whose fault the premises came to be in that condition.
>
> **Accordingly, it seems to me that if one recognised in this case that the landlord was profiting by his own fault one would, in effect, be allowing the landlord's fault to frustrate the local authority's public purpose as well, and in my judgment that cannot be right.** The association between the landlord's fault and the remedy is insufficient in this case to make the maxim applicable. (Emphasis supplied)

[68] In a similar way, in the arena of public law, a public authority cannot be prevented from countermanding its previous stance, if to remain consistent with that stance would result in a breach of the law. The principle may be stated another way, namely, that the doctrine of estoppel "cannot be invoked so as to give an authority powers which it does not in law possess" (see Administrative Law by Wade and Forsyth, ninth edition, page 237). As an example of the application of that principle, the learned authors rely on **Maritime Electric Co Ltd v General Dairies Ltd** [1937] 1 All ER 748.

[69] In **Maritime Electric**, a public utility company, within the meaning of the Public Utilities Act of New Brunswick, mistakenly undercharged a commercial customer for the electricity that it had supplied to the customer. The customer, relying upon the correctness of the charges as rendered, acted to its detriment in its relation to the cost of other inputs, and paid larger sums of money for those inputs than it would, or could

have paid, if the proper accounts for electric energy supplied had been furnished. By the Public Utilities Act, however, a public utility company was strictly limited as to the charges that it could make, and a public utility company charging or receiving, for any service rendered, a greater or less compensation than that prescribed by the Act was liable to a penalty.

[70] The public utility company sought to recover the amount for which it had undercharged the customer. The customer contended that the public utility company was estopped from recovery. The Privy Council, on appeal from the Supreme Court of Canada held that:

> "the [customer] could not rely upon an estoppel which would have the effect of defeating the unconditional statutory obligation imposed by the Public Utilities Act. The duty put upon both parties by the statute could not be avoided or defeated by a mistake."

In the course of delivering the judgment of the Board, Lord Maugham emphasised the status of the relevant statute as opposed to the arrangements between the parties subject to that statute. He said at pages 753-754:

> "It cannot be doubted that, if the [public utility company], with every possible formality, had purported to release its right to sue for the sums remaining due according to the schedules, such a release would be null and void. **A contract to do a thing which cannot be done without a violation of the law is clearly void**." (Emphasis supplied)

It must be said, however, that the Board specifically stated that it was dealing with a statute which created a positive obligation. That obligation was that the public utility company was obliged to properly charge and collect for its product without

discrimination. Notwithstanding that caveat, the dictum of their Lordships in **Maritime Electric**, the principle which prevents an estoppel from thwarting the provisions of a statute, is also applicable where there is no positive obligation imposed by the statute.

[71] In **Minister of Agriculture and Fisheries v Matthews** [1950] 1 KB 148, a minister of government sought to recover possession of premises from Mr Matthews, whom he had put into possession by virtue of a document which had all the indicia of a tenancy agreement. The regulation governing the use of that property did not authorise any letting thereof. Mr Matthews sought to resist the recovery, asserting that he was entitled to notice as was set out in the agreement. The headnote of the case accurately summarises the facts and the decision of Cassels J:

> "Where the Minister of Agriculture and Fisheries, acting in pursuance of the powers conferred on him by reg. 51 of the Defence (General) Regulations, 1939, has taken possession of farm land which has not been cultivated in accordance with the principles of good husbandry, **he has no power to create a tenancy of the land in favour of a person who has been allowed to occupy it, since such an act would be ultra vires the powers conferred on the Minister, and where the occupier is in possession of the land under an agreement with the Minister, the latter is not estopped from denying that a tenancy exists**." (Emphasis supplied)

[72] In **Rhyl Urban District Council v Rhyl Amusements Ltd** [1959] 1 All ER 257, a local council, in breach of the relevant provisions of two separate statutes, entered into a lease agreement with Rhyl Amusements. The lease was for a longer period than one of the statutes allowed, and did not have the approval of the relevant minister, as the other statute required. After many years of occupation of the property

by Rhyl Amusements, the council sought to recover possession on the basis that Rhyl Amusements had a yearly tenancy. Rhyl Amusements resisted the claim. It asserted that the council was estopped from denying the lease and its terms. In respect of these issues, the trial judge, Harman J, held:

> "(i) The lease...was void ab initio because—
>
> > (a) the only sufficient power of letting which the council had was that conferred by the Public Health Act, 1875, s 177, since s 43 of the Act of 1892 did not enable a term of years to be granted, as the words 'dispose of' in that section referred to absolute disposition..., and
> >
> > (b) the necessary consent of the Minister to the exercise of the power conferred by s 177 of the Act of 1875 had not been obtained...
>
> (ii) the council, having acted ultra vires in granting the lease, could not be estopped from denying its validity..."

[73] The principle that was applied in those three cases applies to this case. The Act restricted the release of seized goods, except with the authority of the Minister. The method that was used to clear the Suzuki through customs was in accordance with the directives of the Commissioner. Exhibit OG-9, annexed to Mr Guyah's affidavit, is a certificate issued by Jamaica Customs. It shows that the vehicle was sold to Kingston Logistics "at Public Auction **cet** [sic] on **2011-04-26**" (emphasis as in original). There is no evidence, however, that the method used had the authority of the Minister. The presumption of regularity, based on the above analysis, does not apply. The result is that, on the available evidence, the Commissioner's authorisation was invalid. The

method used for clearing the vehicle was, therefore, also invalid. The consequence is that the Suzuki is therefore, uncustomed goods.

[74] This analysis results in the finding that the learned judge erred in finding that because the relevant duties had been paid, the vehicle did not constitute uncustomed goods.

Was the vehicle unlawfully seized?

[75] The finding in this judgment, that the Suzuki constituted uncustomed goods means that it was subject to seizure by customs officials. Section 210(1) of the Act, among other things, prohibits the harbouring and keeping of uncustomed goods and stipulates that such goods shall be subject to forfeiture. Section 214, as mentioned above, also provides for the forfeiture of uncustomed goods. It states:

> "Subject to the provisions of section 195, all aircraft, ships and carriages, together with all animals and things made use of in the importation, attempted importation, landing, removal, conveyance, exportation or attempted exportation of any uncustomed, prohibited or restricted goods, or any goods liable to forfeiture under the customs laws shall be forfeited; and all aircraft, ships, carriages and goods together with all animals and things liable to forfeiture, and all persons liable to be detained for any offence under the customs laws or under any law whereby officers are authorized to make seizures or detentions, **shall or may be seized or detained in any place either upon land or water, by any person duly employed for the prevention of smuggling, or by any person having authority from the Commissioner to seize or detain the same**, and all aircraft, ships, carriages, and goods together with all animals and things so seized, shall forthwith be delivered into the care of the Commissioner; and the forfeiture of any aircraft, ship, carriage, animal or thing shall be deemed to include the tackle, apparel and

> furniture thereof, and the forfeiture of any goods shall be deemed to include the package in which the same are found and all the contents thereof." (Emphasis supplied)

[76] The finding that the vehicle is uncustomed goods would obviate an assessment of the learned judge's decision that the detention was not an abuse of the Commissioner's powers afforded under the Act. Nonetheless, a brief assessment of that aspect of the judgment will be conducted.

[77] The learned judge had concluded that, as the vehicle was not uncustomed goods, the detention by the customs officials was wrong in law. He refused to say, however, that the detention was an abuse of the powers afforded to customs officials under the Act. He said at paragraph [29]:

> "It follows therefore that…whether the action of taking possession of the vehicle was a seizure or a detention, this action was wrong in law under the Customs Act, if it was based on the vehicle being uncustomed goods. I am however, reluctant to say that the detention was an abuse of the process because I do not know exactly what charges were laid against Mr. Guyah. In his affidavit, he indicates that the charges include corruption but no specific legislation was mentioned."

[78] The essence of the complaint against this finding is that the "learned Judge failed to give proper consideration to the effect of a detention by the Customs Authorities and to the fact that a detention was tantamount to a seizure, and [was] a clear abuse of power" (paragraph 29 of counsels' written submissions). Captain Beswick focussed on the fact that the Suzuki had been detained for "investigation",

according to the notice of detention that was issued when the vehicle was taken by customs officials from Miss Guyah.

[79] Learned counsel submitted that the notice of detention was an instrument issued under the Act and there was no authority for the seizure of goods at a private dwelling place except by virtue of section 203 of the Act. That section, he submitted, only allowed for seizure under the authority of a warrant issued by a Resident Magistrate or a Justice of the Peace. In the absence of that authority, Captain Beswick submitted, the detention or seizure was unlawful and should have been declared as an abuse of authority.

[80] Ms Jarrett supported the learned judge's approach. She submitted that the dearth of evidence that was before him, concerning the charges which Mr Guyah faced, stymied the learned judge's "ability to make a finding as to whether the customs officers abused their powers" (paragraph 16 of her written submissions). Learned counsel submitted that there was no evidence that the vehicle had been detained under the provisions of the Act and that, in any event Mr Guyah had no standing to complain about the detention.

[81] Ms Jarrett is not correct in her submission concerning the basis of the detention. The document, which was intituled "Notice of Detention", and had been given to Miss Guyah, as evidence and authority for the detention, had all the indicia of a form used in the process of the customs department. It was purportedly signed on behalf of H M Customs and Excise by the "Proper Officer". Although certain sections were not

completed on Miss Guyah's copy (which was the copy exhibited by Mr Guyah's affidavit), the document also had a provision for the "Proper Officer" to deliver the item seized to the officer in charge of the Queen's warehouse, and a provision for that officer to issue his receipt for the item to the "Proper Officer". The Queen's warehouse, as mentioned above, is defined in section 2(1) of the Act as meaning "any warehouse or place whatsoever for the time being occupied or used by the Commissioner for the deposit of goods for the security thereof or of the duty due thereon". To suggest that the Notice of Detention was not a document used for customs purposes is untenable.

[82] Learned counsel is correct, however, in her submission that Mr Guyah would have had no standing so as to claim an order that the vehicle had been unlawfully seized or that its seizure was an abuse of the authority of the customs officials. He was not shown to be the owner of the vehicle. The documentation showed that Ms Carter was the registered owner and, as the learned judge correctly observed, the statements of Miss Carter and Miss Guyah, as to Mr Guyah's interest in the vehicle, "revealed a tangled web" (paragraph [10] of the judgement).

[83] The grounds in respect of this issue fail.

Were the learned judge's comments, about Mr Guyah's conduct, justified?

[84] Apart from referring to a "tangled web", the learned judge made other comments, which were in respect of Mr Guyah's conduct, that were less than complimentary. Captain Beswick, with the permission of the court, argued another ground of appeal concerning those comments and other comments, made by the

learned judge. That ground was not specifically set out in the original notice and grounds of appeal. The additional ground states as follows:

> "The conclusion of facts in Paragraphs 27, 31, 33, 34 and 38 are not supported by the evidence which evidence had been accepted by the trial Judge and further are outwith the jurisdiction of the Court to make findings upon."

As a consequence of that ground, Mr Guyah seeks a declaration that:

> "...Paragraphs 27, 31, 33, 34, and 38 of the judgment of Pusey, J. are inconsistent with the evidence in the matter, which evidence had been accepted by the trial Judge and further are outwith the jurisdiction of the Court to make findings upon;"

[85] Paragraphs [31] and [33] speak to the learned judge's assessment of the actions of the customs officials. In those paragraphs, he stated his views for abstaining from making the declaration that those actions were an abuse of their powers. Those paragraphs state, respectively, as follows:

> "[31] The court will not declare the detention by Customs of the Vehicle an abuse of power. Firstly, these officers were investigating an impropriety that had occurred. They received conflicting statements from the parties. It may have been reasonable for the vehicle to be detained while the explanations and stories [shifted and] were sifted. In light of that, it cannot be said that the original seizure or detention was an abuse of the powers. However, the length of time that the vehicle was held after the stories coalesced may have to be considered. This Court cannot opine on that because it has no indication of the criminal proceedings and the timeline there."

> "[33] The other reason for not granting the declaration of abuse of process is as previously stated the seizure although not proper under the Customs Act may have been allowable under common law or under some other legislation. Mr Guyah spoke of the powers of

> Customs officers under the Proceeds of Crime Act. The Court would be speculating to determine that the seizure was entirely a Customs Act seizure or something else, especially since he was charged under other laws."

There is no impugning of Mr Guyah's character or actions in either of those paragraphs. The learned judge made those statements after he had found that the Suzuki did not constitute uncustomed goods. There is no merit in the complaint concerning those paragraphs.

[86] In their written submissions (at paragraph 23), learned counsel for Mr Guyah identified paragraphs 27, 34 and 38 as being "damaging to the character, reputation and integrity of [Mr Guyah]". Learned counsel submitted that the paragraphs should not be allowed to stand. The paragraphs, respectively, state:

> "[27] …The issue of **Mr. Guyah's inferred use of this knowledge to his financial advantage is not within my remit to determine**. I am further constrained in that there are criminal charges which may still be before another court and therefore this Court must be limited in its comments." (Emphasis supplied)
>
> "[34] **It is clear that Mr Guyah acted in a manner which indicates that he is without ruth**. Whether he acted contrary to law or the rules of his employer is for other tribunals. I will merely say that although Mr. Guyah is a very important Crown Servant, **this court is of the view that he did not act in the best traditions of The Civil Service. Rather than being a servant of the people he attempted obtain financial gain from knowledge that came to him because of his position**." (Emphasis supplied)
>
> "[38] …When these factors are added to **the clear inference derived from evidence that he put**

> **before the court that he attempted to profit from information that came to him by way of his job**, this Court will not make an order for costs in his favour." (Emphasis supplied)

[87] Captain Beswick argued that the evidence does not support the findings made by the learned judge. Learned counsel argued that in finding that Kingston Logistics was free to sell to "any person who could pay the amounts assessed in customs duty" and that the "clearance process did not require that there be an auction" (paragraph [7] of the judgment), the learned judge was precluded from castigating Mr Guyah for having been involved in the purchase of the Suzuki. Captain Beswick argued that the court should uphold Mr Guyah's right to have been involved in the purchase of the vehicle.

[88] Ms Jarrett pointed out that the Attorney General and the Commissioner did not argue for the learned judge to make the observations that he did. Learned counsel submitted that those observations were made, in passing, after the learned judge had already ruled that the seizure was not in accordance the Act. Accordingly, she argued, they had no bearing on the ultimate finding in the court below, and that the application for this court to set aside those observations and to make declarations in respect of them, was "pointless".

[89] Whereas it is within this court's authority to make observations concerning comments made by judges in the course of proceedings in the court below, or in their respective judgments, it is not clear that the court may make orders in respect of those comments. Rule 2.15 of the Court of Appeal Rules speaks to the powers of the court. It is set out below:

"**Powers of the court**

2.15 In relation to a civil appeal the court has the powers set out in rule 1.7 [dealing with the general powers of management of cases] and in addition -

(a) all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26; and

(b) power to -

(a) affirm, set aside or vary any judgment made or given by the court below;

(b) give any judgment or make any order which, in its opinion, ought to have been made by the court below;

(c) remit the matter for determination by the court below;

(d) order a new trial or hearing by the same or a different court or tribunal;

(e) order the payment of interest for any period during which the recovery of money is delayed by the appeal;

(f) make an order for the costs of the appeal and the proceedings in the court below;

(g) make any incidental decision pending the determination of an appeal or an application for permission to appeal; and

(h) make any order or give any direction which is necessary to determine the real question in issue between the parties to the appeal.

(3)[sic] The court may reduce or increase the amount of any damages awarded by a jury.

(4)[sic] The court may exercise its powers in relation to the whole or any part of an order of the court below."

[90] It is not immediately clear what authority the court would have for making the order that Mr Guyah seeks. No previously decided case was cited in support of the order claimed.

[91] Authority aside, it is noted that the learned judge was stating his view of Mr Guyah's conduct. It is not difficult to ascertain the reason behind his view. No doubt the "tangled web" concerning the ownership of the Suzuki, and the fact that Miss Carter's responses to the officials, to the effect that Mr Guyah was involved with her in transactions involving five vehicles, which were, apparently, bought in the same manner as the Suzuki, had a significant influence on the learned judge's view. It is noted that the learned judge was careful to point out in paragraph [34] of his judgment that, "[w]hether [Mr Guyah] acted contrary to law or the rules of his employer is for other tribunals". There is no reason to criticise the learned judge's opinion of Mr Guyah's conduct in respect of these transactions.

The order for costs

[92] The learned judge acknowledged that the general rule was that the unsuccessful party should pay the costs of the victor (paragraph [36] of the judgment). He also recognised, in paragraph [36], that the court is given a discretion in respect of awarding costs. It was his view that Mr Guyah's conduct of the litigation, as well as his conduct in his office, required a departure from the general rule regarding costs. The learned judge said at paragraph [38]:

> "In relation to [Mr Guyah], I have reminded myself…that the case is not decided on the basis of the moral worth of the Claimant. However, I have considered that [Mr Guyah]

> abandoned five of the orders that he sought. He did not serve the legal owner who was listed as one of the parties to this action. This unexplained lack of service constrained him from asserting his right of equitable owner of the subject vehicle. When these factors are added to the clear inference derived from evidence that he put before the court that he attempted to profit from information that came to him by way of his job, this Court will not make an order for costs in his favour."

[93] That extract from the judgment indicated a judicial approach to the question of costs. It is, however, unnecessary to further analyse the complaint as Mr Guyah ought to have failed before the learned judge as he should fail in this court. A discussion on the learned judge's assessment of the costs below would be purely academic. It is nonetheless noted that in **Socieìteì Geìneìrale, London Branch v Geys** Lord Sumption, in a dissenting judgment, stated at paragraph [140]:

> "…It is no part of the purpose of the law to reflect moral indignation about SG's conduct, even assuming that SG's mistake calls for moral indignation, which I doubt…."

[94] This ground should also fail.

Costs

[95] As the Commissioner and the Attorney General have not succeeded on both grounds of their counter-claim they will not be allowed to recover full costs thereof. The issue on which they succeeded was the more substantial of the two. They should be allowed their costs on the appeal and two-thirds of their costs of the counter-notice of appeal. They however should have none of their costs in the court below as their disregard of the rules of procedure in that court merits a denial of any such costs.

Summary and conclusion

[96] The learned judge was correct in finding that Mr Guyah had standing to ask for a declaration concerning the customs status of the Suzuki. The evidence was that Mr Guyah had been charged with criminal offences which hinged on that status. Nonetheless, the learned judge erred in finding that the vehicle did not constitute uncustomed goods. The basis of his error was a narrow interpretation of the term "uncustomed goods". That interpretation erroneously restricted the term to referring to items for which the relevant duties had not been paid.

[97] The vehicle constituted uncustomed goods because it had not been released according to the provisions of the Act. It had been previously seized, deemed forfeited and was condemned. In those circumstances it could only have been properly disposed of with the authority of the Minister. It was disposed of by the Commissioner without any evidence of authorisation by the Minister so to do. It was therefore liable to seizure from the person in whose possession it was found.

[98] Mr Guyah's appeal concerning the further declaration that he sought from the learned judge, must therefore be refused, as must his appeal in respect of the order for costs. The counter-notice of appeal advancing the required authority of the Minister must, therefore, succeed, with the Commissioner and the Attorney General securing their costs on the appeal and two-thirds of their costs of the counter-notice of appeal, but none in the court below.

SINCLAIR-HAYNES JA

[99] I have read in draft the judgment of my brother Brooks JA. I agree with his reasoning and conclusion. I have nothing to add.

P WILLIAMS JA (AG)

[100] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

BROOKS JA

ORDER

1. The appeal is dismissed.

2. The counter-notice of appeal is allowed.

3. The judgment and orders of Pusey J made herein on 27 February 2015 are set aside.

4. It is declared that the 2007 Suzuki Swift motor car with chassis number ZC71S404213 constituted uncustomed goods on 15 February 2012 and was subject to seizure by customs officials.

5. Costs of the appeal and two-thirds of the costs of the counter-notice of appeal to the respondents to be taxed if not agreed. No order as to costs in the court below.